



# Towards better local regulation

Summary version



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Summary of final report  
May 2013

## **The New Zealand Productivity Commission**

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The Commission – an independent Crown entity – completes in-depth inquiry reports on topics selected by the Government, carries out productivity-related research and promotes understanding of productivity issues. The Commission’s work is guided by the New Zealand Productivity Commission Act 2010.

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# Terms of Reference

## Local Government Regulatory Performance

### Context

1. The Government has launched '*Better Local Government*', an eight-point reform programme to improve the legislative framework for New Zealand's councils. It will provide better clarity about councils' roles, stronger governance, improved efficiency and more responsible fiscal management. These local government reforms are part of the Government's broader agenda. We are rebalancing the New Zealand economy away from the increased public spending and debt of the previous decade. We are building a more competitive and productive economy. This requires that both central and local government improve the efficiency of delivering public services.
2. Local government, at both regional and territorial level, is involved in many regulatory roles covering, for example, building, resource management, food safety, and alcohol. There is no consistent approach regarding what regulatory functions are most effectively achieved nationally or locally. There is also a concern in local government that functions are allocated to councils without adequate mechanisms for funding. The issue of what is best regulated at the national and local level is also important to the private sector which, through rates, taxes and fees, funds both. There are opportunities to improve New Zealand's productivity through a more efficient regulatory framework.

### Scope

3. Having regard to the context outlined above, the Commission is requested to undertake an inquiry into opportunities to improve regulatory performance in local government. For the purposes of this inquiry, the Commission should:

#### *Regulatory Functions of Local Government*

- a. identify the nature and extent of key regulatory functions exercised by local government;
- b. perform a stocktake to identify which local government regulatory functions are undertaken on the direction of central government and which are undertaken independently by local government;
- c. develop principles to guide decisions on which regulatory functions are best undertaken by local or central government;
- d. identify functions that are likely to benefit from a reconsideration of the balance of delivery between central and local government, or where central government could improve the way in which it allocates these functions to local government;

#### *Improving Regulatory Performance in Local Government*

4. Taking into account the principles developed in point (c) above:
  - e. assess whether there is significant variation in the way local government implements its regulatory responsibilities and functions, and the extent to which such variation is desirable. For example whether variation reflects differences in local resources or preferences or insufficient direction from central government;
  - f. identify opportunities for both central and local government to improve the regulatory performance in the local government sector. For example how to overcome any key capability, resourcing, or regulatory design constraints;

- g. examine the adequacy of processes used to develop regulations implemented by local government and processes available to review regulations and regulatory decisions made by local government; and
- h. recommend options to allow for the regular assessment of the regulatory performance of the local government sector, for example, whether common performance indicators can be developed to assess performance.

### **Other matters**

- 5. Where possible, the Commission should seek to quantify relevant costs and benefits of recommendations it makes in the inquiry. The Commission should prioritise its effort by using judgement as to the degree of depth and sophistication of analysis it applies to satisfy each part of the Terms of Reference.
- 6. The inquiry should not make recommendations that would directly affect representation or boundary arrangements for local government.

### **Consultation Requirements**

- 7. The Commission should take into account existing and ongoing work in this area to avoid duplication, including the Government's eight-point reform programme, resource management reviews, the Local Government Rates Inquiry, and the Auditor-General's work on performance management.
- 8. In undertaking this inquiry the Commission should consult with key interest groups and affected parties. To ensure that the inquiry's findings provide practical and tangible ways to improve regulatory performance, the Commission should work closely with Local Government New Zealand, the wider local government sector and government agencies with regulatory regimes that affect local government.

### **Timeframe**

- 9. The Commission must publish a draft report and/or discussion paper(s) on the inquiry for public comment, followed by a final report, which must be submitted to each of the referring Ministers by 1 April 2013.

HON BILL ENGLISH, MINISTER OF FINANCE  
HON DAVID CARTER, MINISTER OF LOCAL GOVERNMENT  
HON JOHN BANKS, MINISTER FOR REGULATORY REFORM

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# About the summary version

This 'summary version' provides the key points, findings and recommendations from the Commission's final report of the inquiry into local government regulatory performance. It is designed to give you a quick route into the key insights from our examination of local government regulation in New Zealand.

The final report itself follows the release of an earlier draft report and issues paper; consideration of submissions on both papers; a large number of meetings with interested parties; and the Commission undertaking its own research and analysis of issues central to local government regulatory performance.

For more information about the final report please visit our website [www.productivity.govt.nz](http://www.productivity.govt.nz) or call us on 04 903 5150.

## Format of the summary version

### Key points

- The key points box at the start of each chapter is a summary of the main considerations and findings on each topic.

F

Findings

R

Recommendations

# Overview

The Commission has been asked to identify opportunities for both central and local government to improve the regulatory performance of local government. This includes regulation-making processes, appropriate principles for the allocation of regulatory roles between central and local government, and better ways to assess the regulatory performance of local government.

The Commission has carried out an extensive assessment of local government regulatory performance, including substantial engagement with local authorities and other interested parties. This report sets out a reform programme to improve local government regulatory performance. This overview provides a summary of the report.

## Why is this inquiry important?

Regulation affects many aspects of our lives – from the environment and buildings we live in, to the food we eat and the water we drink. Regulation is part of doing business and can have a major impact on a firm's profitability and growth. Local government regulatory activities therefore have a clear impact on regional economic growth and, ultimately, national economic growth and community wellbeing. Importantly, local government regulation is a means by which communities can take responsibility for their own wellbeing.

Making the right regulatory decisions and implementing regulation efficiently is therefore important to New Zealand's social, environmental and economic performance. Regulatory decisions that are soundly conceived, properly monitored and enforced can change behaviour in positive ways, safeguarding future wellbeing without imposing unnecessary costs. In contrast, poorly conceived and implemented regulatory arrangements not only fail to achieve the objectives sought, but also impose unintended costs that can undermine the very purpose of regulatory intervention and the cohesiveness of communities.

The process of amending existing regulation, or designing new regulation, has an added dimension when local government is involved. The analysis supporting a regulatory initiative not only needs to ensure that design and implementation will provide net benefits to society, but should also assess whether central or local government is best placed to carry out the regulatory function.

Getting these things right is critically important, considering the breadth of regulatory activity and workload of local authorities. Local government plays an important role in implementing central government policies. Around 30 pieces of primary legislation have been identified that confer regulatory responsibilities on local government, and many more regulations are found in secondary instruments (Chapter 2). These range from land and resource use under the Resource Management Act 1991 (RMA), to standards for constructing buildings, food and hygiene regulations, the control of liquor and gambling activity, waste management and beyond.

These regulatory responsibilities are critical to central government achieving its broader policy objectives. As partners in production and implementation of regulation, central government has a strong interest in the regulatory performance of local government. Achieving good regulatory outcomes must be underpinned by a strong working relationship between both levels of government.

