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Peer Review Assessment of Public Consultation as Used by Malaysia to Improve Regulation: APEC Peer Review on Public Consultation Initiatives

APEC Economic Committee

May 2019

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Acronyms and Abbreviations

AGC	Attorney General's Chamber, Malaysia
APEC	Asia-Pacific Economic Cooperation
DOSH	Department of Occupational Safety and Health
GRP	Good regulatory practice
INTAN	National Institute of Public Administration
MITI	Ministry of International Trade and Industry
MOH	Ministry of Health
MOTAC	Ministry of Tourism, Arts and Culture
MPC	Malaysia Productivity Corporation, Malaysia
NGO	Non-Governmental Organisation
OECD	Organisation for Economic Co-operation and Development
PC	Public consultation
SOCSO	Social Security Organisation
RIA	Regulatory Impact Analysis
RURB	Reducing Unnecessary Regulatory Burdens
TPP	Trans-Pacific Partnership

Executive Summary

In this project, public consultation (PC) is used generically to refer to engagement with stakeholders when governments write or amend regulation in order to deliver better outcomes. This can be conducted in a number of ways and ranges from informing to listening to interactive engagement. This report provides an in-depth analysis of Malaysia's use of PC when developing new regulations or amending existing regulations, including not only the written regulation but also how it is administered and enforced.

PC plays a crucial role in:

- formulating effective policies
- improving the quality of written regulations
- improving compliance which, in turn, helps to better achieve policy goals
- reducing administration and enforcement costs for government
- reducing compliance costs for business and other sectors
- assessing expectations
- identifying non-evident impacts and policy alternatives
- strengthening the relationship between regulators, policy makers, businesses, other interested parties and society
- increasing buy-in by affected parties.

This in-depth analysis of Malaysia's PC was conducted in parallel with the development of a compendium of PC practices for 15 APEC economies. Both projects are the first of their type for APEC and were proposed and managed by Malaysia, through the Malaysia Productivity Corporation (MPC), co-sponsored with Australia, Thailand and Viet Nam. Ms Sue Elaine Holmes, an Australian expert, was appointed by APEC for this project.

Malaysia volunteered to be the first APEC economy to have its PC to be assessed in detail. The assessment of Malaysia's PC was conducted by Ms. Sue Elaine Holmes through a series of interviews with key stakeholders from businesses, government agencies, and NGOs. The result of Malaysia's PC assessment has been shared with APEC economies members for further comments and improvements at the APEC workshop on 17-18 July 2018. The in-depth analysis of Malaysia can serve as a pilot project which could also be undertaken by other APEC economies, in order to identify gaps in the framework and implementation of their PC as it applies to the writing and administration of regulation.

The compendium on PC practices in participating economies is published as an accompanying report.

Improvements in the pipeline

The new Malaysian Government proposes some changes which will increase the range of ways members of the public can comment on policy proposals:

- informal groups which can involve representatives of civil society

- Green Papers to Cabinet and White papers to Parliament need to demonstrate that the proposing agency has engaged all members of society when policy changes, including regulatory changes, are being discussed
- institutionalizing the Select Committee system with appropriate support staff to enable them to function effectively
- allow the forming of Temporary Committees for ad hoc matters.

This is a milestone in terms of high level support for better PC. This report provides an assessment of the state of play before any of these proposals have been implemented. It thus provides a baseline study against which future progress can be assessed.

The assessment

The in-depth assessment of Malaysia and the survey and discussions were structured around the four key dimensions proposed by the OECD in 2015:

- **methodology** – techniques used to engage the public

- **systematic adoption** – how widely PC is used across the government and the methods used to achieve this

- **transparency** – what information about the reviews of regulation is given to stakeholders. For this APEC project, the team added **inclusiveness** – assistance given to groups who find it difficult to participate

- **oversight and quality control** - the strategies used to ensure government bodies comply with PC requirements and that the conduct of PC is at least adequate.

Methodology

To date, Malaysia has spent a number of years developing its capacity to consult well when developing and reviewing regulation. Of most interest, Malaysia has adopted some innovative and effective PC methods:

- value-chain analysis to help identify all stakeholders

- a structured set of questions to stakeholders that maximises the likelihood of gaining new insights into the ways regulation and its administration imposes unnecessary burdens and finding ways to address them.

However, while there has been significant capacity building in terms of acquiring the methodology by a few government bodies, most need to improve their methodology by providing participants with more information about reviews and giving them more time to respond. It is also important that government bodies change their focus on gathering the input just of businesses instead to engage the widest possible range of stakeholders, such as consumers, those concerned with environmental or public health impacts.

A key barrier to providing participants with more information appears to be the excessive use of the *Official Secrets Act 1972*, which states that any document that has been declared as an official secret by any government official may not be released to the public. Ministries can declare documents as secret, under the Act, without

providing reasons or being subject to external review. This review recommends some mechanisms to curb this overuse and thus allow for better informed PC.

Widespread improvement in the time allowed for comment, would also be achieved if the General Circular No.2 issued by the Chief Secretary to the Government in 2012, which instructs all Ministries to publicly post all draft laws and regulations on the internet for a 14 day public comment period, was adhered to. While there are exceptions, this circular is generally not followed. Non-compliance by government bodies should be addressed.

Systematic adoption

From now on, the broad priority for Malaysia's development of good regulatory policy should be on achieving the systematic adoption of good methodology across the entire bureaucracy. Malaysia has already done the ground work that should put it in good stead for this next exciting stage in embedding good PC in all reviews of regulation.

The leadership provided by the new Government with its commitment to ensure PC for Green and White papers should help to ensure systematic adoption will take place. Two key measures would both reinforce this commitment to PC and ensure it is adopted systematically:

- issue mandatory requirements which stipulate what the Government expects of its civil servants to fully engage with the public before submitting proposals for changes to regulation to the Cabinet or the Parliament
- establish gatekeepers to ensure proposals will not proceed to Cabinet or the Parliament unless these requirements have been met.

It is also important that it is made mandatory that changes to subordinate regulation and circulars are subject to a similar scrutiny outside of the proposing Ministry or other government body.

Transparency and inclusiveness

While systematic adoption of PC for the review of regulation should be Malaysia's key focus, this does not prevent it from also starting to improve transparency and inclusiveness.

Transparency concerns information provided to potential participants and the response and exposure given to those who do participate.

