

TOWARDS BETTER REGULATION: A RESPONSE TO THE PRODUCTIVITY COMMISSION'S QUESTIONS AND RECOMMENDATIONS

The Productivity Commission's report "Towards Better Regulation" was published in December 2012. The Report contains 39 questions, seeking further information, and 58 recommendations. This paper examines each of the questions and recommendations from a local government perspective and provides an initial response.

It has been prepared to assist both councils and LGNZ respond to the Productivity's draft report.

Key points

- Local government regulatory activities have a clear impact on regional economic growth and ultimately national growth. The scope and breadth of the regulatory functions of local government cannot be overestimated with the Commission identifying over 30 pieces of primary legislation that confer regulatory responsibilities on local governments.
- There is scope for improvements in the overall regulatory system by aligning the incentives of all regulatory actors; ensuring adequate capability at both central and local level; coordinating multiple regulatory activities and integrating multiple levels of government to ensure that regulation achieves its desired outcomes.
- There is a level of tension between central and local government about their respective roles and went on to further suggest that it may be at an unhealthy level that could undermine the development and performance of regulatory functions.
- Local government's constitutional position should be considered when governments are designing new regulatory systems.
- Despite common perception, almost all regulations administered by councils are undertaken at the direction of central government.
- As a matter of principle, better regulatory decisions will be made and overall well-being improved when those who bear the costs and benefits from the regulation have representation in the jurisdiction making the decision.
- There are advantages from local decision-making where preferences are heterogeneous because local governments are better at aligning local preferences

than central government - and that where preferences are homogeneous there may be advantages in reducing the effort of multiple decision-makers.

- Where regulations are developed centrally and implemented locally the incentives faced by government departments to undertake rigorous policy analysis are reduced.
- There is significantly more cooperation, coordination and sharing of resources occurring amongst local authorities than is commonly known.

LGNZ process

This initial response has been prepared to both develop an integrated local government response to the Productivity Commission's paper and assist each council developing its own response, should they intend to do so. Any comments will be analysed and incorporated within our final submission.

Please feel free to comment on any part of the document.

Key time frames

Circulation of LGNZ's initial response	25 January 2013
Deadline for comments on LGNZ draft	22 February 2013
LGNZ workshops	13/14 February 2013
Deadline for response to Productivity Commission	6 March 2013
Expected date for final Commission report	1 May 2013

Please forward any comments to Mike Reid at mike.reid@lgnz.co.nz by 8 February 2013.

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QUESTIONS

Chapter 3: Diversity across local authorities

Q3.1 To what extent should local government play an active role in pursuing regional economic development?

Response: The preceding discussion appears to deal with the question of whether or not a council's approach to economic growth could explain local variation in regulations but then switches to whether or not central government has given local government a mandate to pursue regional economic growth. Councils can only provide those services where the benefits are confined to citizens within their jurisdictions, they could collaborate at a regional level in terms of strategic planning and delivery of economic objectives if they so choose.

The contribution of regional governance to economic growth appears widely accepted by policy makers and is best illustrated by the Government's decision to consolidate the Auckland councils. The reform of Auckland was premised on the need for stronger regional leadership and the contribution that this was likely to have on economic growth. Councils exercise a range of policy levers that can either encourage or diminish economic activity within their regions. How these levers are exercised is ultimately a question best left to voters to decide.

Bearing in mind that every decision councils make will have an impact on economic growth, either positive or negative, the answer to whether local government should play an active role in pursuing economic development is one that only local and voters can determine. It is a fundamental tenet of democracy that voters will chose candidates that reflect their preferences, consequently councils will take very different views on whether or not to pursue economic development and how this might be done, whether through specific initiatives or simply providing good quality infrastructure efficiently.

Where councils have discretion, attitudes to economic growth, as opposed to environmental protection or sustainability, are likely to impact on the service levels for regulatory activities. A number of regulatory regimes, such as the RMA, allow citizens, through their elected members, to make trade-offs between economic, environmental, cultural and social outcomes – essentially the *raison d'être* of local government.

Chapter 4: Allocating regulatory responsibilities

Q4.1 Have the right elements for making decisions about the allocation of regulatory roles been included in the guidelines? Are important considerations missing?

Response: Overall the guidelines appear to contain the full range of necessary elements to sensibly allocate regulatory responsibilities between central and local government however the framework may need to differ depending on whether we are dealing with delegated regulatory functions from central government or regulatory functions given to local government directly by Parliament. This is particularly relevant to the issue of capability.

The Guide asks who has capability to make regulatory decisions and implement regulations. It further asks how capability will be maintained. This is a complex question and may lend itself to practical application. Capability is determined by the investment made by a local authority. Given that the question relates to activities limited in scale by a local authority's jurisdiction the required capability is also likely to be determined by population and size of a jurisdiction, creating a circular proposition. There is a need to consider this question of capability in the design of regulatory delivery models. Sharing expertise across more than one council can be a way of spreading the cost of highly skilled personnel.