## The Commission's approach

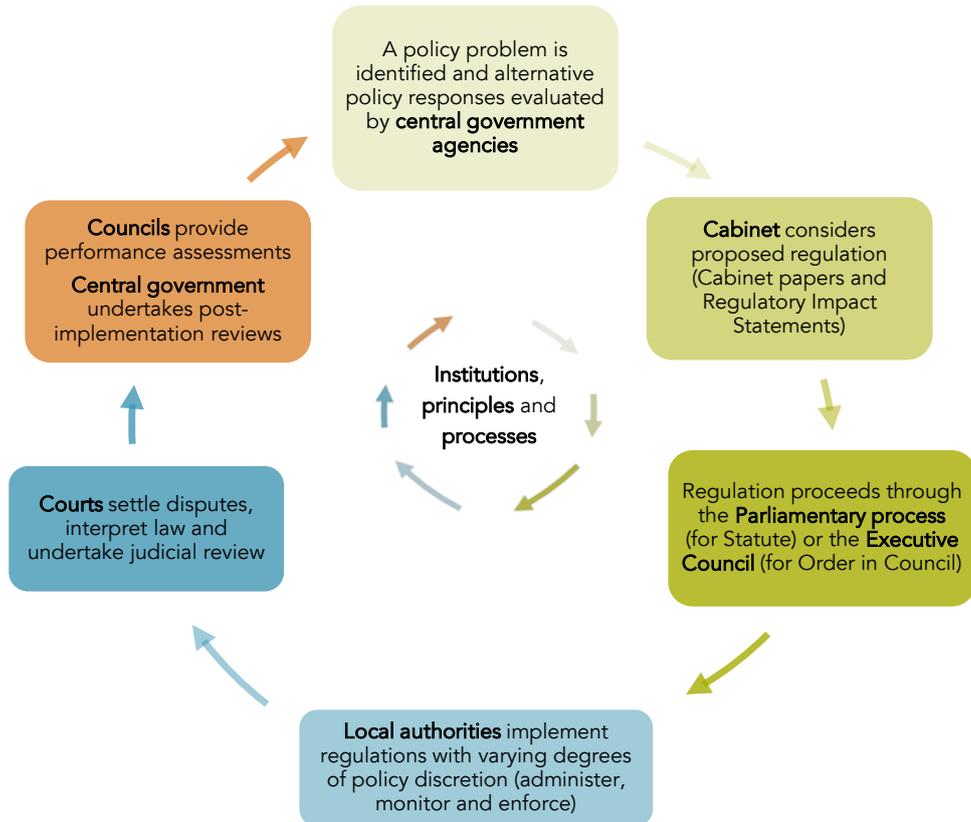
Local government regulatory activity sits within a wider regulatory system that is complex, multi-level and mutually dependent. The fact that more than one level of government plays a role in designing, monitoring, enforcing and reviewing regulations raises inherent risks to regulatory efficiency and performance. It is therefore unhelpful to think about individual component parts in isolation from the wider regulatory system. The regulatory system as a whole determines the quality of regulatory outcomes. The elements of this system are interconnected and all of the elements need to be operating effectively. For example, initiating and shaping regulatory proposals—often done by central government—happens before implementation—often done by local government. Regulations need to be designed with a view to how they can be implemented most effectively, and the lessons from implementation need to feed back into regulatory re-

design, where necessary. Interdependencies such as this highlight that achieving good outcomes is an ongoing responsibility of both levels of government.

The Commission's approach to this inquiry was to take a 'whole-of-system' view that transcends levels of government. That is, to examine the underlying institutions, principles and processes that constitute the regulatory system, and identify possible performance improvements in the regulation-making process, implementation, monitoring and enforcement, allocation of regulatory roles and assessment of regulatory performance.

The regulatory system can be thought of as consisting of six elements (Figure 0.1). These elements are discussed in more detail in Chapter 4.

**Figure 0.1 The regulatory system**



## Local government in New Zealand

New Zealand has had a system of local government since the 1840s. Established and empowered by statute, local government has been dramatically restructured and reshaped numerous times over the years by central government through legislative change.

Local government's structures and powers have reflected its dual roles as providers of local public services and enablers of local democracy. More recently, its dual roles have been explicitly recognised in legislation. The statutory purposes of local authorities are to enable democratic local decision making and action by, and on behalf of, communities; and to meet the current and future needs of communities for good-quality local infrastructure, local public services, and performance of regulatory functions in a way that is most cost-effective for households and businesses.

The powers invested in local authorities are extensive and diverse. They span a spectrum from devolved powers that confer substantial discretion and autonomy on local authorities, to delegated powers to implement regulation with little or no discretion. Most of the regulation made or administered by local authorities is either required by statute, or reasonably required for fulfilling a role delegated by statute. The Commission has found that local authorities have made only limited use of their power of 'general

competence' under the Local Government Act 2002 (LGA) and that most bylaws are made under enabling statutes rather than under the more general provisions of the LGA.

The nature and extent of local government's relationship with central government is context-specific, depending on the particular regulatory framework. Some regulatory frameworks explicitly provide that the relevant Minister or central government department has powers of review and intervention in local authorities' exercise of specific regulatory functions. In the absence of such an explicit statutory power of review and intervention, a local authority is not accountable to the relevant Minister or government department for the exercise of its regulatory powers.

It is important to note that, while local authorities were created by statute, they are not, as sometimes characterised, 'agents' of central government that are required to implement national priorities, and be accountable to central government for operational performance. This agency characterisation seems to reflect a misunderstanding of the respective roles of, and relationship between, local and central government. Local authorities exercise a range of types of powers and have varying degrees of discretion and autonomy, depending upon the specific regulatory context (Chapter 2).

The important point here is that central government has purposefully made the decision to decentralise decision making to local government in many areas.

## The regulatory task: Pressures and challenges

In providing regulatory services, the role of local government in facilitating local democracy and providing local services manifests itself in a number of ways. For example, the function of territorial authority building consent authorities to ensure that buildings meet the requirements of the Building Code is an example of a purely service delivery role. The performance of local authorities in these types of roles will be mainly judged on their capacity and ability to carry out regulatory functions to a national standard. At the other end of the spectrum, the requirement under the RMA to make district and regional plans is part of councils' democratic role. The performance of local authorities will be judged on their ability to consult and reflect community interests and preferences and, importantly, their ability to reconcile different community interests and reach a decision.

In the middle of the spectrum is a raft of other regulations that have been conferred on local government, because it is believed that local government is best placed to tailor regulation to the specific characteristics, needs and preferences of diverse local communities (Figure 0.2).

**Figure 0.2** The spectrum of local authorities' powers



The challenge for local government in carrying out these regulatory roles is to implement and administer those regulatory functions conferred in a way that produces the outcomes that Parliament intended. However, local authorities undertake these complex regulatory roles in an increasingly challenging environment. Certainly, the task is getting harder, and will continue getting harder, for a number of reasons (Chapter 3).

Some councils experiencing population growth face difficult trade-offs between different priorities for the use of resources. Other councils experiencing population decline face challenges in undertaking regulatory roles due to shortfalls in capability. Increasing diversity and greater community expectations present difficulties for local authorities in reconciling different community interests and making decisions (Box 0.3).

Pressures on the physical environment generate a greater need for more technical information and technical skills in order to make decisions relating to environmental pressures. Local authorities in New Zealand are very diverse. Box 0.1 highlights some of the diverse characteristics of New Zealand's territorial authorities.

Local government must navigate through a legislative environment that poses its own challenges. There has been a steady stream of new statutes over the last decade affecting local government regulatory activities to different degrees. Councils also face risk of exposure to legal challenge for losses where a duty of care is owed in undertaking regulatory responsibilities.