While there are exceptions, in general, most of Malaysia's Ministries and other regulatory bodies need to improve aspects of transparency to ensure that all interested parties:

- can access and understand how, when and where consultations are conducted
- can access and understand how and when interested parties can make written submissions to a review
- can access and understand the criteria that will be used in assessing contributions
- who contribute to consultations, receive feedback on their contributions.

Inclusiveness looks at the extent to which PC is made open to the entire spectrum of stakeholders and also to the efforts made to facilitate those less able to participate to do so. Consulting with all stakeholder groups is likely to improve the drafting, administration and enforcement of regulation.

While many Ministries regularly consult with business, in general, all other groups are not regularly consulted.

Even with respect to business, while the businesses likely to be directly impacted by contemplated regulatory changes are usually consulted, industries which supply to the industry/sector directly impacted or those which use its products are often not engaged to comment on how such changes will impact on them.

Being more inclusive will be a core part of the cultural change that will be required to ensure all relevant stakeholders are consulted. Reviewers and policy makers would need to broaden how they think about which groups might be affected by regulatory change, not just business – consumers, environmental groups and so.

As well as being open to inputs from a much broader group of stakeholder, facilitating access for those who need more help in doing so is another way to improve inclusiveness. The groups likely to need assistance include those with disabilities, those without access to electronic communication, those living in remote areas and foreign investors, businesses and employees.

Oversight and quality control

Oversight and quality control concerns the role played by mechanisms, external to the reviewing agencies, to achieve good quality PC.

The next step for Malaysia is to establish an independent body to oversee RIA, RURB and PC. This body would:

- assess the quality of reports on PC, in attached RIA or RURB, and advise gatekeepers whether or not proposals should proceed to Cabinet or Parliament, according to the adequacy of the PC analysis
- advise government bodies of their PC obligations and encourage them to conduct PC
- report publicly on good and poor compliance by Ministries and other regulatory bodies in order to encourage improvements.

With regard to quality control MPC has published four key documents which promote and guide PC and the National Institute of Public Administration (INTAN) provides training on RIA. It does this, in conjunction with MPC. The next stage for INTAN and MPC is develop a program which identifies and then provides targeted training to those bodies with inadequate PC.

Introduction

Why Public Consultation?

PC plays a crucial role in:

- formulating effective policies
- improving the quality of written regulations
- improving compliance which, in turn, helps to better achieve policy goals
- reducing enforcement costs for government
- reducing compliance costs for the business and all other sectors
- assessing expectations
- identifying non-evident impacts and policy alternatives
- strengthening the relationship between regulators, policy makers, businesses, other interested parties and society
- increasing buy-in by all affected parties.

Project Background

In June 30, 2017, the APEC Budget and Management Committee notified Malaysia on the approval of the project: "APEC Peer Review on Public Consultation Initiatives". The approval was in response to the proposal made by Malaysia, through the Malaysia Productivity Corporation (MPC) in March 2017, co-sponsoring with Australia, Thailand and Viet Nam.

This project establishes a platform for volunteer economies to undertake their own peer-reviews of Public Consultation (PC) in their economies, to identify gaps in the framework and implementation of their PC as it applies to the development and administration of regulation.

Addressing these gaps will assist APEC economies in applying Good Regulatory Practices (GRP) and improving indicators measured by the World Bank, APEC, OECD and other relevant International Organizations. At the core, this will support the PC reforms required to improve the mechanisms used to formulate and revise regulations.

Malaysia initiated this project (the first time of its kind in APEC) and volunteered to be the first APEC economy to be assessed by Ms. Sue Elaine Holmes, an Australian expert, who has been appointed by APEC for this project. This assessment can now serve as a guide for other economies which choose to do their own in depth analyses of their current PC framework and practices.

Project Stages

This in-depth analysis of Malaysia's PC was conducted in parallel with the development of a compendium of PC practices for the 15 APEC economies. Both projects are the first of their type for APEC. The compendium on PC practices in participating economies is published as an accompanying report.

The in-depth analysis of Malaysia can serve as a pilot project which could also be undertaken by other APEC economies, in order to identify gaps in the framework and implementation of their PC as it applies to the writing and administration of regulation.

The stages of in-depth peer review also worked in tandem with the development of the compendium. The first version of the survey was filled out by Ministries and other stakeholders in Malaysia. In March 2018, the expert conducted a series of interviews in Malaysia with relevant ministries, policy makers, the business community, NGOs and other interested parties in order to explore their perspectives on the strengths and weaknesses of PC in Malaysia.

After these meetings, the team conducted desk work and contacted relevant experts in order to validate comments made and find out more about the issues raised and observations made. The report on Malaysia was then written and presented at the APEC Peer Review on PC Initiatives Workshop (17 - 18 July 2018). Comments made at the workshop were then also incorporated into the analysis and draft and final reports written.

About the peer review assessment

This exercise assessed PC in Malaysia through a peer-review platform. Through this mechanism, Malaysia has been given the opportunity to identify gaps in how it conducts PC. Addressing these gaps will support Malaysia's initiatives in applying GRP and improving indicators measured by the World Bank, APEC, OECD and other relevant International Organisations. It will also support PC reforms which will improve the formulation of regulation.

The objectives of the peer review assessment are:

- raise awareness of the role and importance of PC in delivering smart regulation
- establish a baseline on PC practices in Malaysia
- identify any best practices in PC
- identify the next steps for Malaysia to take to fully embed PC in the processes by which it assesses regulation.

We invited representatives of the policy makers from Ministries and government agencies, businesses, private sectors and other interested parties:

Table A: List of attended Ministries and government agencies

1. Ministry of International Trade and Industry (MITI)
2. Ministry of Domestic Trade and Consumer Affairs (KPDNHEP)
3. Ministry of Finance (MOF)
4. Ministry of Health (MOH)
5. Ministry of Human Resource (Trade Affairs Union Department)
6. Ministry of Tourism and Culture (MOTAC)
7. Malaysian Investment Development Authority (MIDA)
8. National Pharmaceutical Regulatory Agency (NPRA)

Table B: List of attended businesses and NGOs

1. Association of Private Hospitals of Malaysia (APHM)
2. American Malaysian Chamber of Commerce (AMCHAM)
3. Federation of Malaysian Manufacturers (FMM)
4. Malaysian Food Manufacturing Group (MAFMAG)
5. Malaysian Automotive Tyre Manufacturers Industry Group (MATMIG)
6. Malaysian Ceramic Industry Group (MCIG)
7. Malaysian Petrochemicals Association (MPA)
8. International Business Machines, Malaysia (IBM)
9. Institute for Democracy and Economic Affairs, Malaysia (IDEAS)
10. Institute of Strategic and International Studies, Malaysia (ISIS)
11. Malay Chamber of Commerce Malaysia (MCCM)
12. Malaysian Inbound Tourism Association (MITA)
13. Malaysia Medical Device Association (MMDA)
14. Malaysian Trade Union Congress (MTUC)
15. Pharmaceutical Association of Malaysia (PHAMA)

Assessment Framework

The assessment is conducted through interview with the business and regulator coordinator representatives (26-30 March 2018). The assessment looked at four key dimensions of PC: methodology; systematic adoption; transparency and inclusiveness; oversight and quality control.