The critical point might be the cost to residents (or those subject to the regulation) and whether or not that cost is reasonable, given the cost to residents/users in larger jurisdictions. Even then, when people choose to live in small and isolated communities they do so with the knowledge that public goods are likely to be more expensive. The key principle here might be one of 'horses for courses'.

Q4.2 Are the Guidelines practical enough to be used in designing or evaluating regulatory regimes?

Response: As above, the guidelines may need to be defined in broader terms to cater for the different nature of some regulatory regimes.

Q4.3 Are the case studies helpful as an indicative guide to the analysis that could be undertaken?

Response: Yes

Q4.4 Should such analysis be a requirement in RIS's or be a required component of advice to Ministers when regulation is being contemplated?

Response: Local government's experience with the regulatory impact statement for the Better Local Government legislation suggests that the RIS is too late to inform the final legislation and even more problematic, likely to be ignored if inconsistent with government policy. Our preference is for the discussion to occur as soon as a regulatory response is being considered. Local government should have involvement at the early stages of conceptual thinking and deciding whether regulation is the appropriate tool to address a problem.

Q4.5 Should the Guidelines be used in evaluations of regulatory regimes?

Response: Yes

Chapter 5: The funding of regulation

Q5.1 Do any regulatory functions lend themselves to specific grants? If so, what is it about those functions that makes suitable to specific grants?

Response: Most regulatory functions, as opposed to services, are funded through some form of user charge. General funds (rates, grants etc) are and could be used to fund the preliminary policy work, consultation and monitoring. The question for the Government concerns the willingness of councils to invest sufficiently in the policy and monitoring work which are often the unfunded elements of regulation. Under-investment in these activities might lead to poorly delivered regulations and either over or under provision.

Grants are one way of improving the quality of regulations particularly if targeted to councils representing low socio economic communities.

Q5.2 If general grants were to be considered, on what basis could 'needs assessments ' be undertaken? What indicators could be used to assess need?

Response: We agree with the suggestion that general grants could be used to assist councils lacking capacity to provide a higher minimum level of service and it is appropriate that councils have the discretion to allocate such funds as need requires. Need could be defined in a number of ways from socio economic status to the land value of the district (as used in the Financial Assistance Rate).

The question is also asked whether general grants could be used to fund 'spillovers'. It is not clear, however, what spillovers are in a regulatory context. In the regulatory context rather than "spillovers" the issue is one of displacement – a council that invests heavily in anti graffiti policies may simply displace offenders to a neighbouring authority that has invested less; similarly alcohol bans may simply transfer drunkenness offences to a district without bans.

With regard to environmental regulations it is the role of regional councils to manage displacement and spillovers, where the actions of one community cause costs to another.

Q5.3 What would appropriate accountability mechanisms for funding local regulation through central taxation look like? How acceptable would these be to local authorities?

Response: Local government accepts the principle that with funding comes accountability. The proposed funding principles outlined in Box 5.2 (page 69) are supported. The Government has considerable experience of contracting and funding non-governmental agencies to provide service on its behalf. These models could be applied to any funding allocated to councils to enhance the performance of a regulatory function.

Chapter 7: Regulation making by local government

Q7.1 What measures, or combination of measures, would be most effective in strengthening the quality of analysis underpinning changes to the regulatory functions of local government?

Response: It is simply too easy for Ministers to blame local authorities for regulatory failure when the actual problem lies with the design of the regulatory system itself. As the Report notes, where accountability is diffuse no single party has an incentive to take responsibility for the eventual outcomes of the regulatory regime.

The critical change must involve a more analytic approach to determining whether the regulation is one that should be decentralised to councils, and if so, the degree of discretion that should be given to councils. Local government supports recommendations that would strengthen the regulatory impact process and the quality of regulatory impact statements and specifically support options 1, 2 and 3 in Table 7.1. We are not sure whether option 10, a Select Committee to consider issues concerning local government regulation, is practical however we do support Option 8, the suggestion of an independent statutory body to undertake quality control of RIS.

One of the issues faced with regulatory impact statements concerns the willingness of government to actually take them into account. We would note that the RIS accompanying the recent LGA 2002 Amendment Act 2012 was highly critical not only of the information on which the Bill was based but also some of the policy prescriptions. Decision makers appeared to ignore the RIS in its entirety.

Q7.2 What measures or combination of measures would be most effective in lifting the capability of central government agencies to analyse regulations impacting on local government?

Response: Local Government supports the eight proposals outlined in Table 7.2. We wish to specifically highlight the potential value of the following:

- Option 1 - Seconding/contracting staff with local government expertise. We can't over estimate the value of having officials involved with the implementation of a regulatory regime actively participating in either its development or review. The knowledge of frontline staff can ensure such regimes are designed to better meet local needs without unnecessary cost.