#### Box 0.1 Diversity among New Zealand's territorial authorities

Local authorities vary markedly in the size of their population and the income levels of residents. While, overall, New Zealand's population is projected to grow, that growth is concentrated in key areas, and two-fifths of territorial authority areas are expected to experience population decline. These differences can drive very different regulatory demands at the local government level.

Physical endowments and industrial structures also vary widely across New Zealand's territorial authorities. Employment data indicate a pattern of larger 'hub' territorial authorities with a diverse range of economic drivers. Beyond them are smaller, often more rural territorial authorities characterised by a narrower range of activities. This drives different regulatory needs and the need for different types of regulatory capacity and capability across territorial authorities.

Alongside pressures on councils, there are important regulatory cost pressures on business that impact on productivity and profitability, and ultimately the economy. These include the compliance costs of meeting regulatory obligations; delays in obtaining responses from local authorities and holding costs associated with sequencing of multiple regulatory requirements and decisions by local authorities; and the wider economic costs incurred from regulation that distorts productive behaviour of individuals and businesses. These costs are often hidden, as projects are not undertaken, or are undertaken at a smaller scale than would have been the case in a better regulatory environment.

The Commission's survey of business indicates that regulatory cost pressures are a concern for businesses. Of those businesses that had contact with local government through the regulatory process, 39% reported 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 70% of respondents were dissatisfied with the fees charged.

When there is pressure on the regulatory system, there is a greater risk of poorer regulatory outcomes, and costs could be higher than they need to be to achieve the regulatory outcomes sought. A robust regulatory system needs to provide regulatory institutions, principles and processes that can tackle the pressures and challenges of delivering quality regulation in a changing environment.

## How well is the regulatory system performing?

The current regulatory system is not working as well as can reasonably be expected (Chapter 4). Some of the problems stem from the design of regulations at the central government level, some are problems with the way regulation is implemented and administered by local government and, lastly, there are generic weaknesses with the regulatory system as a whole.

### Design of regulation

A number of weaknesses in the design processes for developing regulations that are devolved or delegated to local government have been identified.

- *Incentives faced by central government for rigorous analysis* – There is evidence that central government accountability is weakened when the implementation of regulatory functions is decentralised and, as a result, the political and fiscal costs of that regulation are (in part or full) transferred to local authorities. This 'accountability disconnect' weakens incentives on central

government to undertake rigorous analysis when designing regulation, and to think about the full range of costs, benefits and impacts when considering the case for regulatory intervention.

- *The level and quality of implementation analysis* – There is insufficient analysis of local government’s capability or capacity to implement regulation prior to devolving or delegating additional regulatory functions, or making changes to existing functions. Weaknesses in implementation analysis may be linked to the observation that few central government agencies have staff with an in-depth knowledge of the local government sector.
- *The level and quality of engagement with the local government sector* – Engagement with the local government sector in the design of new regulations is generally poor and, as such, is undermining the quality of local regulation. The inadequacy of engagement with local government by central government was a recurring theme emerging from this inquiry and, in part, has its origins in poor working relationships and a lack of common understanding between central and local government.
- *The performance of regulatory quality assurance processes* – The Regulatory Impact Statement (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. Too often, the RIS requirements are seen as an ‘administrative hurdle’ rather than an integral part of the policy design process and a vital source of information for regulatory decision makers.

## Implementation and administration

Local government’s ability to achieve regulatory outcomes is critically dependent on the quality of its internal decision-making processes, quality management practices, governance and its capability in regulatory administration. During the course of the inquiry, it has become clear that weaknesses exist in the way in which some regulations are being implemented, administered and enforced. These can often be traced back to gaps in regulatory capability.

- *Regulatory decision-making processes* – While decision-making processes used by local government are generally adequate, considerable room for improvement exists in several areas. Specifically, there is scope to better tailor regulatory objectives to local conditions, increase the breadth of the regulatory options considered and undertake better assessment of implementation issues. There are also concerns expressed by inquiry participants about the inflexibility and lack of discretion of the statutory requirements to consult under the LGA.
- *Consistency and quality management problems* – The single biggest issue businesses have in their dealings with councils is the perceived inconsistency in the application and administration of regulatory standards. Businesses perceive variation to be as common in regulatory areas with national standards as in areas where councils have a level of autonomy and discretion to tailor responses to local conditions. Of particular concern is inconsistency in the application of regulations within individual councils.
- *Governance issues* – There is evidence that, in some cases, councillors have become inappropriately involved in regulatory decisions.
- *Monitoring and enforcement* – Quality regulatory design can be significantly undermined if monitoring and enforcement are done poorly. The adoption of risk-based approaches to monitoring and enforcement activity could, in general, be improved to better achieve compliance and efficient resource use. There are gaps in the enforcement tools available to councils to achieve compliance and quality regulatory outcomes. There is also evidence that, in some instances, penalty levels are disproportionately low and are leading to weak deterrence and enforcement.

## Generic system issues

More generally, a number of broader weaknesses in the regulatory system have been identified that are undermining the system’s efficiency and effectiveness in achieving regulatory outcomes.

## Performance assessment

The current performance assessment framework for local government is not delivering to expectations. The following issues were identified.

- There is a weak 'whole-of-system' mindset when thinking about regulatory performance – that is, a lack of focus on how the regulatory regime is performing overall.
- Performance reporting and post-implementation reviews provide few feedback loops to assist councils to improve the way they deliver regulatory functions and to assist central government to improve policy.
- Local government performance measures are often dominated by externally-imposed formal obligations, such as timeliness and transactional measures, with little emphasis and transparency of regulatory impacts and outcomes. This situation is partly driven by statutory reporting requirements and partly by the inherent difficulty of measuring impacts and outcomes.
- Regulatory performance assessment is largely seen by councils as a compliance exercise for central government, rather than as an important means of improving the performance of regulation administered by local authorities.

## Local regulation and Māori

Māori are a significant and distinct community of interest for local authorities. Indeed, the RMA and the LGA impose specific obligations on local authorities to include Māori in regulatory decision making. To appropriately involve Māori in decision making, councils must effectively mesh two different systems of governance – local representative democracy, and the tikanga of local iwi. There are questions around whether the current legislative framework adequately allows for Māori participation in decision making and whether it permits local government to adequately take account of the tikanga of local iwi. The current systems for including Māori in decision making rely heavily on the often constrained capacity of local iwi.

## Poor central and local government interaction

A recurring theme during this inquiry was the poor state of the relationship and interface between central and local government, across all aspects of the regulatory system. Within local government, there is considerable dissatisfaction with central government agencies, with frequent claims that central government agencies lack respect for, and understanding of, local government's role and purpose. At the same time, central government agencies tend to downplay the role of local government in New Zealand's democratic system. On the other hand, central government points to problems with monitoring and enforcement, delays and inconsistency as symptomatic of broader deficiencies within the local government sector. Criticism is also levelled at local government for its reluctance to act as an agent of central government in regulatory implementation and administration.

The uneasy interaction between central and local government is having a detrimental effect on New Zealand's regulatory system. Indeed, the weaknesses identified in this report often have their origins in, and are perpetuated by, the strained relationship between central and local government. This poor relationship is rooted in divergent views and understandings of the nature of the respective roles, obligations and accountabilities of the two spheres of government.

A more productive relationship and interface between central and local government is required if regulatory outcomes are to be improved. A circuit breaker is needed to 'reset' the relationship in order to improve the efficiency and effectiveness with which the regulatory system operates. This includes having a close look at the current institutional arrangements that act as an interface between the two spheres of government, the principles and processes that should govern this interaction, and the capacity and institutional substance required to underpin a properly functioning relationship (Chapter 12).

