



Are regulations achieving their objectives? Post Implementation Reviews – why they should be done, why they aren't done and how to get them done

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**Are regulations achieving their objectives?
Post Implementation Reviews – why they should be
done, why they aren't done and how to get them done**

Stephen Gibson
Harvard Kennedy School

Krishna Kenche
Harvard Kennedy School

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Are regulations achieving their objectives?

Post Implementation Reviews – why they should be done, why they aren't done and how to get them done

Stephen Gibson¹ and Krishna Kenche²

“One of the great mistakes is to judge policies and programs by their intentions, rather than their results”, Milton Friedman

Abstract

Regulatory policy is often under-prioritised by governments, particularly when compared with the detailed focus associated with tax and spending measures. Even where a clear policy development process is adopted and applied for regulatory measures, it rarely has the same profile or attendant resources as applied to fiscal measures. This paper highlights one aspect of this regulatory policy deficit – the lack of priority given to evaluation and ex-post review of regulatory measures.

Post implementation reviews (PIRs) are an essential part of the framework for ensuring best practice regulatory policy making by government and regulators. *Ex post* evaluation highlights whether regulations are achieving their objectives and operating as expected, or whether they are leading to unintended consequences or imposing disproportionately high costs. They inform decisions over whether to retain, revise or remove the regulation. However only 25% of OECD countries have formal requirements for PIRs and even then, an evaluation is often not undertaken for many regulatory measures.

This paper reviews the different approaches to PIRs in the UK, Canada, Australia, the US and the European Union in terms of system governance, methodology and public transparency and capacity building. It highlights the methodological challenges in undertaking PIRs, in particular the importance of a well-designed monitoring and evaluation plan and the failure to feed the results of the PIR into subsequent modifications to the regulations which suggests a systematic failure in the policy making framework.

The paper suggests that PIRs are not undertaken more comprehensively due to: limited political benefit, lack of prioritisation and concern over exposing previous policy failures. It

¹ Senior Fellow, Mossavar-Rahmani Center for Business and Government, Harvard Kennedy School; Chair of the UK Regulatory Policy Committee and Director of SLG Economics. This article is written in a personal capacity, the views expressed do not necessarily reflect the views of the Regulatory Policy Committee or the UK Government.

² Research Assistant, Mossavar-Rahmani Center for Business and Government, Harvard Kennedy School.

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proposes seven policy approaches that might lead to a more comprehensive approach to PIRs, however the common thread running through all of these approaches is the critical importance of high-level political support. Without high-level backing, statutory requirements will be variously disregarded, internal and external voices ignored and the pragmatic short-term pressures to focus on new and high profile policy measures will trump the longer-term benefits from a comprehensive approach to policy evaluation.

Foreword by John Penrose MP

There's an old saying, that the main job of any organisation's Chief Financial Officer is to wait until their Chief Executive has fired an arrow, and then to run over and paint a target around wherever it lands. This paper is a timely and much-needed reminder that Governments are just as prone to this vice as anyone else, and to the problems which it creates.

Those shortcomings are many and serious, and this report – rightly – lays them bare in pitiless detail. Whether it is regulators under-estimating the costs of a new set of rules, or Ministers overclaiming the benefits of an expensive new programme, or officials counting success as following a process rather than delivering an intended outcome, or politicians assuming that good intentions will automatically lead to good results, human frailty means that it is always hard for Governments to face up to failures. And it's particularly difficult when huge amounts of political blood and treasure were spent getting a new approach in place to begin with.

Even worse, the rest of modern life is headed in the opposite direction. In today's ever-swifter digital age, 'failing fast' has become a commercial religion where amazing new products and services are conceived, developed and launched at breakneck speed, and then modified and improved and tweaked as their weaknesses are discovered and fixed at a pace which pre-digital businesses wouldn't have dreamt possible. Laggards are quickly left in the dust as their swifter and more agile rivals accelerate ever further ahead.

If Governments can't move faster and more nimbly, they will get left behind. If they don't – or won't – face their mistakes, learn from them and fix problems quickly, public services will start to look expensively old-fashioned or low-quality compared to everything else in normal life. It's vital we fix the problem before those gaps get too big, otherwise citizens will lose faith in what the public sector is doing for them, creating opportunities for populists and extremists to exploit.

So this Report is vital, and extremely well timed. It offers specific reforms on how Governments can learn from their successes and failures, so they can work faster, better and more nimbly in future too. It should be required reading for anyone who cares about the detail of how Government works, and how it could be better.

Are regulations achieving their objectives?

Post Implementation Reviews – why they should be done, why they aren't done and how to get them done

1 The regulatory policy development cycle

The better regulation agenda was developed in the early 2000s in the UK by the Better Regulation Task Force and in the EU by the European Commission. It seeks to ensure that government regulation is proportionate and that ministerial decisions are based on the robust analysis of the costs, benefits and risks of the different policy options.

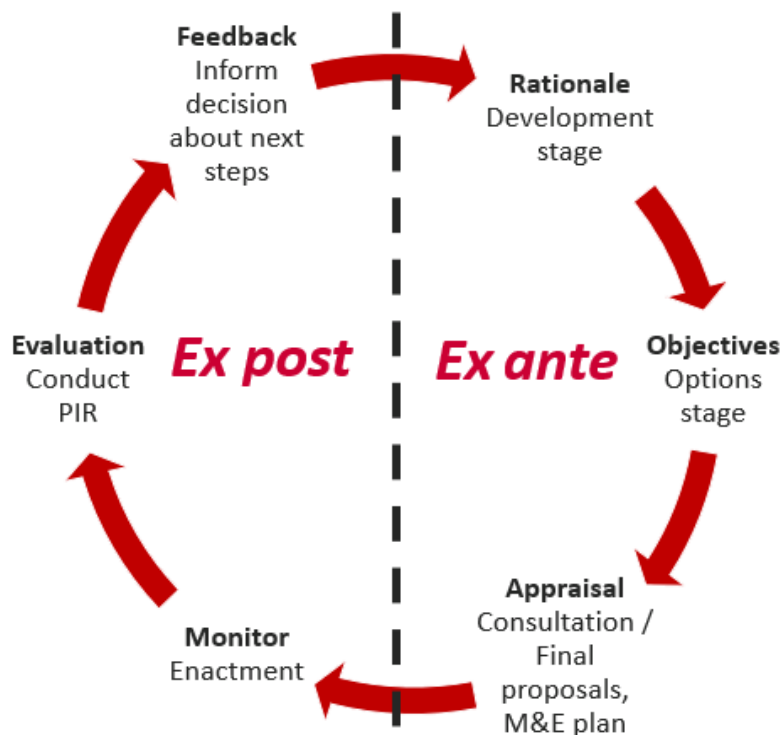
The Better Regulation Framework (BRF) sets out the six-step ROAMEF policy development cycle (see Figure 1). The first three steps: (1) Rationale, (2) Objectives and (3) Appraisal, comprise the *ex ante* assessment stage and the latter three steps: (4) Monitoring, (5) Evaluation and (6) Feedback comprise the *ex post* evaluation stage.