Table C: Assessment framework on public consultation initiatives

Dimensions	Indicators for each dimension
Methodology	• Stages when the public is consulted • Guidance provided to stakeholders • Methods used to encourage widespread involvement • Methods used to gather inputs from interested parties • Minimum period to receive feedback
Systematic Adoption	• Commitment & leadership • Formal requirements • Standard questions for developing new regulations • Standard questions for amending existing regulations
Transparency and Inclusiveness	• Transparency of process • Consideration of and response to stakeholder comments • Availability of information • Who gets to participate in consultations? • What triggers public consultation? • Improving access for challenged groups
Oversight and Quality Control	• Independent body to monitor, enforce and advise • Publicly available evaluation of stakeholder engagement • Training • Guidance documents for civil servants

Stages of regulation policy development and public consultation

The stages of regulation policy development have generally been observed to proceed in the following order:

1. Deregulation

2. Improving the quality of some regulations

3. Regulatory management – systematic adoption of regulatory development tools developed during stage 2

4. Regulatory governance – transparency, participation, continuous improvement and accountability.

These stages can be seen to parallel the four dimensions of PC. The development of a PC methodology may start when an economy starts deregulating and as it explores ways to **improve the quality of some regulations**. **Systematic adoption** of PC is a part of implementing regulatory management. Regulatory governance concerns the last two dimensions, where measures to improve **transparency and inclusiveness** are put in place, along with measures to **oversight** and **improve the quality** of how PC is conducted in order to improve regulations and their administration.

Improvements in the pipeline

The new Government proposes some changes to Parliament which will increase the range of ways members of the public can comment on policy proposals:

- informal groups which can involve representatives of civil society
- Green Papers to Cabinet and White papers to Parliament to demonstrate has engaged all members of society when policy changes are being discussed
- institutionalizing the Select Committee system with appropriate support staff to enable them to function effectively
- allow the forming of Temporary Committees for ad hoc matters.

This should provide an enormous improvement to PC. The ensuing analysis is an assessment of the state of play before any of these proposals have been implemented. It thus provides a baseline study against which future progress can be assessed.

Chapter 1 : Methodology

Methodology concerns what methods governments use to consult with interested parties when regulations are developed or amended, such as guidance documents, how stakeholders are contacted and encouraged to participate, and the use of interactive websites and social media tools. The stages when PC takes place and the minimum length of time given to stakeholders to participate are also indicators of good methodology (box 1.1).

Box 1.1: Indicators of good public consultation methodology

Scope of public consultation:

- when the public is consulted
- applied to:
    - new regulation
    - existing written regulation
    - administration & enforcement of regulation

Guidance to participants

Stakeholder analysis and identification

The range of ways information is gathered

Time given for input

1.1 Guidance Documents

Malaysia has four important documents which provide guidance on PC:

- *National Policy on the Development and Implementation of Regulations* (July 2013)
- *Best Practice Regulation Handbook* (July 2013)
- *A Guide to Reducing Unnecessary Regulatory Burdens: Core Concepts* (July 2014)
- *Guideline on Public Consultation Procedures* (Oct 2014)

These documents are all very accessible, including on the web, and are promoted by the MPC. However, a number of Ministries are still not aware of them and do not follow the processes outlined in them.

A best practice was identified with the Ministry of Health (MoH) and its National Pharmaceutical Regulatory Agency (NPRA). Guidance is provided via NPRA's website and has a Standard Operating Procedure for working with pharmaceutical companies, such as Guideline for Registration of Drug-Medical Device and Medical Device-Drug Combination Products, First Edition – March 2017 and Drug Registration Guidance Documents (DRGD), Second Edition – September 2016, revised July 2018

Recommendations

1.1.1 The Guideline on Public Consultation Procedures should be amended to reflect the recommendations of this review.

1.2 At what stages in the review of regulation is the public consulted?

Malaysia already consults extensively with business, so many of the comments in this section relate to the methods used to consult with business by the Malaysian Government.

Most Ministries report that they consult either early or late in the development or review of regulation. Few say they do both.

While government bodies have developed good skills in consulting with business, businesses generally consider they are not consulted early enough in any regulation review. For example, businesses generally report that they are almost never consulted before a draft of the regulation has been written.

Similarly, businesses say they are more likely to be included after a near final draft of regulation has already been written. Sometimes, they argue that they are consulted simply to get a rubber stamp on what has been written with no intention to change the draft in light of comments made by business. Businesses complain that they are not given reasons why their concerns are not taken into account. They also complain that they may only be given relevant material at the meeting and must make their comments at that meeting.

Consultation with non-business groups is quite limited but some exceptions were observed:

- Ministry for International Trade and Investment (MITI) and the Trans-Pacific Partnership Agreement (TPP)
- Ministry of Tourism, Arts and Culture
- NPRA's process for adopting international standards for pharmaceuticals.

NPRA's process develops proposed policy and regulation for implementation throughout the economy. Systematic and active participation with various stakeholders from the business communities, interest groups within the government, professional organisations and individuals is a key component to the process. Public meetings, technical workshops, focus groups, surveys and feedback via interactive website are all used.

Recommendations

1.2.1 Ministries should consult all business and non-business stakeholders early in the development or review of regulation, including before drafts have been written.

1.2.2 Stakeholders should be consulted using RIA in the development of new regulations so that they can comment on options for addressing an issue and using RURB especially where administrative and enforcement concerns apply to existing regulation.

1.3 Access to information before meetings

When businesses are invited to attend meetings on regulation, they are rarely provided with background information beforehand. This makes it difficult for them to prepare for the meetings and to identify the best people to attend the meetings.

Ministries say they are constrained from sharing drafts of proposed regulation due to constraints under the *Official Secrets Act 1972*, which states that any document that has been declared as an official secret by any government official may not be released to the public.