## How can the situation be improved?

The Commission has identified the following critical areas where the regulatory system can be improved to boost the regulatory performance of local government:

- Regulatory design
- Allocating regulatory responsibilities
- Local government regulatory capability
- Local government regulatory processes
- Māori involvement in local regulation
- Monitoring and enforcement
- Regulatory performance assessment

The recommendations for improving local government regulation proposed in this report will only be successful, and lead to enduring improvements, if there are supportive institutional arrangements put in place to make changes. How this could happen is outlined in Chapter 12.

### Improving regulatory design

As noted above, central government regulation making needs to improve in a number of areas. Improvements are needed in four related areas:

- the interface between central and local government needs to be improved with local authorities recognised as ‘co-producers’ of regulatory outcomes;
- incentives to undertake rigorous policy analysis need to be strengthened along with accountability for providing quality advice on regulatory issues;
- central government agencies need to enhance their knowledge of the local government sector and increase their capability to undertake robust implementation analysis; and
- meaningful engagement and effective dialogue with local government needs to occur early in the policy process.

To move forward will require both central and local government to demonstrate a commitment to fostering a more open and productive relationship and interface. To this end, there would be significant value in developing a ‘Partners in Regulation’ protocol, which articulated an agreed set of behaviours and expectations that would apply when developing and implementing local regulation.

The protocol would aim to promote a constructive interface between central and local government by:

- developing a common understanding of, and respect for, the roles, duties and accountabilities of both spheres of government; and
- articulating an agreed set of principles to govern the development of regulations with implications for the local government sector.

The protocol would be a jointly created document signed by the Government and representatives from the local government sector. To signal strong commitment, it could be signed by the Prime Minister and the Minister of Local Government. This would increase the protocol’s status as a ‘whole-of-government’ document. It is equally important that local government illustrates ownership and commitment to the protocol. For this to occur, signatories to the protocol must be seen by the sector as legitimate representatives with the authority to ‘speak for councils’.

The Commission does not envisage that the protocol would be a legally binding document. However, the requirements of the protocol should be added to the Cabinet Office Manual, along with a directive that the principles be complied with in formulating local regulation in all but exceptional circumstances. At the same time, progress towards implementing the protocol should be included in the performance assessments of relevant central government. Likewise, the protocol should include a provision that local authorities include a ‘statement of intent to comply’ in their annual reports.

Importantly, the protocol would be an avenue through which both spheres of government could acknowledge that the current relationship and interaction is not working to best effect, and take positive steps to improve the situation. More formal and legally binding options could be considered in the future if the protocol failed to have the desired impact. Other options incentivising compliance with the protocol are discussed in Chapter 5.

In addition to the protocol, other measures that would improve central government regulation making include specific guidance on the development of RISs covering local government regulatory issues, the development of strategies to lift the capability of officers to undertake analysis of the local government sector, and the development of joint regulatory change programs.

## Allocating regulatory functions

The Terms of Reference for this inquiry require the Commission to develop principles to guide decisions about which regulatory functions are best undertaken by local or central government.

A careful and systematic application of relevant principles can result in an allocation of responsibilities between central and local government that better achieves the objectives sought for regulatory interventions. However, the allocation of functions is rarely simple in practice. Every case will have unique circumstances and implications that impact on the choices made for allocating responsibility.

The Commission has developed a framework to guide the allocation of regulatory roles (Chapter 6). The framework addresses the key allocation questions: Who should be responsible for setting the regulatory standard or policy, and who should implement and administer the regulation?

- **Should the regulatory standard or policy be determined centrally or locally?** Factors relevant to this choice include the communities of interest that will be affected by the regulation; where the costs and benefits are likely to fall; how those responsible for setting the regulatory standard or policy can be held to account for decisions; and consideration of the merits or otherwise of accepting variability in regulatory outcomes across regions.
- **Should the regulation be implemented and administered centrally or locally?** Considerations include whether or not implementation requirements are likely to vary from region to region; the potential for cost efficiencies in allocating responsibility centrally or locally; the existence of incentives on the regulator that might hamper the effective delivery of regulation; the location of the knowledge and capability to implement the regulation; and whether suitable arrangements for funding administration of the regulation exist centrally or locally.

The Regulatory Impact Analysis Handbook and the Cabinet Office Manual should be updated with a requirement to use the allocation framework where proposals for new or amended regulatory responsibilities are being considered. This would help ensure that Cabinet has the relevant information when considering proposals to allocate new or amended regulatory responsibilities to local government.

There are opportunities to use the framework to review existing regulation, such as the reviews undertaken as part of government agencies' regulatory review programmes. The framework should also be used where there is a change in the skills and capabilities required of the regulator, where there are changes in the institutional arrangements, where there is mounting evidence of poor regulatory outcomes that require remedial action, where there are changes in technology, or where the regulation is simply outdated.

More broadly, the allocation framework could be adapted and applied to consider:

- the allocation of regulatory responsibilities between territorial and regional authorities;
- the allocation or reallocation of functions between local authorities and other agencies such as district health boards; and
- when trans-national regulatory arrangements may have merit.

## Improving local government capability

The capability of local government as a regulator is a key determinant of regulatory outcomes. Concerns have been raised about local government's regulatory capability in a number of areas. Data limitations make it difficult to assess the significance of these concerns, but the local government sector itself sees room for capability improvement.

It is important that the local government sector is the driving force behind improving its own capability. The policy challenge is to find an approach in which both levels of government perform roles that complement each other, without undermining the accountability of local government for building its own capability.

The Government should use existing mechanisms for central-local government consultation more effectively, or develop new ones, to:

- ensure that both levels of government understand the regulatory outcomes that central government is seeking and their relative importance; and
- identify resource and capability gaps that may prevent councils from achieving these outcomes, and determine how these gaps will be addressed.

Many of the capabilities embodied in people, processes, technology and assets are transferrable, so an important option available to councils to address capability gaps in delivering regulatory functions is to coordinate with other councils, or engage with third parties such as independent contractors. While there is room for improvement, there is already a significant amount of formal and informal cooperation, coordination, and sharing of resources amongst local authorities, which is generally seen as successful. Importantly, the Government needs to provide sufficient lead-in times for new regulation, in order to ensure that councils have time to consider opportunities for local cooperation and collaboration in administering and enforcing the regulation.

## Improving local authority regulatory processes

There are improvements local authorities can make to their regulatory decision making. Some improvements rely on 'leadership from the top' in local authorities, but good processes can also reduce the variability in the quality of the analysis undertaken to make decisions.

It is well-established that transparency can improve regulatory decision making. To improve transparency, councils should make publicly available on council websites, using a standardised template format, the key components of the analysis underpinning regulatory decisions, and the information used in making decisions.

Statutory requirements can also sometimes impede efficient regulatory processes, such as mandatory requirements for the level of consultation to be undertaken. The LGA should be amended to enable local authorities to take an approach to consultation that is proportionate to the level of discretion they have to regulate, and the significance of the issue.