We see a value in secondments both ways – central to local and local to central – not just in terms of providing a local government view but in increasing understanding of the issues. Consequently we do not agree with the comment that secondment might lead to excessive influence of local authority views. The value is primarily a technical one, to ensure officials better understand the context that they are making regulations for.

- Option 4 – Best practice guidance for officials in local and central government is important. The local government sector actively supported the Department of Internal Affairs' guidelines that sought to inform the development of local government specific regulations. We would like to see those guidelines updated, enhanced and given greater status.

In addition consideration might be given to developing a university based paper on the principles of good regulation for central and local government personnel. Such a paper could be included, for example, in Victoria University's Master of Public Policy degree.

Chapter 8: Local government cooperation

Q8.1 What are the benefits and costs of cooperation? Are there any studies that quantify the benefits and costs?

Response: Cooperation makes sense where there are economies of scale and agreement on service levels or standards, that is, where community values are relatively homogenous. We agree with the statement that "cooperation gives councils the flexibility of only working

together in areas where there are advantages". The Report also notes that 89% of councils "coordinate/collaborate" on regulatory functions.

Cooperation provides councils with flexibility that is lost by structural change as the distribution of benefits will vary according to each regulatory area and benefits are likely to be maximized if cooperative arrangements can be developed on a activity basis, that is, cooperative partners may be different in the area of building control than, for example, in liquor outlet licensing or inspection.

We are not aware of any studies in New Zealand that have sought to quantify the costs and benefits of cooperation of regulatory functions.

Chapter 9: Local authorities as regulators

Q9.1 Are there potential pooled funding or insurance style schemes that might create a better separation between councillors and decision to proceed with major prosecutions?

Response: Elected members have a valuable role to play in many regulatory regimes, such as their role as hearing commissioners and setting regulatory standards, however, as a matter of principle elected members should not be involved in decisions to determine whether or not individual prosecutions should be laid.

Where appeals and prosecutions are likely to create a significant cost to ratepayers, with limited likelihood of success or limited ability to recover the cost, it is appropriate that governors are involved in the decision. The question is one of scale and whether the cost is proportionate to the scale of the problem. There are a number of regulatory areas where taking an offender to court for an unpaid fine will cost councils more than the maximum fine able to be charged.

In our experience the cost of initiating prosecutions or appeals is not the major determinant of whether such actions are taken or not. We are not convinced that there is a problem that would benefit from a mutual styled fund.

Q9.2 Are bylaws that regulate access to council services being used to avoid incurring costs such as the cost of new infrastructure? Is regulation therefore being used when the relationship between supplier and customer is more appropriately a contractual one?

Response: This question appears to relate to the role of trade-waste bylaws and whether a contractual model would be preferable. It is our understanding that using bylaw, as

opposed to individual contracts with specific users of waste water systems, reduces transaction costs while providing additional compliance options and transparency, consequently reducing the cost to users and ratepayers. The ability to use such bylaws provides an advantage to publicly owned water and waste-water schemes compared to privately owned systems, which perhaps explains why the issue was raised in the first place.

Q9.3 What factors (other than the type of regulation most commonly experienced by different industry groupings and the size of businesses in these sectors) explain differences in the satisfaction reported by industry sectors with local authority administration of regulations?

Response: The issue here is whether dissatisfaction is with the process by which regulations are administered or with the standard users are expected to comply with – more clarity is required. Increasing consistency of process will arguably benefit firms dealing more than a single council but may also diminish the capacity for innovation. Increased consistency of regulatory standards undermines the argument in favour of decentralising regulatory functions and would assume that, at least in relation to this regulatory area, all communities have the same values.

It is understandable that firms regard regulation as a cost, yet the point of regulation is to diminish harm to citizens. This creates a trade-off - what is a reasonable level of regulation? It is a trade-off that we expect elected members, in consultation with businesses and citizens, to resolve. As a check and balance businesses have the opportunity to exit and shift investment to areas with more favourable regulatory. The ability to exit is an important check on both the quality of regulatory practice and the level of regulatory standards.

Chapter 10: Local monitoring and enforcement

Q10.1 Are risk based approaches to compliance monitoring widely used by LAs? If so, in which regulatory regimes is this approach most commonly applied? What barriers to the use of risk-based monitoring exist within LAs or the regulations they administer?

Response: As we understand it councils are increasingly using risk based approaches to regulation. The bio-security regime is risk based and changes to the Food Act are intended to shift that regime to a risk based one. Within the RMA the use of permitted activities is an example of a risk based regime with monitoring managed through regular state of the environment reports.

Q10.2 The Commission wishes to gather more evidence on the level of monitoring that LAs are undertaking. Which areas of regulation do stakeholders believe suffer from inadequate monitoring and compliance? What are the underlying causes of insufficient monitoring? What evidence is there to support these as the underlying cause?