The desirability of conducting PIRs and *ex post* evaluation was recognised as part of the early development of better regulation frameworks. Jonathan Weiner writing in 2006 commented that “*as it implements Better Regulation, the EU and its member states should take the opportunity to build in regular ex post evaluations of policies*”.³ However much of discussion of the Better Regulation Framework has focussed on *ex ante* policy development and assessment stages, rather than *ex post* evaluation. This may be one of the reasons why *ex post* evaluation is often seen as secondary in importance, resulting in the lack of a comprehensive approach to robust, evidence-based scrutiny of policy interventions after they have been introduced.

This paper reviews the different approaches to post implementation evaluation, considers the methodological challenges and constraints on administrations in undertaking Post Implementation Reviews (PIRs) and considers some approaches that might lead to a more comprehensive approach to undertaking PIRs.

³ Better Regulation in Europe, Jonathan B Wiener, Current Legal Problems 2006, Volume 59, Oxford University Press https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=2291&context=faculty_scholarship

Figure 1: The ROAMEF Policy Cycle



2 Why Post Implementation Reviews are important

Post Implementation Reviews (PIRs) are an essential part of the framework for ensuring best practice regulatory policy making by government and regulators. The evaluation of regulations after they have been implemented allows policy makers to see if regulations are operating as expected and achieving the intended objectives, or alternatively if they are leading to unintended consequences or imposing disproportionately high costs relative to the benefits that they offer⁴. This then informs decisions over whether they should be retained, revised or removed. PIRs can also lead to a better understanding of the regulation and the problem it was meant to address; support improved future regulatory interventions and inform broader stakeholders about the impacts and success (or otherwise) of government regulatory policy. By providing a structured assessment of the effectiveness of a policy measure to achieve a specified objective, PIRs can also signal the government's serious commitment to the desired outcome and thereby influence business and consumer behaviour potentially helping to achieve that outcome.

Many regulations either fall short of their intended effects or fail to offer the protections or behavioural changes that they were intended to deliver. This might be because they were poorly specified when introduced, or because markets, technology etc. has changed in the interim reducing the effectiveness of the regulation. Retaining ineffective regulations can lead

⁴ The UK Prime Minister's Delivery Unit used mid-implementation reviews of significant projects (in addition to *ex post* evaluation) to catch and avoid potential problems during project development. See <https://history.blog.gov.uk/2022/08/26/the-art-of-delivery-the-prime-ministers-delivery-unit-2001-2005/>

to a loss of trust in the regulatory institutions themselves and undermine the effectiveness of wider government policy.

Problems occur with impact assessments misestimating both the costs and benefits of the policy intervention. They may overestimate the *costs* because:

- Industry players opposing the regulation claim high cost estimates, but when faced with the regulation may adapt their approach so that the actual cost of compliance is lower than estimated,
- Higher costs associated with regulated products may prompt consumers to substitute to alternatives or producers to change production processes or innovate to reduce those costs.

IAs may also underestimate costs if they:

- Focus on a subset of costs such as industry compliance, or
- Ignore or fail to quantify indirect, wider or longer-term effects such as foregone innovation or the impacts on competition in the regulated market.

Similarly, *benefits* may be underestimated if risk assessments:

- Focus on risks sequentially and fail to consider multiple simultaneous exposures and positive correlations,
- Neglect low probability extreme events,
- Neglect sensitive sub-populations,
- Neglect or underestimate impacts that are difficult to quantify in monetary terms.

They may be overstated if:

- Policy implementation or compliance falls short of initial expectations,
- If the IA neglects countervailing risks of negative correlations,
- If valuation methods for environmental or health benefits overstate the true benefits (for political or methodological reasons).

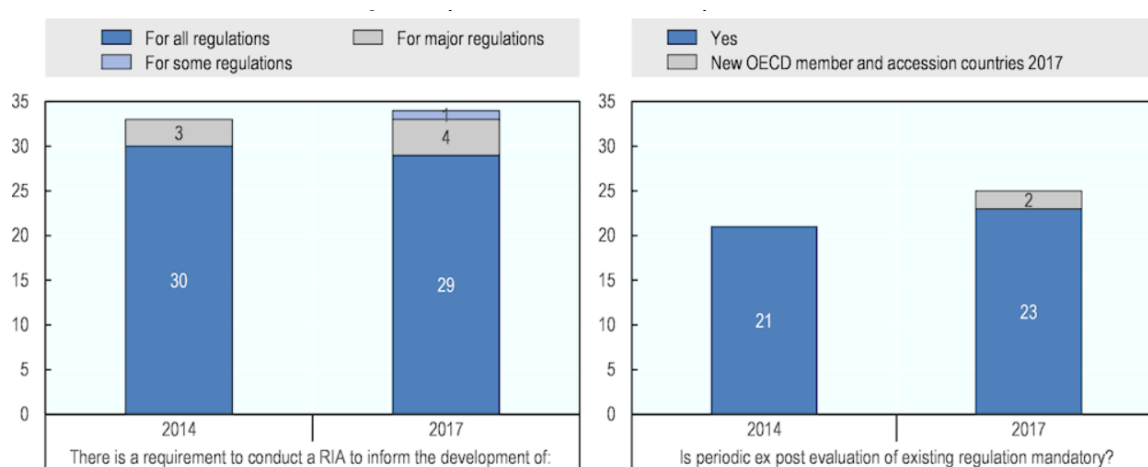
As well as supporting forward-looking policy revisions and improvements, PIRs can identify and help to minimise inaccuracies in IAs, so as to improve future impact assessments. PIRs can also potentially be used for regulations that bypassed the ex ante impact assessment stage, perhaps due to situations of urgency or emergency (for example rules introduced during the Covid global pandemic) as suggested by the European Parliament's Policy Department for Citizens' Rights and Constitutional Affairs⁵.

⁵ See: Assessment of current initiatives of the European Commission on better regulation Policy Department for Citizens' Rights and Constitutional Affairs, June 2022
[https://www.europarl.europa.eu/RegData/etudes/IDAN/2022/734766/IPOL_IDA\(2022\)734766_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/IDAN/2022/734766/IPOL_IDA(2022)734766_EN.pdf)

3 Comparison of different countries' approach to PIRs

Only one in four OECD members have systematic requirements in place to conduct PIRs⁶ and even then, these systems sometimes do not align with best practice. Some form of ex post evaluation was recorded as obligatory in only 60% of OECD member countries, compared to around 90% for ex ante assessment (Figure 2). Of course, evaluation happens absent a systematic requirement to review measures post implementation and formal (even statutory) requirements may not actually lead to evaluations taking place (see Section 6.1 below); however this is an indication of the wider focus on *ex ante* assessment rather than *ex post* evaluation.