There is considerable debate about the participation process under the RMA, in particular whether it incentivises early and full participation by councils and participants, or whether it incentivises parties to 'keep their powder dry' for the Environment Court. The evidence suggests that councils and participants have incentives to resolve issues rather than go to court, and appeals to the Environment Court are mostly resolved through mediation. The success of mediation processes suggests that participants are prepared to compromise and participate constructively in the RMA decision-making process, if this process is run well. The Ministry for the Environment should consider the feasibility of making the Environment Court's mediation capability available to support local authority plan-making processes earlier in the planning process.

There is a general need to improve quality management systems to resolve inconsistency in administration and enforcement of regulation. This has been largely accepted by the local government sector during engagement meetings. The features of good quality management systems, and ways that good practice can be facilitated within councils are outlined in chapter 8.

Councillors have an important governance role in driving performance improvements in local authority regulatory processes. However, it is also possible for councillors to become inappropriately involved in regulatory matters. Where councillors are involved in regulatory decisions, it is important that an appropriate separation is maintained between the governance and advocacy roles of councillors.

Requirements to use independent hearings panels (IHPs) in resource management decisions can weaken the accountability and ownership that councillors have for regulatory decisions. The impact of further expanding the use of IHPs on councils' decision-making role, and councils' accountability to their communities, should be carefully considered.

## **Māori involvement in local regulation**

Although tikanga Māori and the 'Rule of Law' are two distinct systems of governance, when it comes to regulation there are ways that they can mesh appropriately. This is important for effectively involving Māori in regulatory decision making. Meshing the two systems of governance can be achieved by focusing on:

- establishing appropriate 'secondary rules' about who decides on what is regulated, when, and how;
- supporting Māori involved in decision making through appropriate provisions for tikanga Māori in rules and plans; and
- providing appropriate legal backstops and safeguards.

Chapter 9 discusses several frameworks for thinking about how local authorities could better include Māori in decision making. The solutions these frameworks lead to may be more diverse than just extending the use of co-management agreements.

There is already plenty of experimentation occurring within local government with respect to involving Māori in decision making, although it is distributed unevenly across the sector. Some of these experiments are set out in chapter 9.

## **Improving monitoring and enforcement**

An appropriate mix of compliance promotion and deterrence is likely to be the best enforcement strategy. The enforcement challenge is striking the right balance between persuasion, coercion and expense in securing regulatory compliance.

There are indications of a low level of prioritisation of monitoring and enforcement resources based on risks. This situation can be improved by pooling experience and databases among councils to identify trends and patterns in compliance, and encouraging councils to separate their monitoring and enforcement activities and budgets from consent processing activities and budgets. Improvements in monitoring will also come about through formal coordination between councils and other monitoring and enforcement agencies.

Constraints on the use of infringement notices, combined with the low level of fines where infringement notices can be used, may inhibit councils' capacity to encourage compliance with regulation. To improve this situation, the agencies responsible for regulation that local government enforces should work with LGNZ to identify regulations that should be supported by infringement notices, and to identify penalty levels that are disproportionately low, relative to the offence.

At the moment, regulations enabling councils to impose infringement notices (under s259 of the LGA) need to be made on a council-by-council basis. This is a cumbersome process, and the only infringement notices that have been made on this basis are those under navigation bylaws. S259 should be broadened, so that regulations can be drafted enabling infringement notices for similar kinds of bylaws across local authorities, rather than on a council-by council basis.

## **Assessing regulatory performance**

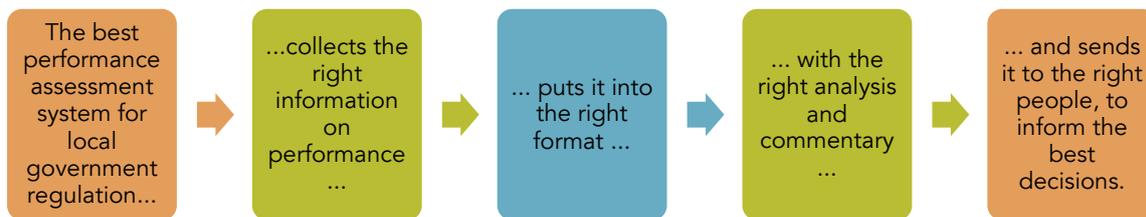
Regulatory staff and decision makers throughout New Zealand routinely gather and distribute information about the performance of a regulatory activity, process or system, and critically examine this information.

When done well, such activities can drive continuous improvement in the way regulation is designed, implemented and administered. It can also provide vital information for holding councils to account for the efficient and effective discharge of regulatory duties.

There are several leading performance assessment practices in local government. Some local authority annual reports already apply an outcome-based approach to performance assessment. The Society of Local Government Managers (SOLGM) provides practical guidance material on performance management, and there are strong relationships between local authorities and their auditors. Several local authority inquiry participants also commended some central government performance assessment approaches, such as audits of Building Control Authorities and the biennial RMA survey.

The Commission has developed a framework for examining potential improvements to regulatory performance assessment (Figure 0.3).

**Figure 0.3 Framework for an effective performance assessment system**



A package of initiatives will improve performance assessment.

- The Department of Internal Affairs (DIA) should work with local authorities to remove instances where authorities provide the same data to more than one department, and make central government administrative datasets available to local authorities to assist in the assessment of regulatory performance.
- The DIA should work with LGNZ and SOLGM to assess the costs and benefits of common measures of regulatory services, and prepare a framework for implementation.
- The Treasury, LGNZ and SOLGM should jointly trial the concept of a 'health check' of a regulatory regime, in which experts from local and central government would summarise the problems and opportunities in an area of local government regulation.

This package will help rebalance the performance assessment framework for local government, rather than creating additional performance assessment requirements.

## Making it happen

This report has identified many opportunities to improve the performance of local regulation in New Zealand and has set out recommendations that, taken together, would make up an ambitious reform agenda. It has highlighted that local government regulation is mostly shaped by central government.

A key theme is that central government should have a continuing role in contributing to good regulatory outcomes, even when regulation is delegated or devolved to local government. To operate effectively, New Zealand's regulatory system needs effective engagement and collaboration between the two levels of government. At present, there are diverse understandings and attitudes towards the respective roles, responsibilities, accountabilities and constitutional settings of both levels of government. While the quality of engagement will be influenced in the short term by personal relationships, enduring inter-governmental cooperation depends on the effectiveness of supporting institutional arrangements.

The Commission has made 29 recommendations for improving local government regulation. However, these recommendations, if accepted by the Government, will not lead to enduring improvements unless there are supportive institutional arrangements, which may involve some organisational change and more clarity about roles and responsibilities for driving reform. The fact that the Government has seen the need

to implement a wide-ranging review of local government regulation, together with the deficiencies in performance of the regulatory system and poor interface between the two levels of government that have been found by this inquiry, suggest that the current institutional arrangements are not adequate.

This has prompted the Commission to consider alternative arrangements for managing the relationship between the two levels of government. The reform programme proposed in this report culminates in nine functions that need to be carried out in order to secure effective implementation (Box 0.2). Currently, responsibility does not appear to be clear-cut for some of these functions.

#### Box 0.2 **Functional requirements**

The Commission has identified the following functions that are necessary to implement and progress the recommendations made in this report. Both levels of government are potentially involved in each of these functions, although in several cases the lead needs to be taken by central government.