In contrast, the Chief Secretary to the Government issued General Circular No.2/2012, instructing all Ministries to publicly post all draft laws and regulations on the internet for a 14 day public comment period. While there are exceptions, this circular is generally not followed.

Recommendations

1.3.1 Ensure more information is made public before, during and after meetings with interested parties on regulatory issues, by:

- requiring government bodies to publicly release information papers, assessments and drafts of regulations
- establishing, in a regulation, the criteria which justifies when a document can be declared as confidential under the *Official Secrets Act.* The decision should not be left solely to a Ministry's discretion, perhaps requiring Ministries to get approval from the Attorney General's Chambers. The reasons for declaring a document confidential should be made public when the declaration is made
- ensuring that the Chief Secretary to the Government's General Circular, No.2/2012 - which instructs all Ministries to publicly post all draft laws and regulations on the internet for a 14 day public comment period - is followed by all Ministries. This could be enforced by gatekeepers who would not allow regulatory proposals to proceed to Cabinet or Parliament if this requirement has not been met. The AGC could perform a similar role for subordinate regulation usually developed and promulgated by a Ministry.

1.4 How stakeholders are encouraged to participate

Maximising the participation of stakeholders involves identifying who the stakeholders are and then encouraging them to contribute to any review. To identify possible stakeholders most Ministries maintain databases of:

- companies, organisations and NGOs
- past engagements by function and interest.

Some Ministries conduct stakeholder analysis before engaging interested parties in PC. One best practice used in identifying stakeholders has been developed by the MPC (box 1.2).

To encourage participation, most Ministries use ICT tools, social media and provide information on their websites. Some, but not most, Ministries use advertising, provide a copy of an issues paper or similar analysis early in a review. A few also provide a summary of proposed amendments.

Ministers sometimes draw attention to reviews in speeches or at press interviews and some use media releases.

Box 1.2: Best practices on value chain analysis

When trying to identify all interested parties early in a RURB review, MPC uses value-chain analysis.

By working out all stages of production and consumption that precede and follow the industry under review, it is possible to identify other industries, suppliers to, and users and consumers of the products or services of the industry. All of these groups are likely to be affected by the regulation and thus should be treated as stakeholders.

Logistics Value Chain
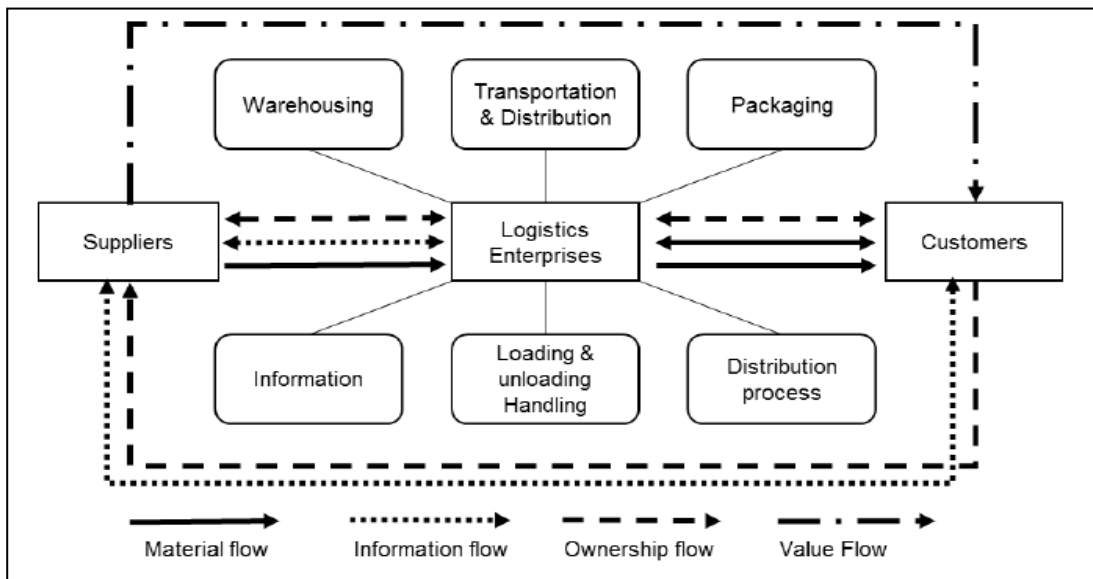
Seven Steps International Shipping
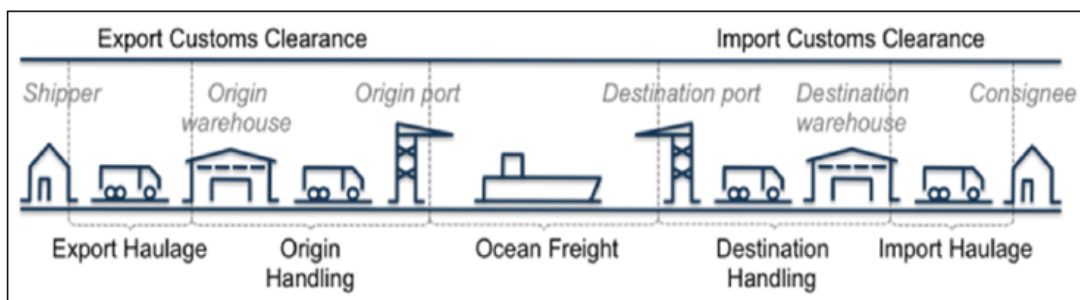
Recommendations

1.4.1   All Ministries and other government agencies should:

- seek to identify all stakeholders, not just businesses
- ensure all workers, not just those who belong to a 'recognised' union, can be represented in matters that impact on them
- use value chain analysis to help identify all those likely to be affected by proposed changes to regulation and its administration.
- make wider use of advertising, issues/information papers and public summaries of proposed amendments
- allow interested parties to identify themselves as being affected by a proposal rather being reliant on an invitation from the relevant Ministry.

1.5 How data and feedback is gathered

Most Ministries use the following methods to gather information on regulation:

- public/town hall meetings
- face-to-face meetings held separately with relevant organizations
- ICT Tools
- social media - Website, Twitter, Facebook, LinkedIn, etc
- technical committees to advise on changes to regulation.

Some Ministries use:

- written submissions
- focus groups
- community workshops
- surveys.