Figure 2: OECD requirements to conduct regulatory impact assessments and *ex post* evaluation⁷



The OECD has set out three overarching principles for the ex post review of regulation⁸. These are:

- ex post reviews should be an integral and permanent part of the regulatory cycle
- ex post review processes should ensure comprehensive coverage of the regulatory stock over time, and
- they should include an evidence-based assessment of the actual outcomes from regulatory action against their rationale and objectives and should contain recommendations to address any performance deficiencies.

This section examines how PIRs are administered across the UK, Canada, Australia, the US and the European Union, to understand the differences across jurisdictions and how this compares to OECD's best practices. These jurisdictions were selected due to their high maturity ranking by the OECD and their comparatively similar approaches to policy development and Regulatory Impact Assessment (RIA) governance. This review aligns its

⁶ OECD, "OECD Regulatory Policy Outlook 2021" (Paris: OECD Publishing, 2020), <https://doi.org/10.1787/38b0fdb1-en>.

⁷ Note based on 34 OECD countries that were OECD members in 2015 and accession countries of Colombia, Costa Rica, Latvia and Lithuania in 2017

⁸ OECD, "Reviewing the Stock of Regulation" (Paris: OECD Best Practice Principles for Regulatory Policy, OECD Publishing, 2020), <https://doi.org/10.1787/1a8f33bc-en>.

analysis to the strategic issues used in the OECD's best practice principles: 1) system governance, 2) methodology and public transparency and 3) capacity building.

3.1 System Governance

The UK, Canada, Australia and the European Union have formally adopted PIRs into their regulatory frameworks and policy development cycles. This is often achieved through either formal legislation or government policy directive. The UK establishes requirements for PIRs through legislation⁹ and statutory guidance¹⁰. Canada, Australia, and the EU have Cabinet or Commission policy directives that specify that a PIR is required¹¹¹².

Different jurisdictions have different requirements for when a PIR is initiated and complied with. OECD best practice suggests that a PIR is completed for each regulation after implementation, ideally before any new policy development occurs (the 'evaluate first' principle).

The UK is formally aligned with best practice due to a statutory requirement to either include in the secondary legislation a provision to review the measure within a set period or publish a statement explaining why it is not appropriate to do so¹³. Statutory review provisions generally impose a legislative duty to carry out and publish a PIR within 5 years of the commencement of the measure. PIRs are developed by the government department that was responsible for the original policy and subject to scrutiny by the Regulatory Policy Committee (RPC) who assess whether the evidence and analysis underpinning the recommendation to retain/revise/repeal is fit for purpose and comment on the quality of the monitoring, implementation and evaluation. However, the UK has issues with compliance, with less than 40% of PIRs being completed on time¹⁴ and the National Audit Office (NAO) noted in their 2016 report: *"although HM Treasury guidance says that departments should monitor the ongoing impact of their regulatory decisions, they rarely do so. This means that departments could miss opportunities to adapt policies in ways that would help businesses. Lack of evaluation means that the government cannot know the real impact of its efforts on*

⁹ "Small Business, Enterprise and Employment Act 2015," § 28-31 (2015), <https://www.legislation.gov.uk/ukpga/2015/26/contents/enacted>.

¹⁰ Department for Business, Energy, and Industrial Strategy, Better Regulation Executive, "Producing Post-Implementation Reviews: Principles of Best Practice," GOV.UK, 2021, <https://www.gov.uk/government/publications/business-regulation-producing-post-implementation-reviews/producing-post-implementation-reviews-principles-of-best-practice>.

¹¹ Secretariat Treasury Board of Canada, "Policy on Regulatory Development," September 7, 2018, <https://www.canada.ca/en/government/system/laws/developing-improving-federal-regulations/requirements-developing-managing-reviewing-regulations/guidelines-tools/policy-regulatory-development.html>.

¹² Australian Government, "Australian Government Guide to Policy Impact Analysis" (Australian Government, February 2023), <https://oia.pmc.gov.au/resources/guidance-impact-analysis/australian-government-guide-policy-impact-analysis>.

¹³ Statutory guidance sets out key considerations for the appropriateness of a review, the most significant being whether the anticipated impact on business is more than a +/-£5m pa *de minimis* threshold (which aligns with the UK's *de minimis* requirement for undertaking an *ex ante* IA).

¹⁴ Jeremy Mayhew, "Is Regulation Working as Intended? - Regulatory Policy Committee," September 3, 2021, <https://rpc.blog.gov.uk/2021/09/03/is-regulation-working-as-intended/>.

*business*¹⁵. An NAO report published in 2023¹⁶ identified a backlog of 63 PIRs in one government department alone (DEFRA), despite it being a statutory requirement to undertake a PIR.

In the UK, the Office for Environmental Protection (OEP) has produced a report¹⁷ on PIRs relating to environmental regulations, identifying those environmental regulations with published PIRs, those where the PIR is not yet due, and those where the PIR has not been produced. They found that 82% of environmental regulations did not have a published post implementation review. However, this was a one-off review covering a specific area of regulation, rather than a regular or comprehensive overview of all regulatory measures.

Australia only requires PIRs to be completed for regulations “*that have a substantial or widespread impact on the economy*”¹⁸ (or when a regulatory change is made without a Regulation Impact Statement or one that has been assessed by the Office of Impact Analysis (OIA) as ‘insufficient’). Also where there are information gaps or the effects of a policy cannot be fully understood until it is operational, a post-implementation review or other additional evaluative work may be required¹⁹. The OIA assesses the quality of PIRs and regularly publishes a list of PIRs that have been completed and published²⁰ and those that are required²¹. It uses internal pressure from the Prime Minister to chase other Ministers who have not completed PIRs on time²², as a result, close to 100% of required PIRs are completed in Australia.

The EU Regulatory Scrutiny Board has an ‘evaluate first’ principle that requires EU agencies to complete evaluation prior to introducing amendments to regulatory requirements²³. EU agency compliance with the “evaluate first” principle has steadily grown over time, with 2022 having an almost 90% compliance rate²⁴. However, a large number of emergency measures

¹⁵ Comptroller and Auditor General, Sir Amyas More KCB, “The Business Impact Target: Cutting the Cost of Regulation,” HC 236 (London: National Audit Office, 2016), <https://www.nao.org.uk/wp-content/uploads/2016/06/The-Business-Impact-Target-cutting-the-cost-of-regulation.pdf>.

¹⁶ Comptroller and Auditor General, Gareth Davies, “Regulating to Achieve Environmental Outcomes” (London: National Audit Office, April 17, 2023), <https://www.nao.org.uk/wp-content/uploads/2023/04/regulating-to-achieve-environmental-outcomes.pdf>.

¹⁷ Office for Environmental Protection, “Post-Implementation Review of Environmental Law” (Worcester: Office for Environmental Protection, March 2023).

¹⁸ Office of Impact Analysis, “Post-Implementation Reviews,” May 2023, <https://oia.pmc.gov.au/resources/guidance-oia-procedures/post-implementation-reviews>.