- Ensuring that there is a clear statement of desired regulatory outcomes
- Promoting effective engagement between the two levels of government
- Developing and implementing the central government - local government 'Partners in Regulation' protocol
- Implementing the new framework for allocating regulatory functions between central and local government
- Promoting a 'whole-of-government' approach to local government
- Promoting and developing regulatory capability
- Undertaking research into new regulatory techniques and encouraging their diffusion
- Fostering evaluation and improvement of the enforcement of regulation
- Reviewing whether regulation enforced by local government remains fit for purpose

A more precise definition of these functions, combined with clear allocation of responsibilities for performing them, is likely to improve local government regulatory performance. However, if the Government wishes to implement the recommendations in this report, it would need to explore options that go further than allocating some extra functions within the current organisational arrangements. It is also worth considering whether more far-reaching organisational changes—including strengthening the organisations within each level of government, and creating a new organisation dedicated to improving the relationship and interface between the two levels of government—would encourage better outcomes.

### **An inter-governmental forum**

A model that builds on the existing inter-governmental forums, while creating a step-change from the current situation, would create more effective engagement between both levels of government.

New arrangements could involve:

- a forum at the political level, with ministers and mayors as members. The existing Central Government-Local Government Forum (jointly chaired by the Prime Minister and Chair of LGNZ) could provide the starting point. However, the proposed revamped forum would need to be quite different in terms of its profile and agenda, in order to be recognised as a key place where nationally significant issues are considered on an ongoing basis through a structured and continuing work programme;
- a forum of chief executives – from both levels of government. The recently-established Central-Government-Local Government Chief Executives Forum is a useful model, but its work programme and profile would need to be enhanced as it would provide support to, and give effect to the decisions of,

the forum of ministers and mayors. The Chief Executives Forum would have the capacity to make some decisions on its own account, but would perform an advisory role in relation to significant issues that need to be determined by the forum of ministers and mayors;

- the Chief Executives Forum could be supplemented by a set of topic-specific forums, similar to the Chief Executives Environment Forum. Alternatively, there could be one or more steering groups made of middle level managers, whose role is to ensure that tasks that are determined by either of forum of leaders are completed; and
- adequate support from both levels of government, probably through a small secretariat, with experienced staff drawn from both sectors and funded through existing budgets.

The two levels of government should therefore consider establishing new joint institutional arrangements, which might grow out of the existing ones but would be a step change from them in terms of status, resourcing and priority. To be effective, these new arrangements would need:

- a clearly defined role, which might be to initiate, develop and monitor the implementation of significant initiatives to improve the achievement of regulatory outcomes requiring cooperative action by both levels of government. Performing this role is likely to involve the new organisations in the nine functions listed in Box 0.2;
- high-level representation from both levels of government, at senior ministerial level from central government and a small representative group of mayors and chief executives from local government. A key role of the local government representatives would be to provide feedback to the sector as a whole; and
- the capacity to set up working groups or task forces to examine particular issues, under direction from one of the forums or from a steering group that the forums choose to set up.

# 1 About this inquiry

## Key points

- Regulations affect many aspects of our lives—from the environment and buildings we live in, to the food we eat. Regulation is part of doing business and can have a major impact on a firm’s profitability and growth. Local government regulatory activities have a clear impact on regional economic growth, and ultimately national economic growth. The impacts and outcomes of regulation are all around us.
- When designed well, and enforced efficiently and effectively, regulation can help achieve broader economic, social and environmental goals that underpin wellbeing. Equally, poor regulation damages achievement of these goals.
- The Government has asked the Commission to undertake an inquiry into opportunities to improve regulatory performance in local government. Specifically to:
  - develop principles to guide decisions on which regulatory functions are best undertaken by local or central government;
  - identify opportunities for both central and local government to improve the regulatory performance of local government; and
  - recommend options for regularly assessing the regulatory performance of the local government sector.
- The scope and breadth of the regulatory functions of local government is extensive. The Commission has identified more than 30 pieces of primary legislation that confer regulatory responsibilities on local government, and many regulations in secondary instruments.
- Local government regulatory activity sits within a wider regulatory system that can be characterised as complex, multi-level and mutually interdependent. This raises inherent risks to regulatory efficiency and performance.
- The Commission’s approach to this inquiry is to take a ‘whole-of-system’ view. That is, to examine the underlying institutions, principles and processes of the regulatory system and identify possible performance improvements in the regulation-making process, implementation, monitoring and enforcement, allocation of regulatory roles and responsibilities and assessment of regulatory performance.

## 2 Local government in New Zealand

### Key points

- Local government has a long history in New Zealand, originating out of provincial settlements, the need for service delivery at the local level and the articulation of local requirements and preferences.
- Local government's structures and powers have reflected its dual roles as a provider of local public service and enabler of local democracy. More recently, the dual role has been explicitly recognised in legislation establishing and empowering local government. The statutory purposes of local authorities are to enable democratic local decision making and action by, and on behalf of, communities; and to meet the current and future needs of communities for good-quality local infrastructure, local public services and performance of regulatory functions in a way that is most cost-effective for households and businesses.
- As a creature of statute, established and empowered by legislation, local government has been frequently restructured and reshaped over the years by central government through legislative change.
- In the absence of explicit legal or fiscal relationships, local and central government are most accurately regarded as two spheres of a system of collective decision making, each with revenue-collection powers to fund the implementation of its particular policies and programmes, and accountable to their respective voters.
- The nature and extent of local government's relationship with central government is context-specific, depending on the particular regulatory framework. Some regulatory frameworks explicitly provide that the relevant Minister or central government department has powers of review of, and intervention in, local authorities' exercise of specific regulatory functions. In the absence of explicit statutory recognition of a line of accountability, a local authority is not accountable to the relevant Minister or government department for the exercise of its regulatory powers.
- Recent changes to the Local Government Act 2002 (LGA) have given the Minister of Local Government enhanced general powers of intervention in local authorities.
- The powers invested in local authorities are extensive and diverse. They span a spectrum between powers that confer substantial discretion and autonomy to local authorities, to delegated powers to implement regulation with little or no discretion.
- Most of the regulation made or administered by local authorities is either required by statute or reasonably required for fulfilling a role delegated by statute.

### Findings

#### F2.1

There is no inherent agency or accountability relationship between local authorities and central government simply because local authorities are established and empowered by statute. The relationship between central and local government is context-specific, depending upon the particular regulatory framework.

### 3 Pressures and challenges

#### Key points

- Local authorities undertake complex regulatory roles in an increasingly challenging environment. The main pressures acting on local government in performing their regulatory functions are:
  - population growth in some local authorities (posing difficult trade-offs between different priorities for the use of resources) and population decline in other local authorities (posing challenges in undertaking regulatory roles due to shortfalls in capability);
  - increasing diversity and greater community expectations, which present difficulties for local authorities in reconciling different community interests and making decisions;
  - a steady stream of new statutes over the last decade affecting local government regulatory activities to varying degrees;
  - a greater need for more technical information and technical skills in order to make decisions relating to environmental pressures; and
  - risk of exposure to legal challenge for losses where a duty of care is owed in undertaking regulatory responsibilities.
- Alongside pressures on councils, there are important regulatory cost pressures on business that impact on productivity and profitability, and ultimately the economy. These include:
  - compliance costs of meeting regulatory obligations;
  - delays in obtaining responses from local authorities and holding costs associated with sequencing of multiple regulatory requirements and decisions by local authorities; and
  - wider economic costs that are incurred from regulation that distorts productive behaviour of individuals and businesses. These are often hidden, as projects are not undertaken, or are undertaken at a smaller scale than they would have been.
- The Commission's survey of business 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; and
  - nearly half of respondents thought the time and effort involved in complying with local authority regulations is too large, and 70% of respondents were dissatisfied with the fees charged.
- When there is pressure on the regulatory system, there is a greater risk of poorer regulatory outcomes, and costs could be higher than they need be to achieve the regulatory outcomes desired. New Zealand's regulatory system therefore needs to be strong enough to be able to respond to these pressures.