Response: Three different types of monitoring:

- Environmental monitoring
- Compliance monitoring
- Plan effectiveness monitoring

Of the three the cost of compliance, such as the monitoring of resource consent conditions, is met by applicants while the cost of the other two forms of monitoring is met out of general revenues. Investment in environmental and plan effectiveness monitoring will be influenced by the pressure of budget constraints.

Q10.3 Which specific regulatory regimes could be more efficiently enforced if infringement notices were made more widely available? What evidence and data are there to substantiate the benefits and costs of doing this?

Response: Resource management; freedom camping; biosecurity; illegal dumping of waste. The benefits of enforcing infringement notices needs to be balanced against the cost of providing warranted officer resource to enforce and collect the infringement fines.

Q10.4 Is there sufficient enforcement activity occurring for breaches of the RMA, other than noise complaints? If not, what factors are limiting the level of enforcement that is occurring?

Response: Some regulatory regimes, by their nature are difficult to enforce. For example illegal dumping here the current fine has a maximum of \$400. Many councils find the cost of enforcement and prosecution to be greater than income received from a successful prosecution. The protection of wetlands is another area where enforcement is difficult given the isolation of many of our wetlands and the difficulty of monitoring.

Q10.5 Should the size of fines imposed by infringement notices be reviewed with a view to making moderate penalties more readily available? What evidence is there to suggest that this would deliver better regulatory outcomes?

Response: In response to LGNZ's cost shifting survey Wellington City provided a good example that might be able to be avoided should the councils be able to use instant infringement fines. The council reported that the Ministry of Justice has removed the ability of councils to pursue debt recovery through the Small Claims Court. Because the alternative, taking claims to the District Court, costs between \$5,000 and \$15,000 per case (even where a court finds in the council's favour) the likely fine, often only \$200, makes the exercise uneconomical. Consequently Wellington City Council writes off about \$20,000 in small debts each year, regardless of the strength of the council's case.

In the end the time and resource spent in court action which fails to influence behavioural change is less effective.

Q10.6 Is sufficient monitoring of liquor licenses occurring? What evidence and data exists that would provide insights into the adequacy of current monitoring efforts?

Response: Unfortunately this question begs the corollary, how do you define "sufficient"? Elected members are elected to oversee the performance of council officers; this includes overseeing councils' regulatory performance. Most regulatory regimes deal with matters of high public interest – should officials fail to adequately monitor liquor licenses in a particular area and problems arise then citizens will inevitably raise concerns with elected members who will ensure appropriate action is taken by officials. Close liaison with the Police on these matters will often provide insights into the effectiveness of any monitoring efforts.

Q10.7 How high is the burden of proof for each kind of enforcement action? Is it proportional to the severity of the action?

Response: In our experience the burden of proof is automatically proportionate to the severity of an action otherwise enforcement is unlikely to follow.

Q10.8 Is the different gradient in the use of compliance options because there are missing intermediate options?

Response: The model is possibly too simplistic as the reason an enforcement action is taken may vary considerably from serving minors to breaking licensed opening hours. Rather than thinking of this as a gradient it might be better to think of it as a menu of regulatory tools.

Q10.9 Are the more severe penalties not being used because there is insufficient monitoring activity by local authorities to build sufficient proof for their use?

Response: We assume that the enforcement regime works well with a high level of voluntary compliance, consequently little use needs to be made of the severe penalty options.

Q10.10 Why are relatively few licenses varied?

Response: The current liquor licensing regime is not a fully decentralised one – possibly the uniformity of conditions is explained by the influence of the Liquor Licensing Authority.

Chapter 12: Making resource management decisions

Q12.1 Is the very low number of consents declined best explained by the risky applications not being put forward, the consent process improving the applications or too many low risk activities needing consent?

Response: In LGNZ's view it indicates the regulatory system is working well. The rules are clear and significant energy is devoted to 'pre-lodgement' meetings to assist both risky and incomplete applicants meet the rules. In short it reflects a focus on customer service.

Q12.2 Would different planning approaches lead to less revisiting of regulation? What alternative approaches might there be?

Response: Under the RMA councils are required to consider private requests for plan changes. Certainty is assisted by the use of zones whereas the alternative performance based approach provides less certainty and is likely to prove expensive to prospective developers.

Q12.3 What factors have the strongest influence on whether a district plan or regional policy statement are appealed?

Response: Plans and policy statements are mechanisms for making trade-offs between competing demands. By their nature they involve collective choices which both limit certain kinds of activities or favour others. The number of appeals is likely to be influenced by the process followed in the development of plans and policy statements and the degree to which interested parties believe their interests have been acknowledged and taken into account. Despite this the right to appeal by parties who feel their interests have not been adequately addressed or where circumstances may have changed is an important constitutional right.