¹⁹ Australian Government Guide to Policy Impact Analysis, Australian Government Department of the Prime Minister and Cabinet, March 2023 <https://oia.pmc.gov.au/sites/default/files/2023-02/oia-impact-analysis-guide-nov-22.pdf>

²⁰ Office of Impact Analysis, “Post-Implementation Reviews: Completed and Published” (Department of the Prime Minister and Cabinet, May 12, 2023), <https://oia.pmc.gov.au/sites/default/files/2023-05/2022-23-pir-completed-published.pdf>.

²¹ Office of Impact Analysis, “Post-Implementation Reviews: Required,” *Department of the Prime Minister and Cabinet*, May 12, 2023, <https://oia.pmc.gov.au/sites/default/files/2023-05/2022-23-pir-required.pdf>.

²² Author’s conversation with Jason Lange, Executive Director, Australian Office of Impact Analysis.

²³ European Commission, “Better Regulation Guidelines” (European Commission, November 2021), https://commission.europa.eu/system/files/2021-11/swd2021_305_en.pdf.

²⁴ Regulatory Scrutiny Board, “Regulatory Scrutiny Board: Annual Report 2022” (Brussels: European Commission, May 2023), https://commission.europa.eu/publications/regulatory-scrutiny-board-annual-report-2022_en.

associated with the Covid pandemic were adopted without an *ex ante* impact assessment and there have been calls for these measures to be subject to a PIR²⁵. The EU Regulatory Scrutiny Board allows evaluations to be part of the corresponding impact analysis for proposed regulations ('back-to-back' evaluations). This allows EU agencies to comply with the 'evaluate first' principle without doing complete, standalone evaluations; instead the evaluation is part of the impact analysis for new regulations – indeed there were only 8 stand-alone evaluations completed in 2022 compared to 70 impact assessments in the same year²⁶.

The EU appears to be the only jurisdiction that requires a 'fitness check' before developing new regulatory policy. These are comprehensive evaluations of specified policy areas to explore how related legislative acts have interacted and what their overall impact has been on achieving policy objectives²⁷, and are based on five criteria: effectiveness, efficiency, relevance, coherence and EU added value. They are intended to provide decision-makers with a clear understanding of the system-wide impacts of legislation and where future interventions or reform may be needed; however "*the lack of systematic quantification of impacts* [partly due to a move from cost-benefit analysis to multi-criteria analysis in European IAs], prevents the Commission from using *ex post* evaluations also as a means to verify the estimates in the original impact assessment"²⁸.

The EU Regulatory Scrutiny Board's annual reports also provide a high-level of transparency of the quality of ex-post analysis through its annual reports. At a high-level, the annual report provides the average quality scores of evaluations, the use of 'back to back' evaluations and the types of impacts assessed in each evaluation²⁹. In its Annual Reports, the Regulatory Scrutiny Board provides an overview of its opinions at each stage for all impact analyses and evaluations it has reviewed.³⁰

In the US, evaluation is required for all "retrospective analyses" of existing rules since 2011³¹. Individual US federal agencies are required to periodically undertake ex-post analysis of their regulations to determine whether they should be "*modified, streamlined, expanded, or repealed*"³², and provide them to the White House Office of Information and Regulatory Affairs (OIRA) for consideration (this periodic requirement contrasts with the UK's 'once-and-

²⁵ Assessment of current initiatives of the European Commission on better regulation, Directorate-General for Internal Policies PE 734.766, June 2022

[https://www.europarl.europa.eu/RegData/etudes/IDAN/2022/734766/IPOL_IDA\(2022\)734766_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/IDAN/2022/734766/IPOL_IDA(2022)734766_EN.pdf)

²⁶ Regulatory Scrutiny Board, "Regulatory Scrutiny Board: Annual Report 2022."

²⁷ European Commission, "Better Regulation Guidelines."

²⁸ Assessment of current initiatives of the European Commission on better regulation, Policy Department for Citizens' Rights and Constitutional Affairs, June 2022

[https://www.europarl.europa.eu/RegData/etudes/IDAN/2022/734766/IPOL_IDA\(2022\)734766_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/IDAN/2022/734766/IPOL_IDA(2022)734766_EN.pdf)

²⁹ Regulatory Scrutiny Board, "Regulatory Scrutiny Board: Annual Report 2022."

³⁰ Regulatory Scrutiny Board.

³¹ Executive Order 13563: Improving Regulation and Regulatory Review.

<https://obamawhitehouse.archives.gov/the-press-office/2011/01/18/executive-order-13563-improving-regulation-and-regulatory-review>

³² Ibid.

you-are-done’ approach to post implementation evaluation). Agencies are also required³³ to undertake public consultation, setting evaluation priorities, and their overall accountability to OIRA. The final ex-post analysis is published individually by agencies and on a centralised OIRA database³⁴.

One common feature across most jurisdictions³⁵ is the expectation of PIRs being completed within a set period after the introduction of the regulation, typically 5 years³⁶³⁷³⁸³⁹ (although in Australia, regulations whose RIA was assessed as being insufficient have to complete the PIR in 2 years⁴⁰). The UK’s review of its Better Regulation Framework proposed bringing forward the time period for completing PIRs to two years post-implementation, with findings published in the third year (unless the IA suggests a different timescale)⁴¹. There is a risk with shorter timescales that the PIR focuses on reviewing the success of the implementation of the policy, rather than the impacts of the policy itself, which may take longer to emerge. In addition two years does not provide much ‘reputational distance’ to facilitate impartial evaluation – particularly in the case of policy failures. Both the evidence available to measure and attribute impacts to interventions and the potential use of evaluation in the policy cycle change over time, there is no single ‘best point’ to undertake evaluation that would suit all purposes, let alone one that is uniform across different measures and circumstances; however a premature evaluation (by consuming resources to no purpose and forestalling better-informed later evaluation) may be worse than no evaluation at all.

A major system-level challenge that all jurisdictions have recognized is that PIRs are often completed at the same time as *ex-ante* assessment. A recent review of the EU’s better regulation initiative by the EU Directorate-General for Internal Policies found the “*lack of systematic quantification of impacts*” results in the Commission missing out on understanding

³³ Executive Order 13610: Identifying and Reducing Regulatory Burdens.

<https://obamawhitehouse.archives.gov/the-press-office/2012/05/10/executive-order-identifying-and-reducing-regulatory-burdens>

³⁴ Office of Information and Regulatory Affairs, “Regulatory Actions Currently Under Review by Agency - Dashboard,” accessed June 20, 2023, <https://www.reginfo.gov/public/jsp/EO/eoDashboard.myjsp>.

³⁵ Note, the EU does not specify a fixed horizon, but does go into considerable detail on recommending the right time for internal and external purposes – see Better Regulation Toolkit, Chapter 6, Section 3

<https://commission.europa.eu/system/files/2023-07/BRT-2023-Chapter%206-How%20to%20carry%20out%20an%20evaluation%20and%20a%20fitness%20check.pdf>

³⁶ Australian Government, “Australian Government Guide to Policy Impact Analysis.”