Only one Ministry, MITI, reported using public hearings. This was during its review of the proposed Trans-Pacific Partnership (TPP). No Ministries reported using skype, zoom or other means by which to hold 'virtual' meetings.

Box 1.3 outlines some best practice methods used to gather inputs from stakeholders and/or reduce the burden on stakeholders in contributing. With the tripartite meetings, according to Section 5 of the Industrial Relation Act 1967 (IRA 1967), all workers including the Small and Medium Enterprises (SMEs) employees can be represented by a union. However, there is an issue for some trade unions to enter bargaining as some employers refuse to recognise the trade union. While it is helpful to have employers, employees and government discuss regulatory issues, this does not represent other stakeholder groups including consumers, the unemployed, taxpayers and those concerned about the environment.

While documenting these best practices, it is also important to note that business also observed some inefficiencies in how they are consulted. Even though some Ministries coordinate, sometimes others do not which results in a number of separate meetings on the same regulatory topic. This can waste time both for the Ministry and for business. Similarly, sometimes units within the same Ministry consult with the same business or business association separately on the same regulatory topic.

Box 1.3: Best practice methods to collect input

Inter-ministerial meetings can reduce the number of times stakeholders need to be consulted by having Ministries share the information they have collected from stakeholders. It also facilitates more coordination and consistency in developing, adopting and implementing regulation.

Ministries often hold inter-ministerial meetings. When inter-related issues are discussed, relevant Ministries and agencies are usually invited to attend the meetings. For example, MOH has held inter-ministerial meetings with a number of other Ministries, such Environment and Agriculture, for many years. These regular meetings were established with Terms of Reference.

The concept of **tri-partite meetings** - used by the National Labour Advisory Council (under the Ministry of Human Resources) for industrial relations, to ensure government, employers/businesses and unions/workers are represented - is adopted in the formation of many boards of statutory bodies in Malaysia For example, MPC's Board is composed of 7 government, 6 business leaders, 1 academic and 1 union representative.

Open days held by Ministries where anyone can attend is used quite extensively but not by all Ministries, although they not used as often as they used to be. Similarly, Ministers would sometimes attend but also is not as common as previously. The open days provide a way by which groups could raise issues which perhaps were not being addressed sufficiently well by the bureaucracy and provided the Minister with a indicator of how the work of his/her portfolio was being received by the public.

Information booths are sometimes used at public events, such as industry fairs, to get quick responses from attendees to issues identified by the government body as needing more information.

Another Malaysian best practice is an approach called *Reducing Unnecessary Regulatory Burdens* (box 1.4).

Box 1.4: Best practice of Reducing Unnecessary Regulatory Burdens (RURB)

Malaysia, through MPC, has spent the last 6 years developing and applying an approach which focuses on reducing unnecessary regulatory burdens. It relies heavily on engaging stakeholders to identify burdens (whether due to the text of the regulation or to the way it is administered or enforced), determine which can be reduced without compromising the objectives of the regulation and work out which are the best amendments which will reduce burdens while ensuring the regulation and its administration achieves its policy objectives. The key features are:

- it reviews existing regulation including its administration and enforcement
- the focus is on identifying regulatory burdens that can be removed while still achieving the objective of the regulation
- PC is core to the process of identifying unnecessary regulatory burdens
- all possible stakeholders are included
- extensive engagement with stakeholders
- structured questions
- inputs are acknowledged
- draft and final reports.

In meetings with stakeholders, Malaysia has developed a set of structured questions to identify unnecessary burdens, which provide a great deal of openness to stakeholders to raise whatever most concerns them.

1. Which regulations concern you the most? Why?

2. Which regulations are the hardest to comply with?

3. Which regulations do you think are too onerous given what they are trying to achieve?

4. Do you think any regulations are not justified at all?

5. Are some regulatory requirements inconsistent?

6. Do you consider inspectors and other regulatory administrators do a good or a poor job? In what ways?

7. Do you find inspectors and administrators are consistent in their decisions?

8. Do you find they are helpful or unhelpful in advising you how to comply?

9. Are there any publicly available guidelines?

10. How long do regulators take to respond to applications, etc?

11. Do you have any suggestions for reducing the burden of compliance of regulations?

12. Are there any other issues you want to suggest we should cover in our review?

Recommendations

1.5.1 All government Ministries and agencies should adopt the best practices in information gathering and participant engagement which have already been developed within Malaysia but have, so far, not been widely adopted, including:

- public/town hall meetings
- face-to-face meetings held separately with relevant organizations
- ICT Tools
- social media
- technical committees to advise on changes to regulation
- written submissions
- focus groups
- community workshops
- surveys
- public hearings
- inter-ministerial meetings
- open days
- information booths
- the approaches and questions used for RIA and RURB
- structured questions which allow for the widest canvassing of issues.

These practices should be regarded as a consultation 'tool kit' of methods for engaging with interested parties and the one actually used for each engagement should be chosen based on what will be the most effective in terms of gathering relevant information.

Although no government body has so far adopted 'virtual' meetings, by using skype, zoom or similar this should also be adopted where it saves time and money and is appropriate to the circumstances.

1.5.2 Ministries should increase cooperation and coordination in-house and across ministries, so that unnecessary duplication of consultation with the same businesses and stakeholders is avoided both by units within the same Ministry and by a number of Ministries.

1.6 *Time allowed for input from stakeholders*

The time allowed for input from stakeholders generally refers to the deadline set for submissions from interested parties. It can also refer to the period time which the reviewer allows for consulting with stakeholders, such as by way of meetings or surveys. Malaysian Ministries report that the time given to stakeholders can vary depending on:

- the complexity of the issue
- the level of public interest
- the type of regulatory instrument.

Generally, Ministries give stakeholders 2 to 4 weeks, though they can be given up to 12 weeks. One Ministry indicated it generally allows 6 to 12 months between the time when it decides to amend regulation and when the amendment is implemented. This is to allow engagement with stakeholders. With regard to trade matters, another

Ministry indicated the time allowed is very much influenced by the international context, the nature of any standards involved and how they are being developed.

As noted in section 1.3, often stakeholders are only able to make comments on draft legislation at a meeting, without having been provided relevant information before the meeting. Thus the time given for commentary is just a number of hours.

The limited time given to stakeholders to comments is in conflict with the Chief Secretary to the Government's General Circular No.2/2012 which instructs all Ministries to publicly post all draft laws and regulations on the internet for a 14 day public comment period. While there are exceptions, this circular is generally not followed.