Q12.4 Overall, would it be feasible to narrow the legal scope of appeals?

Response: Yes, the Biosecurity Act is an example that might be considered.

Q12.5 Would it be feasible to narrow legal standing?

Response: Yes; to people who have previously submitted, for example.

Q12.6 What features of the bylaw making process are distinct from the district plan making process and how might you use practice under the one to improve the process under the other?

Response: These are very different frameworks and are designed to deal with very different kinds of issues, although some aspects will be similar, such as the policy work required to assess costs and benefits of different options. This could/should allow for building organisational competency. Some bylaws relating to street dining will have a direct impact on district plan rules for encroachment.

Chapter 13: Local regulation and Maori

Q13.1 Are there any other ways that local authorities include Maori in decision-making that should be considered?

Response: The difficulty in answering this question concerns the very different nature of the regulatory regimes operated by councils. Most if not all of Chapter 13 deals with participation within the context of the RMA. It is not clear how Maori involvement in decision-making could be applied in other regulatory areas such as Building or gaming other than ensuring that consultation has occurred and tangata whenua interests have been considered. Where the regulatory instrument requires councils to consult with communities to set levels of service, such as gaming or dog control, then statutory duty to consult applies and avenues are present. Other regulatory areas, such as building control, do not provide such options and regulatory decisions are increasingly reserved for staff with specific qualifications.

The most comprehensive survey of mechanisms by which local authorities engage with Maori (which is wider than decision-making opportunities) was carried out by LGNZ and Te Puni Kokiri in 2004. That survey found:

- 69 councils had formal processes for consulting Maori
- 79 councils had informal processes for consultation and information sharing
- 43 councils held Iwi management plans
- 55 councils provided funding for one or more joint initiative
- 22 councils had established co-management regimes for managing site or resource
- 57 councils provided internal training (elected members/staff) on matters such as statutory obligations to Maori
- 39 councils had established Maori advisory committees
- 42 councils used appointed Iwi/Maori representatives on committees or working groups
- 42 councils scheduled regular meetings with Maori organisations
- Councils which had negotiated relationship agreements with Iwi/Maori numbers 44
- 32 councils employed dedicated Iwi liaison/policy staff

Compared to the same survey undertaken in 1997 the number of mechanisms in each area had increased markedly.

Q13.2 What are some examples of cost-effective inclusion of Maori in decision-making you are aware of?

Response: The potential range of mechanisms is included in the answer to Q.13.1. The establishment of relationship agreements, joint regulatory committees and appointment of Iwi representatives on councils' regulatory /service delivery committees are all cost-effective instruments.

We should note that some councils have identified co-governance arrangements, following Crown Iwi settlements, as responsible for significant administrative costs. Care must be taken when designing such governance and regulatory mechanisms that they don't result in an unfair cost to councils (see Devolution: Fact or Fiction 2012 edition).

Q13.3 What more intermediate options could there be for including Maori in RMA decision-making?

Response: LGNZ believes that over the last two decades since the RMA there has been considerable innovation and at this point the full range of options have probably been explored. The more pressing issue is to expand sector understanding of the options that are working well, for both councils and Maori.

Q13.4 What are some examples of decision-making systems well tailored to Maori involvement?

Response: Our experience suggests that there is no system that is correct for every community. Generally each district or city has arrived at models that are relatively unique to their own context, particularly to the nature of Iwi/Maori within their districts. Arrangements that involve councils and single Iwi/hapu will be very different to where councils are required to build relationships with multiple Iwi/Maori.

There has been considerable research into this question in recent years. The Department of Internal Affairs survey Maori Participation and Engagement with local government (2009) identified a number of factors that contributed to successful engagement practices, namely:

- the councils demonstrating a commitment through actions, not just words
- Maori electoral seats (ala Bay of Plenty Regional Council)
- recognition that participation and engagement needs to take place at all levels within councils

- strong leadership from the councils and Maori which is driving a collaborative approach
- strong formal and informal relationships
- recognition that relationships will be diverse and dynamic

An earlier LGNZ survey (Local Government Relationships with Maori 2002), which interviewed council officials and members of local Iwi, found that strong leadership needed to be balanced with formal processes and structures and that this needs to occur in the contexts of governance, consultation and participation. In addition, adequate resourcing, for councils and Iwi/Maori; guidance on the Treaty of Waitangi, and building the capacity of tangata whenua to engage were also important factors in making relationships work.

Chapter 14: Assessing the regulatory performance of local government

Q14.1 How have local authorities used the SOLGM guide on performance management frameworks – or other guidance material – to assess local government regulatory performance?

Response: Many councils have used guides on performance management frameworks within their planning and monitoring cycles for Annual Reports, Long Terms Plans and other reporting mechanisms. Many councils use these frameworks to design their reporting systems on a quarterly basis with some also producing a scorecard for the public. This has increased the visibility of performance reporting in the sector.