³⁷ Treasury Board of Canada Secretariat, “Cabinet Directive on Regulation,” guidance, June 28, 2018, <https://www.canada.ca/en/government/system/laws/developing-improving-federal-regulations/requirements-developing-managing-reviewing-regulations/guidelines-tools/cabinet-directive-regulation.html>.

³⁸ Office of Impact Analysis, “User Guide to the Australian Government Guide to Regulatory Impact Analysis” (Department of the Prime Minister and Cabinet, 2023), <https://oia.pmc.gov.au/resources/guidance-impact-analysis/user-guide-australian-government-guide-regulatory-impact>.

³⁹ Department for Business, Energy, and Industrial Strategy, Better Regulation Executive, “Producing Post-Implementation Reviews.”

⁴⁰ Office of Impact Analysis, “Post-Implementation Reviews.”

⁴¹ HM Government, “The Benefits of Brexit: How the UK Is Taking Advantage of Leaving the EU” (HM Government, January 2022), https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1054643/benefits-of-brexit.pdf.

the impacts of the previous regulation as well as the quality of that assessment⁴². This lack of system-level methodologies and quality control of PIRs has also been raised in Australia, Canada, and the UK.⁴³⁴⁴

3.2 Methodology, independence and public transparency

There are a range of different initiatives aimed at improving the quality, utility, proportionality and fitness for purpose of PIRs. These initiatives often focus on methodology and on public transparency and involvement in how PIRs are conducted, for example, introducing quality indicators or strengthening public transparency requirements. PIRs are generally carried out by the department or agency responsible for introducing the policy measure, which raises the question of bias and independence given the obvious conflicts of interest. This lack of independence may lead to perverse incentives to deliver tendentious or self-serving reports, while a lack of independent scrutiny of RIA's monitoring and evaluation plans may lead to systematically avoiding the collection of potentially problematic evidence.

One approach would be to have an independent party undertake the review, though they would generally be reliant of the department/agency to provide data and offer a supporting narrative. The approach adopted in a number of jurisdictions is to have independent bodies - the RPC in the UK, OIRA in the US, the Regulatory Scrutiny Board (RSB) for the EU and OIA in Australia - who assess the quality of the PIR and highlight deficiencies and areas for improvement. This appears to work well, particularly when the RIA includes a well-developed monitoring and evaluation plan which clearly sets out what the policy is expected to deliver, how this will be measured and what success looks like.

A different challenge is faced when (as often occurs in the US), the regulation is being reviewed by a different administration to the one under which it was introduced. This presents a different question of political independence – particularly (as happens in the US) where key leadership positions in the agency performing the evaluation and independent reviewing body (the government agency and OIRA) are appointed by the incoming administration.

All jurisdictions provide guidance and support to agencies in developing PIRs. For example the UK RPC provides best-practice case histories and guidance on the application of the Better Regulation Framework as well as links to other departmental and regulator guidance⁴⁵.

The EU RSB has made a major push to use public consultation to improve evaluations. Individual evaluations are required to go through an extensive public consultation process. For the 'fitness checks', the public can engage with them through a formal public consultation that invites comments on all elements of different evaluations for that policy sector.

⁴² Andrea Renda and Policy Department for Citizens' Rights and Constitutional Affairs, "Assessment of Current Initiatives in European Commission for Better Regulation" (Brussels, June 2022).

⁴³ Productivity Commission, "Research Report - Identifying and Evaluating Regulation Reforms," December 15, 2011, <https://www.pc.gov.au/inquiries/completed/regulation-reforms/report>.

⁴⁴ OECD, "Reviewing the Stock of Regulation."

⁴⁵ Regulatory Policy Committee, "RPC Summary Diagram of Existing Appraisal and Framework Guidance," GOV.UK, accessed August 11, 2023, <https://www.gov.uk/government/publications/rpc-summary-diagram-of-existing-appraisal-and-framework-guidance>.

Furthermore, the Fit for the Future Platforms bring together representatives of Member States and stakeholders (business, civil society, and non-government stakeholders) to make suggestions for simplification and modernisation of regulation⁴⁶. These are incorporated into the advice given to decision-makers when considering new policies or regulations.

Jurisdictions have moved towards promoting a wider approach to evaluating regulations, considering upstream and downstream impacts rather than narrowly focusing on the immediate localised effects. There has also been a move towards reviewing ‘chunks’ of the regulatory stock or regulations across a sector to understand how the different measures interact and reinforce or detract from one another – the EU ‘fitness checks’ consult on a policy area (for example transport), rather than a specific regulatory measure to provide a better understanding of the impact of regulation across the sector. Its aim is to identify excessive administrative burdens, overlaps, gaps, inconsistencies and/or obsolete measures which may have appeared over time, and to help to identify the cumulative impact of the legislation⁴⁷.

All jurisdictions publish completed PIRs either on a central website or individual agency websites. This is aligned with the OECD’s best practice in providing public transparency for PIRs.

Australia appears to be the only country providing “meta-data” on the overall PIR process. This includes PIRs that are outstanding or have not been completed, the responsible agencies, timeframes for completion, etc. This information is publicly available on the Australian Department of the Prime Minister and Cabinet website⁴⁸. There is limited information available on the extent to which this level of public transparency drives stakeholder behaviour that results in improved completion rates or higher quality PIRs.

3.3 Capacity building

All jurisdictions have identified capacity building as a key priority in improving PIRs. Most have tackled this by updating guidance on PIRs or incorporating it into their broader RIA training for public servants. However, there is limited PIR-specific training provided by jurisdictional RIA-responsible agencies. In some cases, other agencies, such as the Audit Office or economic review commission have capacity-building initiatives around evaluation. The UK RPC offers tailored training courses on IAs and PIRs to policy specialists across different government departments to seek to improve government capability and capacity in this area. The Australian Government has recognised the need to build research and evaluation expertise and commissioned an independent report⁴⁹ which proposed a central enabling evaluation function to:

- drive a service-wide approach to evaluation,

⁴⁶ OECD, “Indicators of Regulatory Policy and Governance: Europe 2022” (Paris: OECD, 2022), <https://www.oecd.org/gov/regulatory-policy/EU-country-profile-EU-report-2022.pdf>.

⁴⁷ Fitness Check, EurWORK European Observatory of Working Life, December 2015

<https://www.eurofound.europa.eu/observatories/eurwork/industrial-relations-dictionary/fitness-check>

⁴⁸ Office of Impact Analysis, “Summary Reports,” 2023, <https://oia.pmc.gov.au/summary-reports>.

⁴⁹ Department of the Prime Minister and Cabinet, Our Public Service, Our Future, Independent Review of the Australian Public Service, September 2019 <https://www.pmc.gov.au/sites/default/files/resource/download/independent-review-aps.pdf>

- provide guidance and support to agencies on best-practice approaches,
- to develop a new strategic approach to evaluation of past, present and proposed programs and policies, and
- provide advice on how to embed mandatory requirements for formal evaluation in Cabinet process and budget rules.