1.6.1 All Malaysian government bodies, should allow at least two weeks for all consultations concerning regulatory matters, noting that the issues raised, in recommendation 1.3.1, need also to be addressed in ensure well-informed engagement.

Chapter 2 : Findings on Systematic adoption

2.1 Stages of regulation policy development

Systematic adoption concerns whether good PC practices are widely and routinely adopted across the bureaucracy.

The stages of regulation policy development have generally been observed to proceed in the following order:

1. Deregulation

2. Improving the quality of **some regulations**

3. **Regulatory management** – systematic adoption of regulatory development tools developed during stage 2

4. **Regulatory governance** – transparency, participation, continuous improvement and accountability.

These stages can be seen to parallel the four dimensions of PC. The development of a PC **methodology** may start when an economy starts deregulating and as it explores ways to improve the quality of some regulations. **Systematic adoption** of PC is a part of implementing regulatory management. Regulatory governance concerns the last two dimensions, where measures to improve **transparency and inclusiveness** are put in place, along with measures to **oversight** and improve the **quality** of how PC is conducted in order to improve regulations and their administration.

Deregulation

Malaysia has been implementing some significant **deregulation**, with regard to foreign competition. After maintaining a strict closed-skies aviation policy for many decades, Malaysia has seen a boom in air traffic growth due to greater domestic competition led by AirAsia after the Airline deregulation and liberalization. Also, the *Exposure Draft on Operating Cost Controls for Life Insurance and Family Takaful Business* sets out the deregulation of operating cost control limits to allow licensed life insurers and family Takaful operators greater flexibility to manage operating expenses commensurate with their business strategies, encourage greater innovation and competition.

However, Malaysia could usefully further remove its extensive duplication of regulation. This is now largely being addressed through its RURB program which embodies extensive PC.

Improving particular regulations

Over the last 5 years, Malaysia has embarked on a program to improve individual regulations (stage 2). Since 2013, MPC has dedicated time and resources to developing the capacities to improve regulations. These developments are reflected in the two publications:

- *10th Malaysian Plan (2011 – 2015)*

- *National Policy on the Development and Implementation of Regulations (NPDIR), 2013.*

Through the work of MPC and MITI, Malaysia has developed the capacity to use PC to improve regulations. MPC published guidelines on Regulation Impact Analysis (RIA) and Reducing Unnecessary Regulatory Burdens (RURB).

RIA is used to examines and measures the likely benefits, costs and effects when developing new or amending regulations. It is intended to achieve better regulation by supporting sound analysis, informed & evidence-based decision making and transparency. PC with stakeholders is part of RIA process where each stages of the regulation making process required getting feedback from stakeholders.

Ministries and agencies need to submit Regulatory Notification (for RIA) upon assessment by MPC. Since 2014 up until October 2018, MPC has received a total of 306 Regulatory Notifications. Some of the examples are:

- Amendment of Occupational Safety and Healthy on the Noise Exposure Regulation – Department of Occupational Safety and Healthy
- Safe Drinking Water Act – Ministry of Health
- Industrial Coordination Act 1975 – Ministry of International Trade and Industry
- Private Higher Educational Institutions Act 1996 – Ministry of Education
- Employment Insurance System Act 2017 - Social Security Organisation (SOCSO)

MPC, also regularly reviews bodies of existing regulation, which impact on a particular sector, using the approach of RURB. The approach is built around the concept of cost-effectiveness analysis. The key characteristics of RURB are outlined in Box 1.2. MPC has conducted reviews of ten sectors. Examples include:

- Private Hospitals (August 2014)
- Growing Oil Palm (September 2014)
- Logistics (March 2016).

2.2 Malaysia's core challenge is systematic adoption

A number of best practices (Chapter 1) are currently conducted by one or more Ministries but are not regularly used by all Ministries. In Malaysia, the use of good practices is mostly dependent on being implemented by the person in charge, rather than being systematically adopted across the bureaucracy. Now that Malaysia has achieved the capacity to improve the quality of individual regulations, the next challenge is to ensure that this capacity is systematically applied to all new and amended regulations. This will involve instituting a consistent strategy to achieve systematic adoption of good regulatory assessment of which PC is a core part.

Systematic adoption of RIA and RURB will provide the key vehicles by which PC is also adopted, as both use PC extensively. Removing duplication and inconsistency is a particular issue for Malaysia. This can be done when any regulation is reviewed but a dedicated strategy is important. The RURB program can also provide the basis for this.

Malaysia has taken the first steps to systematic adoption of regulatory analysis and PC by producing overarching documents, including PC guidelines) which provide guidance on and requires government bodies to conduct RIA when introducing new

regulation and to conduct PC (Chapter 1). However, in fact, they have not been widely adopted.

2.3 How to achieve systematic adoption

The achievement of Systematic adoption requires:

- high-level political endorsement
- mandatory requirements
- gatekeepers
- consequences for non-compliance – non-acceptance of proposals, reporting of non-compliance.

high-level political endorsement - leadership and cultural change

It is widely observed throughout the world, that leadership and cultural change are fundamental to bringing about significant changes.

The new Government has given a strong endorsement to conduct PC when writing new or amending existing regulations. This provides the high-level political endorsement required to achieve systematic use of PC (Manifesto, *Rebuilding our Nation, Fulfilling our Hopes)*. Under Promise 16 – *Restore the Dignity of Parliament –* the Government proposes to improve PC. A core aspect is the proposal to use Green and White papers to engage all members of society when policy changes are being discussed.

Promise 16 provides the leadership from the top which is core to systematic adoption of effective PC. In turn, this leadership should foster the cultural change which leads to officials being committed to such changes rather than seem as perfunctory.

mandatory requirements, gatekeepers and consequences

Ideally, the Government needs to back up its promise by making PC mandatory, giving a body the role of checking and enforcing compliance with this requirement, and setting out the consequences that will follow if a Ministry or other government body does not comply with its new PC requirements. Unless, these three elements are put in place, it is unlikely that PC on regulatory matters will be systematically adopted.

At minimum, an official circular should be issued wherein it is made clear that all ministries must follow the new PC requirements. And this should be promulgated by the Chief Secretary to the Government or someone of similar stature.

Gatekeeping functions should be established for Green papers (with a RIA or RURB attached) going to Cabinet, White papers (with a RIA or RURB attached) going to Parliament and for subordinate regulation (with a RIA or RURB attached) which does not go to Parliament. Among other things, gatekeepers would ensure the Government's PC requirements have been met. One option, which works with existing institutions, would be that when the Attorney General's Chambers receives a request to draft new regulation, it not only asks the regulator to confirm it has conducted RIA or analysis to RURB – both of which require PC – it also requires an official signed declaration from MPC that this has been done adequately.