Q14.2 Is there sufficient focus on regulatory capabilities in local government planning and reporting under the LGA2002?

Response: Other than by-law making, which the Report notes as relatively minimal in the scale of regulations implemented by councils, regulatory responsibilities possess their own principal legislation which (should) set out requirements governing capability, performance and reporting. Other than the prescribed by-law making process the LGA 2002 does not provide a mechanism for adopting new regulations, so we cannot see any justification for further legislative requirements to be placed on councils.

It should be noted that the LGA 2002 does make it clear that chief executives must ensure council responsibilities and duties are “properly performed or exercised”, that activities are “effectively and efficiently managed” and that there are systems to “enable effective

planning and accurate reporting of the financial and service performance“ of the authority (S. 42 LGA 2002).

Q14.3 Have local authorities encountered difficulties in dealing with different performance assessment frameworks across different forms of regulation? Which forms of regulation do a good job of establishing performance assessment frameworks, in legislation or by other means?

Response: Our preference is for performance assessment regimes which enable councils to set their own standards in consultation with local citizens which are monitored annually by elected members.

Q14.4 Which of the Commission’s performance assessment options have the best potential to improve the efficiency and effectiveness of assessment of local government regulatory performance and improve regulatory outcomes? What are the costs and benefits of these options? Are there other options in addition to those that the Commission has identified?

Response:

- 1. Regulatory terms of reference documents:** *Local government supports this option. Increasing clarity about the purpose of regulatory regimes, the relative roles of local and central government and the manner in which performance will be assessed should be helpful for local authorities.*
- 2. A joint health check programme:** *The option to have central and local government officials jointly reviewing all stages of a single regulatory regime would be possible. In our view such a programme would need to be triggered where local and central government both agree and the result should feed into a regular statutory review.*
- 3. Adopt elements of the PIF model:** *For a large number of councils the cost of a PIF style approach would be excessive and seriously outweigh the benefits. Through OAG and performance measures used in the Long Term Plan and Annual Plan, there is already a mechanism for monitoring performance. A number of councils use external quality control methodologies, such as ISO9000, to provide independent surety about capability. This could be encouraged.*
- 4. Increase focus on regulatory capabilities:** *As discussed above the LGA 2002 already requires chief executives to ensure councils responsibilities and duties are delivered effectively and efficiently and this is expressed in their annual performance agreement. In addition some government chief executives currently have the ability to intervene directly if they believe a council is failing to invest in the appropriate*

level of capability to deliver particular regulatory services. Again, the cost of the additional reporting requirements is likely to outweigh the benefits.

- 5. Expansion of leading practices to other regulatory regimes:** *In theory there should be a culture which encourages the sharing of good practice where opportunities exist. In reality diversity in the nature of regulatory regimes and in the capacity of councils might limit opportunity for aligning performance frameworks. Ultimately this depends on the scale of risk; we suggest a 'horses for courses' approach.*
- 6. Reduce the frequency of regulatory performance reporting:** *Local government fully supports recommendations that reduce the cost of reporting arrangements, shifting to an "as needed" basis and improved consistency of performance assessment frameworks. We also support the proposal that central government is encouraged to share data with councils to assist with performance assessment.*

FINDINGS

Chapter 2: Local government in New Zealand

F2.1 The level of tension between central and local government about their respective roles may now be at a level that is unhealthy and could undermine the development and performance of regulatory functions.

F2.2 It is important to be clear about the constitutional place of local authorities and, in particular, about the relationship between local and central government, because these matters will determine what options for the design of the regulatory system are feasible and appropriate.

F2.3 Contrary to common perceptions, almost all regulations made or administered by local authorities are undertaken on the direction of central government, or are necessary for carrying out their duties under Acts of Parliament.

Chapter 3: Diversity across local authorities

F3.1 New Zealand's national population is projected to grow over the next 25 years, but almost half of New Zealand's territorial authority areas are expected to decline in population over this period.

F3.2 Differences in demography, labour markets and local incomes across New Zealand's local authorities may drive different regulatory needs and capacity at the local government level.

F3.3 Physical endowments vary across New Zealand's territorial authorities, as does industrial activity. Employment data indicates a pattern of larger hubs, which tend to have fuller suites of industries, along with a larger number of more specialised smaller authorities.

F3.4 Greater industrial specialisation in smaller territorial authorities suggests more specific regulatory needs in smaller authorities. This provides one explanation for variation in regulatory activity across New Zealand's territorial authorities.

F3.5 New Zealand's territorial authorities have had mixed employment growth experiences. Employment growth has been steadier in larger territorial authorities, while varying significantly across smaller territorial authorities.

F3.6 Local variation likely drives different regulatory approaches. Part of this variation in regulatory approach appears to be differing interpretations of local government's role in promoting economic growth.