Associated with developing the capacity across government to undertake evaluation, it is also important to create an ‘evaluation culture’ to underpin statutory requirements and guidance. The Australian independent report⁵⁰ noted the risk of evaluation leading to failures being exposed which might lead to political embarrassment; however they also hoped that “*success can also be celebrated and people’s trust in government be enhanced by greater honesty in making available objective and rigorous assessments of performance*”. They commented on the value from welcoming a new approach to evaluation to improve transparency, support better budget prioritisation, increase the willingness to learn lessons and areas for improvement, however “*such a culture can only be realised with the backing of secretaries, ministers, the Government and the broader public*”.

4 Methodological challenges in undertaking PIRs

Undertaking effective PIRs can be difficult in circumstances where there has been limited monitoring of the effectiveness of the policy and/or a lack of clarity over the policy objectives and therefore what should be evaluated in a PIR. In order to facilitate well considered PIRs, it is therefore important that the original RIA includes a well-designed monitoring and evaluation plan that clearly sets out:

- Under what circumstances it will be appropriate to carry out a PIR,
- How the impacts of the intervention will be monitored,
- The main external factors that are likely to affect the success of the intervention,
- How the department intends to assess whether the intervention has met its objectives – ideally this would be a set of desired outcomes, however in practice it is often appropriate to develop success metrics across inputs, activities, outputs and outcomes,
- How the department might assess whether there have been unintended consequences or disproportionate costs for businesses or households or particular groups (such as vulnerable customers),
- What existing data sources exist to inform the review and what new monitoring arrangements need to be created,
- What circumstances / changes might require earlier policy review (for example changes in technology, in the market dynamics etc), delayed or periodic review.

⁵⁰ Ibid.

The UK PIR best practice principles⁵¹ state that PIRs should address the following key questions (with more detailed questions underpinning each key question):

- To what extent is the existing regulation achieving its objectives?
- Is government intervention still required?
- Is the existing form of intervention still the most appropriate approach?
- If regulation is still required, what refinements could be made?
- If regulation is not required, but government intervention in some form is, what other regulations or alternatives to regulation would be appropriate?

This assumes that the original regulatory impact assessment specified the policy objectives and success criteria and that the IA included a monitoring and evaluation (M&E) plan that captures data about the baseline before the policy took effect and the subsequent impacts of the policy as implemented permit proper assessment can be made. It is notable that in the UK the RPC has commented⁵² that more than one in five M&E plans is weak or very weak,⁵³ raising concerns about the ability of subsequent PIRs to properly address the questions above. Other challenges include:

- the treatment of noisy, uncertain or incomplete evidence (including selection and other sources of bias) in conducting, interpreting and undertaking the analysis,
- the importance and interpretation of proportionality in closing these gaps,
- the evaluator's problem of attribution – identifying events or changes that occurred as a result (direct or indirect) of the intervention and differentiating them from events or changes that would have happened anyway, and
- the problem that good decisions do not always lead to good outcomes (and vice versa). Therefore one cannot necessarily infer from the outcomes whether the original decision was appropriate, or whether an alternative would have given a better result in a different state of the world.

The question as to whether regulations are working as intended provides feedback for the impact assessment process and should inform understanding of how actual impacts differ from expected impacts. However, it may be difficult to distinguish between differences due to actual circumstances being different from those that had been forecast and differences due to failings in modelling future events. There is value if the PIR can understand whether the prior estimate and the actual outcome differ due to factors that were taken into account

⁵¹ Producing post-implementation reviews: principles of best practice, BEIS, August 2021

<https://www.gov.uk/government/publications/business-regulation-producing-post-implementation-reviews/producing-post-implementation-reviews-principles-of-best-practice>

⁵² Mayhew, "Is Regulation Working as Intended? - Regulatory Policy Committee."

⁵³ A 'weak' rating means that: "*the analysis is not sufficiently robust to address the issue. Improvements are required in one or a number of areas. It provides inadequate support for decision-making on these aspects of the assessment.*"

A 'very weak' rating means that: "*the analysis is poor and has significant flaws. Significant improvements are required in one or a number of areas. It provides inadequate support for decision-making on these aspects of the assessment.*" <https://www.gov.uk/government/news/rpc-launches-new-opinion-templates>

in the RIA, factors that should have been taken into account (a failure of the RIA), or factors that could not reasonably have been anticipated.

In addition, PIRs are not purely retrospective; they must assess the impacts of the options involved (retaining, revising or repealing the measure). The impacts of removing an extant regulation are different from those of not introducing the measure in the first place – households and businesses will already have faced costs and made adjustments to accommodate the regulatory requirements and may face other costs to revert to the previous regulatory position. Therefore, whether a regulation has been net beneficial/costly is not the same as whether the measure should be retained or removed.

The second part of the PIR focuses on whether the regulatory measure is still appropriate or whether it should be revised, replaced or removed. This is effectively the first part of the process to develop new regulation and underpins the principle of ‘evaluate first’ and the ROAMEF cycle from Feedback to Rationale (see Figure 1). It is notable that according to the RPC “very rarely, even when completed properly, do they [PIRs] lead to modifications to the regulations being reviewed” and they are often “ignored by those charged with making subsequent or related policies”⁵⁴. This suggests a systemic failure in the policy making framework. A classic example of this was the UK PIR of the mandatory 5p charge for single use carrier bags (Box 1).

Box 1: The PIR of the mandatory 5p charge for Single Use Carrier Bags

The PIR of the UK measure to reduce the litter and environmental damage from discarded single use plastic carrier bags (SUCBs) by introducing a mandatory 5p charge for SUCBs was undertaken in May 2021¹. This was 3 months after the February 2021 decision¹ to increase the charge from 5p to 10p and extend its scope to cover small retailers (with less than 250 employees) and airport and charity retailers. The purpose of the PIR of the 5p SUCB charge was to inform decision makers about the potential need for a revision to the charge or an extension of the policy approach; increasing and extending the charge before the PIR was undertaken defeated the whole point of the PIR and meant that the subsequent decision was taken without a full understanding of the effectiveness of the previous measure. In addition, the PIR did not properly take into account the use of bags for life (BFL) as an alternative to SUCBs – evidence of increased BFL demand was taken as an indication of success, when it might have indicated the opposite, due to the higher environmental impact and lower biodegradability of BFLs - as discussed in the Regulatory Policy Committee opinion of the PIR which was rated ‘not fit for purpose’¹.

5 Why are PIRs not undertaken more comprehensively?

Several reasons have been offered to explain the lack of PIRs undertaken despite the statutory requirement (in the UK) and the policy benefits from ex post evaluation that governments

⁵⁴ Is regulation working as intended?, Regulatory Policy Committee, September 2021, <https://rpc.blog.gov.uk/2021/09/03/is-regulation-working-as-intended/>

almost universally recognise. These reasons include: limited political benefit, lack of prioritisation and concern over exposing previous policy failures.