## Findings

**F3.1**

Different regulatory challenges are faced by regions experiencing population growth compared to regions experiencing population decline. Local authorities experiencing population decline face less demand for regulatory services and may have difficulty undertaking their 'service delivery' regulatory roles due to shortfalls in capability. Local authorities that are growing may face difficulties in making trade-offs in reconciling the different priorities for the use of resources.

**F3.2**

Increasing diversity and greater community expectations present difficulties for local authorities in reconciling different community interests and making decisions.

**F3.3**

There has been a steady stream of new statutes over the last decade, affecting local government regulatory activities to varying degrees.

**F3.4**

Councils making decisions with environmental implications increasingly need access to:

- technical information and skills in interpreting technical information;
- methods of modelling uncertain scenarios; and
- skills in engaging with communities and stakeholders on technical issues.

**F3.5**

Local authorities have an acute and increasing awareness the risk of exposure to legal challenge for losses where a duty of care is owed in undertaking their regulatory responsibilities.

**F3.6**

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.

## 4 Assessing the regulatory system

### Key points

- The Commission has identified a number of weaknesses in the regulatory system. Some of these weaknesses stem from shortcomings in the regulatory design process at the central government level. Others stem from the way regulation is implemented and administered by local government. There are also generic weaknesses within the regulatory system as a whole.
- Weaknesses at the central government level include poor options analysis, a lack of quality engagement with local government during policy development and limited implementation analysis.
- These weaknesses are compounded by quality assurance processes that are only partially effective, and by reduced incentives on central government agencies to undertake rigorous policy analysis when political and fiscal costs are (in part or full) transferred to local authorities.
- While decision-making processes used by local government are generally adequate, considerable room for improvement exists – there could be better tailoring of regulatory objectives to local conditions, consideration of a broader range of options and better account taken of implementation issues.
- The single biggest issue businesses have in their dealings with councils is perceived inconsistency in the application and administration of regulatory standards. Businesses perceive variation to be as common in regulatory areas with national standards as in areas where councils have a level of autonomy and discretion to tailor responses to local conditions.
- Councillors can sometimes become inappropriately involved in regulatory decisions.
- The statutory requirement for notified resource consent applications to be heard by independent hearings panels (if requested by an applicant), combined with the limited ability of councils to reject the recommendations of such panels, diminishes councillors' ability to 'own' and be accountable for resource management decisions.
- The level of monitoring and enforcement activity that is occurring at the local level is inadequate in some areas, and councils lack the appropriate enforcement tools to achieve regulatory outcomes.
- Issues with the quality of analysis and decision making, concerns in the business community about inconsistencies in the way regulations are administered, and the problems identified with monitoring and enforcement, may signal underlying capability weaknesses.
- The inquiry has uncovered a number of broader weaknesses in the regulatory system.
  - Performance reporting and post-implementation reviews provide few feedback loops to assist councils to improve the way they deliver regulatory functions.
  - There are questions around whether or not the current systems for including Māori in decision making rely too heavily on a level of capacity that often is not available in Māori organisations. If the system is reliant on participants possessing a level of capability and capacity that they do not have, then the desired outcomes are unlikely to be achieved.
  - There is a poor relationship and interaction between central and local government. This is having a detrimental impact on New Zealand's regulatory system.
- If regulatory outcomes are to be improved, then a more productive relationship and interface is needed between central and local government.

## Findings

**F4.1**

Current institutional arrangements can shield central government from the full fiscal and political cost of assigning regulatory functions to local government. This can have the effect of reducing the quality of regulations.

**F4.2**

There is often limited analysis of local government's capability or capacity to implement regulations prior to the allocation of additional regulatory functions (or changes to existing functions).

**F4.3**

Central government agencies with oversight responsibility for regulations do not have knowledge of the local government sector commensurate with the importance of the sector in implementing these regulations.

**F4.4**

Engagement with local government during the design of new regulations is generally poor, resulting in a missed opportunity to improve the quality of policy advice from central government agencies and the resulting quality of regulation.

**F4.5**

The Regulatory Impact Statement 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.

**F4.6**

While decision-making processes used by local government are generally adequate, considerable room for improvement exists in several areas.

**F4.7**

Businesses perceive variation to be as common in regulatory areas with national standards as in areas where councils have a level of autonomy to tailor responses to local conditions.

**F4.8**

There are indications of a low level of prioritisation of monitoring and enforcement resources based on risks. Constraints on the use of infringement notices—combined with the low level of fines where infringement notices can be used—can also inhibit councils' capacity to encourage compliance with regulation.

**F4.9**

Currently, few performance assessments provide feedback loops aimed at improving council delivery of regulatory functions. Further, there is a need for more focus on how activities across a regulatory regime fit together and influence each other.

**F4.10**

Local government performance measures are often dominated by timeliness and transactional measures. These measures do not provide a sufficient basis to determine whether local authorities are achieving impacts associated with their regulatory activity, or whether regulation is achieving its intended outcomes.

**F4.11**

Performance assessments are often seen by councils as a compliance exercise for central government rather than as a means of improving their own performance.

**F4.12**

To appropriately involve Māori in decision making, councils must effectively mesh two different systems of governance – local representative democracy, and the tikanga of local iwi.

**F4.13**

The current system for involving Māori in resource consent decisions is often mismatched to the capability of Māori. On the strength of evidence from business, Māori and local authorities, the current system for involving Māori in consent decisions does not appear to be working well for anyone, due largely to the costs and timeframes involved.

**F4.14**

The lack of effective interaction between central and local government is having a detrimental impact on New Zealand's regulatory system. The uneasy relationship between the two spheres of government is rooted in divergent views and understandings of the nature of their respective roles, obligations and accountabilities.

## 5 Improving regulatory design

### Key points

- In a number of areas, central government regulation making is below the standard set for the public sector. These areas include the level and quality of engagement with local government, the rigour and content of implementation analysis and the performance of quality assurance processes.
- Improvements are needed in four key areas:
  - the interface between central and local government needs to be improved;
  - incentives to undertake rigorous policy analysis need to be strengthened;
  - central government agencies need to enhance their knowledge and understanding of the local government sector; and
  - meaningful engagement with local government needs to occur early in the policy process.
- To move forward will require both central and local government to demonstrate a commitment to fostering more open and constructive interaction. To this end, there would be significant value in developing a protocol that articulated an agreed set of behaviours and expectations that would apply when developing and implementing regulations.
- The protocol would be a jointly developed document signed by representatives from both local and central government.
- Other measures that would improve the quality of regulations delegated or devolved to local government include:
  - the development of strategies to lift the capability within central government agencies to undertake rigorous analysis of issues impacting on the local government sector;
  - greater scrutiny by the Treasury's Regulatory Impact Assessment Team of regulatory proposals impacting on the local government sector; and
  - the development of a regulatory change programme that signals areas of local government regulation that may come under review in the coming 12-24 months.