F3.7 The appropriate role of local government in fulfilling its mandate to pursue economic growth has been left unclear by central government.

Chapter 4: Allocating regulatory responsibilities

F4.1 Better regulatory decisions will be made, and overall wellbeing improved, when those who bear the costs and benefits from the regulation have representation in the jurisdiction making the decision.

F4.2 If there are spillover effects, better regulatory decisions will be made if the costs and benefits that are borne by those outside the decision making jurisdiction are taken into account.

F4.3 There are advantages from local decision making if preferences are heterogeneous because local governments are better at aligning local preferences than central governments, but where preferences are more homogenous across the country, there may be advantages from reducing the effort and cost of multiple decision makers.

F4.4 When allocating regulatory responsibilities, consideration should be given to what level of government has, or can most efficiently obtain, the relevant information needed for effective decision making and implementation.

F4.5 When allocating regulatory responsibilities, consideration should be given to the capabilities required of the role and the existence and quality of governance and accountability arrangements within the jurisdiction tasked with the role.

F4.6 Good regulatory outcomes are more likely to be achieved when there is clarity of role and coordination between levels of government responsible for standard-setting and implementation.

F4.7 Good regulatory decision making and implementation will be compromised if the level of government responsible is inherently inefficient or unaccountable.

F4.8 Submissions point to a mismatch between national and local preferences and priorities when it comes to regulation. Around half of local authority survey respondents agreed that there are conflicts between local priorities and regulations originating at central government level.

F4.9 Approximately 70% of businesses in New Zealand only deal with one council and for those businesses that operate over more than one jurisdiction, this is over a limited range of regulatory matters.

F4.10 Targeted approaches could be adopted for reducing the costs for businesses operating across multiple jurisdictions while maintaining the benefits of local tailored regulation.

F4.11 There are issues with insufficient regulatory capability but this can be found at all levels of government. There are a number of ways of dealing with capability gaps that do not always require a reassignment of roles to a different level of government.

F4.12 A misallocation of risk can have costly consequences. Insufficient attention has been given in the past to the ability to manage risk when allocating regulatory roles.

F4.13 Both local and central government need to work on a constructive engaged relationship for the development of quality regulations and the delivery of regulatory outcomes.

Chapter 5: The funding of regulations

F5.1 The local government sector has a strongly held view that central government passes regulatory functions to local authorities without sufficient consideration of the funding implications for councils.

Chapter 7: Regulation making by central government

F7.1 Regulation making at the central level is below leading practice. This is having a material impact on the quality of regulations devolved or delegated to the local government sector.

F7.2 Current institutional arrangements can shield central government agencies from the full fiscal and political cost of decentralising regulatory functions.

F7.3 When regulations are developed centrally and implemented locally, the incentives faced by central government to undertake rigorous policy analysis are reduced. However, care needs to be taken not to confuse implementation problems with inadequacies in the underlying design of regulations – this requires careful post-implementation analysis.

F7.4 The degree of Ministerial pressure on the public service to provide quality advice on local government regulatory issues is a key influence on behaviour. It is therefore important

that Ministers have strong incentives to ensure that the advice they receive on these issues is of high quality and the product of a rigorous policy process.

F7.5 The tendency of central government agencies to operate independently has resulted in regulatory functions being conferred on local government without considering their interaction and impact on existing regulatory functions administered by local authorities.

F7.6 An opportunity exists to use the Better Public Service Initiative to promote a more joined up, whole of government approach to regulatory policy involving the local government sector.

F7.7 The RIS process has a valuable role to play in ensuring the quality of regulations delegated or devolved to local government. However, at present this value is not being fully realised and improvements to the process are required.

F7.8 While there are some examples of leading practice, consultation with local government on the design of new regulations is generally poor.

F7.9 There is evidence to suggest that implementation analysis is a generic weakness of regulatory policy analysis in New Zealand. This weakness impacts on local government because local government is often the implementer of government policy.

F7.10 The financial, capability, capacity and risk management challenges faced by local government in implementing regulations appear to be poorly understood within central government. There is little analysis of how these challenges will impact the successful achievement of regulatory outcomes.

F7.11 A spectrum of measures exist that would help improve the quality of regulation delegated or devolved to local government. Many of these would have broader benefits for the overall standard of central government regulation making.

F7.12 While guidance and training material on good policy practices are available, the incentives on agencies to ensure they utilise this material are weak. Perhaps the most relevant example of this is the limited traction obtained by DIA's policy guidelines for regulatory issues involving local government.

F7.13 Pragmatic approaches to building better relationships between central and local government are needed. These relationships must be based on a mutual understanding that both levels of government ultimately exist to create public value and that their ability to create public value is tied, at least in part, to the actions of the other.

Chapter 8: Local government cooperation

F8.1 There is significantly more cooperation, coordination, and sharing of resources occurring amongst local authorities than is commonly known.