5.1 Limited political benefit

Politicians tend to gain political profile (and civil servants advance in their careers) from developing new policies and advancing new measures that create growth opportunities or solve problems faced by their constituents. Reviewing existing regulatory measures (unless it directly fulfils a manifesto pledge, such as the UK ‘Red Tape Challenge’⁵⁵) is unlikely to advance ministerial or civil service careers. This leads to a lack of political incentive to undertake evaluation and post implementation reviews.

5.2 Lack of prioritisation

With the lack of political incentive to undertake ex-post evaluation comes a lack of prioritisation and failure to allocate sufficient resources to undertaking proper evaluation (or to develop the appropriate capability and capacity to do so). In a crowded political agenda, PIRs are unlikely to receive the necessary political support to deliver the resources necessary to drive this work forward. While important, PIRs are never urgent and therefore struggle to gain political attention or priority. This is particularly the case given the possibility that the PIR leads to a conclusion that the measure is working effectively and no changes need to be made, or that if changes are suggested there is insufficient parliamentary time available to make the changes.

5.3 Concern over exposing previous policy failures

A further concern is that undertaking PIRs may expose mistakes and policy failures, either by current incumbents who were responsible for previous policy decisions or by their parliamentary colleagues. While the PIR may support such errors or failures being fixed or mitigated, it nonetheless may not be an attractive avenue for a government minister to pursue. There is clearly a strategic tension between exposing previous policy or implementation failings and providing the opportunity to correct former failures and deliver better regulations. In the context of Australian policy evaluation, Bray et al note: “... *departments and agencies are often more concerned with reputational risk, seeking to preempt or divert criticism than learning from experience and feedback*”⁵⁶.

6 Policy approaches that might lead to a more comprehensive approach to PIRs

There are several approaches that might lead to a more comprehensive and consistent approach to undertaking PIRs. These include:

⁵⁵ Stephen Gibson, Will Henshall, and Tasila Banda, “Reducing the Burden of Government Regulation” (London: Social Market Foundation, March 2023), <https://www.smf.co.uk/wp-content/uploads/2023/03/Reducing-the-burden-of-government-regulation-March-2023.pdf>.

⁵⁶ R. Bray et al., Evaluation and learning from failure and success, ANZSOG, March 2019, <https://www.apsreview.gov.au/resources/evaluation-and-learning-failure-and-success>

6.1 *Statutory requirement*

In the UK, it is a statutory requirement (under the Small Business, Enterprise and Employment Act)⁵⁷ to evaluate the effectiveness of a regulation within five years of its introduction (or to provide an explanation of why this is not appropriate). However, since 2018, less than 40% of PIRs were completed on time⁵⁸ and as noted above, the NAO has identified⁵⁹ a backlog of 63 PIRs in one department alone (DEFRA). Importantly, there is no consequence for ignoring the statutory ‘requirement’⁶⁰. When challenged in Parliament on the lack of PIRs in DEFRA, the Secretary of State (Therèsè Coffey) recognised that she had not met her obligations to deliver PIRs on time, acknowledged that this was unacceptable and committed to seek to address the backlog by the end of 2024⁶¹. Therefore, a statutory requirement on its own does not appear to be sufficient, and it needs to be supported by an effective sanction to ensure that PIRs are properly carried out.

6.2 *Internal and external pressure on departments to undertake PIRs*

The Australian approach uses a combination of internal pressure (messages from the Prime Minister to Ministers who have not completed PIRs on time) and external pressure (the Office of Impact Analysis regularly publishes a list of PIRs that have not been completed on time to ‘name and shame’ departments and their ministers). This appears to have been very successful in ensuring that almost all qualifying PIRs are completed in Australia.

6.3 *Take account of previous PIR compliance in the scrutiny of future regulatory proposals*

In developing its new Better Regulation Framework, the UK has considered taking into account whether departments have completed previous reviews on time and if not, “*any new regulatory proposals will face additional scrutiny to ensure they are necessary and effective*”⁶². It was not clear whether this was intended only to apply to previous regulations in the same ‘policy space’ as the proposed new regulation (for example evaluating existing gambling regulations before proposing new gambling restrictions), in which case it was effectively an ‘evaluate first’ approach (see below), or whether it was really intended to cover all the regulations previously implemented by the department, which would provide a consequence to the relevant minister/department for a failure to complete a previous PIRs properly. There is a risk that this sets a disincentive to commit to a PIR (where there is discretion at the RIA stage) and does not impose a standard of quality (only timeliness).

6.4 *Evaluate First*

Evaluate First seeks to ensure that relevant existing regulations are evaluated before any new regulations are proposed in that policy area. Since 2016, the EU Commission has required that

⁵⁷ Small Business, Enterprise and Employment Act 2015.

⁵⁸ Mayhew, “Is Regulation Working as Intended? - Regulatory Policy Committee.”

⁵⁹ Comptroller and Auditor General, Gareth Davies, “Regulating to Achieve Environmental Outcomes.”

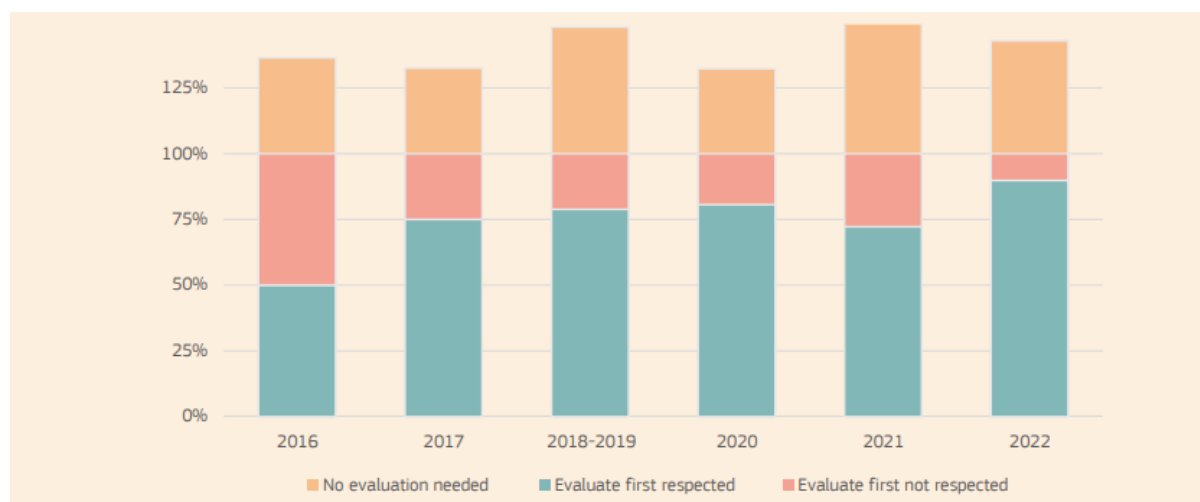
⁶⁰ it might be possible to Judicially Review the Department concerned, however there are few if any stakeholders with the incentive and financial/legal resources to do so.