Similarly, the AGC could ensure that White papers (containing RIA or RURB with PC) precede or accompany the introduction of a new Bill into Parliament. Systematic

adoption is most likely to be achieved if the AGC will not allow any Bills to enter Parliament if they have not fulfilled this requirement.

It will be more challenging to achieve compliance for the more subordinate written regulation some of which can be issued by a Ministry without external scrutiny.

Recommendations

2.3.1   MITI and MPC should prepare a Cabinet Paper on Good Regulatory Practice to demonstrate how RIA, RURB and PC guidelines are in line with the promises in the Manifesto of the new Government and gain endorsement for their implementation plan from the new Government. This implementation plan, as reflected in the ensuing recommendations, will result in requiring all reviews of regulation by Ministries and other government bodies to use RIA or RURB, as appropriate, rather than set their own criteria and make the use of PC in RIA and RURB mandatory.

2.3.2   The Chief Secretary to the Government should require all ministries to follow the guidelines contained in

- *Guideline on Public Consultation Procedures (October 2014)*
- *Best Practice Regulation Handbook* (July 2013)
- *A Guide To Reducing Unnecessary Regulatory Burdens (July 2014)*

This requirement should be stated in an official circular. Thereby, all Ministries and reviews would be required to use RIA or RURB, as appropriate, and to conduct PC in the process of conducting RIA and RURB

2.3.3   There are 3 places where gatekeeper functions should apply:

- when a Ministry or other regulatory body wants to submit a regulatory proposal to Cabinet unless the Green Paper (first-stage RIA or analysis of RURB) contains a section recording comments by all stakeholders is attached and assessed as adequate by the MPC, it will **not** be allowed to proceed to Cabinet
- when a Ministry or other regulatory body wishes to submit draft legislation to Parliament unless the White Paper (final RIA or analysis of RURB) contains a section recording comments by all stakeholders is attached and assessed as adequate by the MPC, it will **not** be allowed to proceed to Parliament
- when subordinate regulation, which does not got to Cabinet or Parliament, is about to be declared, it also needs to be assessed by the relevant gatekeeper before proceeding to proclamation and becoming law. One option for Malaysia is to require any regulation written by any Ministry must be cleared by the AGC before it can become law. It would also help if such regulations are only lawful once they have been published in an official legal document, such as the Government Gazette, as happens in Australia.

The Secretary to the Cabinet and the Secretary to the Parliament could perform the gatekeeper functions. Their roles would need to be supported by an assessment of the adequacy of the PC. This could be done by MPC or a newly created body with the skills to do this.

2.3.4   In order to encourage consistent adoption of PC across the bureaucracy, there should be adverse consequences for those Ministries which do not comply. This could consist of:

- non-acceptance of proposals via gatekeepers, as outlined above
- monitoring and public reporting on the extent to which ministries comply with PC requirements, as outlined in the chapter on 'Oversight an Quality Control'.

Chapter 3 : Transparency and inclusiveness

Transparency and inclusiveness are part of good **governance**, which is the fourth stage in developing GRP. While, historically, economies have usually established good regulatory **management,** to achieve systematic adoption of good PC practices, before they have attended to regulatory governance, there is no clear reason why both governance and management cannot be addressed concurrently by Malaysia.

Many of the issues under Methodology also impact on transparency and inclusiveness. For example, when a government provides guidance documents, improves the ways it gathers input and the timing of consultation, then transparency and inclusiveness must improve.

3.1 Transparency

With regard to the use of PC when developing new or revising existing regulation, transparency concerns information provided to potential participants and the response and exposure given to those who do participate. More specifically, transparency concerns how easily anyone:

- can access and understand how, when and where consultations are conducted
- can access and understand how and when interested parties can make written submissions to a review
- can access and understand the criteria that will be used in assessing contributions
- who contributes to consultations, receives feedback on their contributions – ranging from acknowledgements to indicating how these comments have influenced the assessment and policy recommendations.

Generally, a number of Malaysian Ministries provide publicly available information on the issues being addressed in particular reviews but most do not. Less information is publicly provided on the stages of reviews and on the timelines.

With regard to responsiveness to those who do participate, almost all Ministries, who responded to the survey, indicated that they acknowledge the receipt of contributions. However, generally most, though not all, do not:

- make the content of contributions public
- respond to contributors on how their input has been used – either directly or implicitly in a published report, although regular meetings of some established committees provide feedback in the form of the meeting minutes.

The most important exception to these observations is the work done by the MPC which produces draft and final reports on regulatory regimes, which acknowledge all contributions. These reviews provide a mechanism by which contributors can make submissions public, where those contributors have agreed to this.

3.2 Inclusiveness

Inclusiveness relates to the entire spectrum of stakeholders – business and non-business. Inclusiveness looks at the extent to which PC is made open to the entire

spectrum of stakeholders. It refers to both who is consulted and who is not, and also to the efforts made to facilitate those less able to participate to do so. Consulting with all stakeholder groups is likely to improve the drafting, administration and enforcement of regulation.

In Malaysia, there is extensive consultation with business (see comments made under Methodology) and limited consultation with other stakeholders. However, some Ministries, such as MITI, MOH and Ministry of Tourism and Culture (MOTAC) have demonstrated thorough consultation with non-business on some issues.

Consultation with other stakeholder groups is not nearly as extensive. While all Ministries, which responded to the survey, indicated they regularly consulted with business, all other groups were not regularly consulted. Of the different types of stakeholders, in general, there is some consultation with researchers and professionals. Researchers provide expertise. Professionals are likely to overlap with business.

The least consulted stakeholders are employees, non-government organisations, final consumers and industries which supply to the industry/sector directly under review or those which use their products should be consulted when changes are being considered.

The low consultation with consumers and suppliers reflects a limited focus on the particular industry or sector which will be most directly affected by regulatory changes to the exclusion of those who will be indirectly affected. However, those industries which supply to the industry/sector directly under review or those which use their products will also be impacted and should be consulted when changes are being considered. Similarly, the ultimate consumers of the products/services produced by the industry/sector under review will be affected by regulatory changes due to possible impacts on prices, availability and the quality of outputs.