F8.2 Despite the wide use of cooperative arrangements, very few empirical studies have been undertaken (either domestically or internationally) to quantify the benefits and costs of council cooperation on regulatory functions.

F8.3 Because local authorities operate within a highly diverse set of circumstances, the returns from cooperation are likely to be highly situation-specific. As a result, significant care must be taken in applying or interpreting business cases from one jurisdiction in another.

F8.4 Cooperation can capture many of the benefits of centralisation while maintaining the advantages of local decision making (such as the ability to cater for spatial variations in community preferences).

F8.5 The speed with which central government seeks to implement new regulatory initiatives may materially affect the likelihood of local cooperation. Central government consultation processes, done well, can lay the foundation for local authorities working together.

Chapter 9: Local authorities as regulators

F9.1 Local authorities do not appear to be using their powers of general competence to get into new areas of regulation. However, local authorities are using the powers available to them to deal with local issues they face. Some local authorities will take a very cautious approach with regulation that requires a high level of technical expertise, reflecting capability or risk issues.

F9.2 Elected council members involvement in individual regulatory decisions is most likely greater than previously understood.

F9.3 The independent hearings panel process can be a good way of ensuring the views of interested parties are heard fairly and lead to recommendations being made to councils.

F9.4 Centralising functions or providing more national guidance is often seen as a solution to inconsistency. However, inconsistency more often than not occurs because of the different understandings or approaches of local officials working on the ground. Greater consistency is more likely to be achieved through sharing good practice and coordination between local authorities, which could be facilitated by relevant departments and ministries.

F9.5 Twenty seven per cent of business survey respondents were actively dissatisfied with the regulatory services and approach of their local authorities, however there is considerable variation between industries.

Chapter 10: Local monitoring and enforcement

F10.1 Statutory timeframes for consent processing may have the unintended consequence of diverting resource away from other parts of the regulatory process, especially monitoring and enforcing regulatory compliance.

F10.2 Local authorities need a wider range of enforcement methods to ensure they can always take a proportional approach to enforcement.

Chapter 11: The cost impact of local government regulation on firms

F11.1 Delays in obtaining responses from local authorities, and the sequencing of multiple regulatory requirements and decisions by local authorities, can impose substantial holding costs on business.

F11.2 The Commission's survey of businesses showed that almost three quarters of businesses had at least some contact with local government through the regulatory process. Of those that did:

- 39% report that local government regulation places a significant financial burden on their business.
 - Nearly half of respondents thought the time and effort involved in complying with local authority regulations is too large (and nearly half were neutral or disagreed), and 70% were dissatisfied with the fees charged.
 - 'Planning, Land Use or Water Consents' and 'Building and Construction Consents' have the greatest cost impact on businesses. Both of these local government regulatory areas are typically associated with new projects such as expanding or building something new.
 - Around 40% of surveyed businesses had contact with the local council over four or more separate regulatory areas.
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Chapter 12: Making resource management decisions, and the role of appeals

F12.1 Explicit consideration of the more moderate options included in the Legislation Advisory Committee's guidelines for appeals processes needs to be included in any discussion of changes to the plan-making process.

Chapter 13: Local regulation and Māori

F13.1 On the available evidence, the current system for involving Māori in resource consent decisions does not appear to be working well for anyone, due largely to the costs and timeframes involved.

Chapter 14: Assessing the regulatory performance of local government

F14.1 Assessment of local government regulatory performance will have net benefits when it improves regulatory outcomes while minimising the cost of performance assessment. The key elements are:

- a good understanding of the steps that lead to regulatory outcomes
 - considering multiple dimensions of performance
 - adaptability to different regulatory regimes and local and national priorities
 - a focus on minimising assessment costs by considering the frequency, form and information-requirements for performance reporting.
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F14.2 There is a crowded and disjointed regulatory performance reporting space for local government, driven by the combination of reporting requirements in the Local Government Act and the legislative reporting requirements for different forms of regulations.

F14.3 There are several leading practices in relation to local government regulatory performance assessment, including:

- auditor/local authority interaction
- Society of Local Government Managers guidance material
- local authority annual reports that have moved away from transactional performance measures toward outcome-based, impact-based, and service-based measures
- International Accreditation New Zealand auditing processes for Building Control Authorities
- the Ministry for the Environment biennial Resource Management Act performance survey.

F14.4 The value of performance assessment is likely to be impaired at present as a result of lack of balance in what is measured, insufficient focus on assessment of performance information, a potential weakness in the accountability framework as it relates to capability, and potential inconsistencies in the way regulatory performance is assessed across regulations.

RECOMMENDATIONS

Chapter 5: The funding of regulations

R5.1 Regulations should be reviewed to remove specific fee amounts and make those fees at the discretion of local authorities, subject to the requirements of section 101(3) of the Local Government Act 2002.