⁶¹ Statement made In Parliament on 27 March 2023 by Therèsè Coffey, Secretary of State for Environment, Food and Rural Affairs <https://questions-statements.parliament.uk/written-statements/detail/2023-03-27/hcws674>

⁶² HM Government, “The Benefits of Brexit: How the UK Is Taking Advantage of Leaving the EU.”

all impact assessments for proposed revisions of existing legislation should include an evaluation of the extent to which the current policy is effective, efficient, coherent, adds value and remains relevant. Figure 3 shows that the proportion of initiatives complying with this ‘evaluate first’ principle has varied over time – the latest year (2022) had almost a 90% compliance rate (not counting initiatives that did not require evaluation), however in the previous year (2021) compliance was only 72%⁶³. The EU Regulatory Scrutiny Board suggest that this significant increase means that “*evaluations have been further mainstreamed into the policy development process and culture of the Commission*”.⁶⁴ This highlights the importance that they place on creating a *pro-evaluation culture* to underpin the evaluate first principle.

Figure 3: Compliance with the EU ‘Evaluate First’ principle 2016-2022⁶⁵



6.5 Sunset regulation if no PIR

A potentially effective approach to ensuring that post implementation reviews are carried out is to enshrine in the regulation automatic sunseting after a certain time period if a PIR has not been carried out beforehand. The effectiveness of this approach depends on the time-frame and nature of the regulation – if it has finite objectives (or the deadline falls due beyond the life of the current Government) then there may be little incentive to undertake a PIR; alternatively if the intervention has widespread support and is regarded as a success, then it may be extended without a PIR. However, for objectives that require ongoing regulation, this has the potential to require regular post implementation evaluation of the measure (although, as illustrated by the REUL sunseting proposal discussed below, a wave of new measures that require evaluation can create a future drain on policy-making capacity).

⁶³ Regulatory Scrutiny Board, “Regulatory Scrutiny Board: Annual Report 2022.”, Figure 7

⁶⁴ Regulatory Scrutiny Board. Page 27

⁶⁵ Regulatory Scrutiny Board. Figure 10. Note that the numbers in the table total to more than 100% because the RSB includes in the table new initiatives and those in areas where the EU has not previously in the been active which do therefore need to meet the ‘evaluate first’ principle.

Under the 2010 UK coalition government, the UK approach to regulation sought to achieve this with sunset and review clauses⁶⁶. These imposed a statutory duty to review the measure in a specified timescale, usually within 5 years of its entry into force and a sunset provision, within a maximum of 7 years. The combination of these two requirements meant that a PIR needed to be carried out if the department wanted to extend (or amend) the measure which would otherwise be withdrawn. Whilst sunset clauses are not a requirement in new UK legislation, they are considered an administrative tool at the disposal of departments.

The use of sunseting was proposed for retained EU legislation (REUL) in the Retained EU Law (Revocation and Reform) Bill which was introduced into Parliament in September 2022. The original intention of this Bill was to sunset all retained EU law by December 2023 unless a specific decision was made to review or retain it beforehand (with an option to extend the sunseting date to 23 June 2026 for individual measures). The Government originally intended this to apply to over 2400 individual retained EU laws (although further information suggested that it would actually involve close to 4000 pieces of legislation)⁶⁷. This would have forced the government to review each piece of retained EU law before the deadline or see it subject to sunseting. However the proposed legislation was challenged in Parliament (partly because of the huge challenge involved in reviewing such a large number of different regulatory provisions and the consequences of the significant uncertainty over the future status of regulations that it entailed). In the end the Bill was amended⁶⁸ in May 2023, so that it only applied to a list of 600 retained EU laws that the Government intended to revoke – these were almost exclusively measures that were either defunct (and therefore unnecessary), or duplicative (therefore all the sunset REUL measures were expected to have minimal or no impact). The Government plans to continue to review retained EU law, but to a slower timetable and without the backstop of a sunset deadline.

6.6 Establishing an independent body for ex-post analysis

Political pressure often drives individual government agencies to be resistant to conducting PIRs for fear of potential negativity. A potential solution to this is to empower an independent third-party body to lead evaluation, especially for highly contentious policies or programs.

Australia has recently announced the “Australian Centre for Evaluation” in the Australian Treasury⁶⁹. It is responsible for leading evaluation planning, capacity building, and cultural change to embed a more pro-evaluation culture in the Australian Government. Furthermore, the Centre is empowered to conduct flagship evaluations with individual government

⁶⁶ Better Regulation Unit, “Better Regulation Framework Manual (Withdrawn)” (HM Government, March 2015), https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/583871/bis-13-1038-Better-regulation-framework-manual.pdf.

⁶⁷ Ellie Goodchild, “The Retained EU Law Bill: What Are the next Steps?,” CBI, accessed August 11, 2023, <https://www.cbi.org.uk/articles/the-retained-eu-law-bill-what-are-the-next-steps/>.

⁶⁸ Department of Business and Trade, “Schedule of Retained EU Law,” GOV.UK, May 17, 2023, <https://www.gov.uk/government/publications/schedule-of-retained-eu-law>.

⁶⁹ Assistant Minister for Competition, Charities and Treasury, Assistant Minister for Employment, “Australian Centre for Evaluation to Measure What Works,” May 25, 2023, <https://ministers.treasury.gov.au/ministers/andrew-leigh-2022/media-releases/australian-centre-evaluation-measure-what-works>.

agencies to review high-stakes, contentious policies. Effectively, this takes the political pressure off individual agencies at the same time as providing an independent evaluator to provide transparency and assurance.

6.7 Having a political “champion” for evaluation

Australia’s practice of having the Prime Minister as the “champion” for PIRs is effective in driving an ‘evaluation culture’. This practice of having a very senior champion is a low-cost, high-value way forward that could be applied by all organisations with responsibility for introducing regulatory policy – in the same way as regulators often have Board champions for other cross-cutting high-level objectives such as diversity or the environment. A nominated champion provides visible individual accountability and responsibility for sponsoring and delivering post implementation review. Furthermore, it mitigates the concerns of political ‘blowback’ that might arise from a PIR identifying negative policy outcomes or implementation failures.

7 Conclusions

Regulatory policy is often under-prioritised by governments, particularly when compared with the detailed focus associated with tax and spending measures. Even where a clear policy development process is adopted and applied for regulatory measures, it rarely has the same profile or attendant resources as applied to fiscal measures. This paper highlights one aspect of this regulatory policy deficit – the lack of priority given to evaluation and ex-post review of regulatory measures.

While there is little debate around the benefits of evaluation and post implementation reviews in theory, their adoption in practice has been far from comprehensive (for the reasons given in Section 5). This paper has highlighted a range of approaches that aim to achieve a more comprehensive adoption of post-implementation evaluation and review (Section 6). However the common thread that runs through all of these approaches is the critical importance of high-level political support. Without such high-level political backing, statutory requirements will be variously disregarded, internal and external voices will be ignored, and the pragmatic short-term pressures to focus on other new and high-profile policy measures will trump the longer-term benefits from a comprehensive approach to policy evaluation.