Some types of Malaysian workers, such as those working for small businesses, are not legally permitted to have union representation and thus no means by which to have their perspectives presented at tri-partite meetings.

With regard to assisting participation by those who are challenged to do so to date, Malaysia has given little consideration to helping people with physical disabilities or living in remote areas or having limited access to the internet. Although a couple of Ministries use town hall meetings which would address issues for those without access to electronic communication, though they are not used systematically.

One indicator of inclusiveness is the types of impacts which are likely to lead to using PC – the more types there are, the more inclusive is the PC policy. Consistent with other observations, the most common reason given for conducting PC in Malaysia is that the regulatory issue will impact on business. The second most common reason is if the regulatory issue is likely to impact on productivity. Other impacts are generally given low priority with the third being if there will be impacts on consumers or there will be other social impacts, the fourth being impacts on regions and the fifth being impacts on the environment. Another important consideration is the size of potential risks and most Ministries indicate that the size of potential risks is correlated with the likelihood of conducting PC. The nature of the risk is probably less influential though financial impacts are given more attention than social, environmental and work place risks.

Being more inclusive will be a core part of the cultural change that will be required to ensure all relevant stakeholders are consulted. Reviewers and policy makers would need to broaden how they think about which groups might be affected by regulatory change, not just business – consumers, environment, etc.

Recommendations

3.2.1   As Malaysia adopts Green and White papers which involve PC more extensively, it should develop a comprehensive policy to facilitate access by all interested parties to the making and review of regulations and produce a template to address transparency and inclusiveness. This template would:

- promote a broader view of who might be impacted by a regulatory change and thus be stakeholders in the regulation under review

  - consumers, NGOs, suppliers to the industry under review, users of the industry's outputs (services and/or goods), employees, foreign companies, etc

  - use value chain analysis to help do identify all stakeholders who will be impacted

  - all types of risks should be considered with the focus on their potential size and severity, irrespective of the nature of the risks

- require acknowledgement of and engagement with all contributions

  - who, what and how each contribution has influenced thinking

- outline ways to improve access

  - methodology: internet, public meetings, etc

  - facilitate access: identify those who need more help

    - people with disabilities

    - people without access to electronic communication

    - other disadvantaged groups

    - foreign investors, businesses and employees.

The MPC's *Guideline on Public Consultation Procedures* could be this template. It should be revised to include any new ideas from this review, including from the list above.

3.2.2 Malaysia find a way to ensure all groups of workers can be represented by a union and thus all to have access to tri-partite discussions and negotiations.

Chapter 4 : Oversight and Quality Control

Oversight and quality control concerns the role played by mechanisms, external to the reviewing agencies, to achieve good quality PC which in turn should result in good polices and well written and administered regulation.

4.1   Oversight

Oversight concerns whether there are external mechanisms in place to ensure PC takes place and to monitor and assess the quality of PC and stakeholder engagement. In this case, external refers to mechanisms which are separate from the government body proposing the regulation. The external body may still be part of government, either being placed within one of the core Ministries or be an independent public organisation. These evaluations are more effective in improving compliance if they are made publicly available.

Oversight mechanisms also help to ensure the systematic adoption of good PC is actually achieved resulting in PC being widely and routinely practised across the bureaucracy.

In establishing RIA and RURB, MPC plays a role in assessing compliance with the National Policy on the Development and Implementation of Regulations (NPDIR) by monitoring compliance by regulatory bodies with RIA, RURB and their PC requirements. MPC has invested heavily in acquiring the skills needed to develop and review regulation and how it is administered and enforced, and thus is able to assess the adequacy of PC in RIA and RURB. The publication of assessment reports which indicate how well government bodies have complied with these requirements would encourage compliance into the future, as they would draw attention to those bodies which do not conform to the requirements.

Recommendations

4.1.1   Via statutory power or delegation from a central Ministry, an independent body should be allocated the role of overseeing RIA, RURB and PC. This could be MPC which has already acquired skills in this area or be given to a more centrally located body such as in the Attorney General's Chambers. Ideally the oversight role should not be performed by the gatekeepers, as too often gatekeepers do not have sufficient time to fully assess submissions. Instead the gatekeeper would rely on the independent body to advise it of compliance with requirements and thus whether proposals can progress to the decision makers. The core functions of this independent body would be to ensure all government bodies conduct PC by:

- advising them of their obligations and encouraging them to conduct PC
- evaluating the adequacy Regulation Impact Statements and RURB Statements and the PC analysis and reporting contained therein
- monitoring compliance with RIA, RURB analysis and PC requirements
- reporting publicly on good and poor compliance by Ministries and other regulatory bodies in order to encourage improvements.

Also see recommendations for systematic adoption.

4.2   Quality Control

Quality control concerns the ways governments support officials to conduct PC well and provide mechanisms to improve its quality. Indicators for this include:

- guidance documents for civil servants
- general training
- targeted training when standards are inadequate.

As outlined in chapter one, MPC has published four key documents which promote and guide PC.

The National Policy on the Development and Implementation of Regulations, 2013, established the National Institute of Public Administration (INTAN) as the main training body for RIA. In addition, MPC has developed some experience in training in PC, especially as associated with the RIA and RURB programs.

Recommendations

4.2.1   The Government should endorse a body to improve the quality of PC by all government agencies. This body would assist all government bodies to improve the quality of their PC by:

- providing regular standard training to all Ministries, in conjunction with INTAN which is currently responsible for training in RIA and PC

- reporting publicly on good and poor compliance in order to encourage improvements in PC

- identifying where focused training is required in order to improve inadequate performance and provide this training in conjunction with INTAN.

Chapter 5 : Conclusion

Over the last six years, Malaysia has laid the foundation for PC to be fully integrated into the processes by which it writes, adopts and implements regulation. It has developed the capacity to conduct PC well. Now it is time to build on this foundation to ensure PC is systematically adopted across the bureaucracy. The key elements to achieve this involve:

- submit a Cabinet Paper on Good Regulatory Practice to demonstrate how MPC's RIA, RURB and PC guidelines are in line with the Government's goals of public engagement before policies, and the regulations which support them, are decided

- issue a written requirement that sets the new PC requirements for all civil servants to follow, using RIA and RURB frameworks. The requirement should be an official circular or higher-level document, probably mandated by the Chief Secretary to the Government

- establish gatekeeper and assessment functions

- build capacities in the civil service by developing guidance documentation and roll out a training program for all civil servants

- amend MPC's Guideline on Public Consultation Procedures to reflect the findings of this review.