## Recommendations

**R5.1**

Central and local government should work together to develop a 'Partners in Regulation' protocol. The protocol should develop an agreed set of principles to govern the development of regulations that will have implications for the local government sector.

**R5.2**

The Government should add the requirements of the 'Partners in Regulation' protocol to the Cabinet Manual. A Cabinet directive should be given for all agencies to act in accordance with the protocol. Progress towards implementing the protocol should be included in the performance assessments of central government agencies.

**R5.3**

A review of the 'Partners in Regulation' protocol should be conducted a suitable amount of time after it is introduced. The review should be undertaken by an independent party appointed by the Minister of Local Government in consultation with LGNZ.

**R5.4**

The 'Partners in Regulation' protocol should include a provision that local authorities include a 'statement of intent to comply' in their annual plan.

**R5.5**

Central government agencies should develop strategies to increase, and then maintain, their knowledge and understanding of the local government sector.

**R5.6**

The trigger for involving the Treasury's Regulatory Impact Assessment Team in scrutinising Regulatory Impact Statements should be amended to explicitly cover proposals that have a significant impact on local government.

**R5.7**

The Government, in consultation with local government, should develop and publish a regulatory change programme that signals areas of local government regulation that may come under review in the coming 12-24 months.

## 6 Allocating regulatory responsibilities

### Key points

- The Terms of Reference for this inquiry require the Commission to develop principles to guide decisions about which regulatory functions are best undertaken by local or central government.
- A careful and systematic application of relevant principles can result in an allocation of responsibilities between central and local government that better achieves the objectives sought for regulatory interventions. However, the allocation of functions is rarely simple in practice. Every case will have unique circumstances and implications that impact on the choices made for allocating responsibility.
- A framework is provided to guide the allocation of regulatory roles between central and local government. The framework addresses the following key allocation questions.
  - **Should the regulatory standard or policy be determined centrally or locally?** Factors relevant to this choice include the communities of interest that will be affected by the regulation; where the costs and benefits are likely to fall; how those responsible for setting the regulatory standard or policy can be held to account for decisions; and consideration of the merits or otherwise of accepting variability in regulatory outcomes across regions.
  - **Should the regulation be implemented and administered centrally or locally?** Considerations include whether or not implementation requirements are likely to vary from region to region; the potential for cost efficiencies in allocating responsibility centrally or locally; the existence of incentives on the regulator that might hamper the effective delivery of regulation; the location of the knowledge and capability to implement the regulation; and whether suitable arrangements for funding administration of the regulation exist centrally or locally.
- The Commission recommends updating the Treasury Regulatory Impact Analysis (RIA) Handbook and the Cabinet Office Manual, with a requirement to use the allocation framework where proposals for new or amended regulatory responsibilities are being considered. The framework should also be used to review existing regulation, including where:
  - there are changes in the skills and capabilities required of the regulator;
  - institutional arrangements have changed; and
  - there is mounting evidence of poor regulatory outcomes.
- The framework could be adapted and applied more broadly to consider:
  - the allocation of regulatory responsibilities between territorial and regional authorities;
  - the allocation or reallocation of functions between local authorities and other agencies such as district health boards; and
  - when trans-national regulatory arrangements may have merit.

## Recommendations

**R6.1**

The allocation framework should be used by central government agencies when recommending new regulation or amendments to regulation where local government is involved. This would be achieved through updating the Regulatory Impact Analysis Handbook and the requirements in the Cabinet Office Manual.

**R6.2**

Agreement to use the allocation framework should be part of the proposed regulatory protocol between local and central government.

**R6.3**

The allocation framework should be used to review existing regulation, such as reviews undertaken as part of government agencies' regulatory review programmes. The framework should also be used where there are issues with capability or there is evidence of poor regulatory outcomes.

## 7 Improving local government's regulatory capability

### Key points

- The local government sector needs to be the driving force behind improving its own capability.
- The challenge is to find an approach in which both levels of government perform roles that complement each other, without undermining the underlying responsibility of local government for building its own capability.
- The Government should use existing forums, or develop new ones, to:
  - ensure that both levels of government understand the regulatory outcomes that central government is seeking and their relative importance; and
  - identify resource and capability gaps that may prevent councils from achieving these outcomes, and determine how they will be addressed.
- Coordination between councils or contracting with third parties for regulatory services can lead to improved performance through utilisation of better capability. However, coordination and contracting is more likely to be successful where councils have information on ways to cooperate and contract, sufficient time to consider implementation options when new regulatory tasks are introduced, and clear guidance on regulatory tasks.
- Improving the capability of local government requires a multi-faceted approach undertaken cooperatively by both levels of government; however, current organisational arrangements do not appear to be building momentum to lift the capabilities of local government.

## Findings

**F7.1**

Responses to the Commission's survey of councils indicate that, while there may be room for improvement and reprioritisation of effort, there is a significant amount of formal and informal cooperation, coordination and sharing of resources occurring amongst local authorities, which is generally seen as successful.

## Recommendations

**R7.1**

The guidelines for preparing Regulatory Impact Statements should be amended, to require departments sponsoring regulation that will be delegated to local government to include in their statements—following reasonable consultation with local government—the costs of improving to an acceptable level the capabilities in local government to administer and enforce the regulation.

**R7.2**

The Government should use existing forums, or develop new ones, to:

- ensure that both levels of government understand the regulatory outcomes that central government is seeking and their relative importance; and
- identify resource and capability gaps that may prevent councils from achieving these outcomes, and determine how they will be addressed.

**R7.3**

Relevant departments should consult with local government about the adequacy of guidance material and the potential benefits and costs of options for improving it.

**R7.4**

The Government should work with local government to develop a process for reviewing the regulatory practices of local government that is voluntary, and involves self-assessment and publication of findings.

**R7.5**

The Government should provide sufficient lead-in times for new regulation in order to ensure that councils have time to consider opportunities for local cooperation in administering and enforcing the regulation.

## 8 Local authority regulatory processes

### Key points

- There are improvements local authorities can make to their decision making. Some improvements rely on 'leadership from the top' in local authorities, but good processes can also reduce the variability in the quality of the analysis undertaken to make decisions. There are also ways to increase the transparency of local regulatory decision making by producing information in a standardised way and making it available on council websites. At the very least, this would allow stakeholders to quickly access the key information that had been used to support regulatory decisions.
- The consultation or public participation requirements for decision making differ between the Local Government Act 2002 (LGA) and the Resource Management Act 1991 (RMA). There is a blanket requirement that all new bylaws or changes to bylaws go through the Special Consultative Procedure (SCP) process. There is a case for amending the LGA to enable local authorities to take an approach to consultation proportionate to the level of discretion they have and the significance of the issue they have to regulate.
- There is considerable debate about the participation process under the RMA, in particular whether it incentivises early and full participation by councils and participants, or incentivises parties to 'keep their powder dry' for the Environment Court.
  - The evidence suggests that councils and participants have incentives to resolve issues rather than go to court, and appeals to the Environment Court are mostly resolved through mediation.
  - Evidence of the efficacy of the Environment Court's mediation process in resolving appeals challenges the view that participants are unwilling to compromise.
  - There may be value in the mediation capability of the Environment Court being made available to councils earlier in the plan-making process.
- There is a general need to improve quality management systems that would ordinarily be used to resolve consistency issues. This has been largely accepted by the sector during engagement meetings. The Commission outlines the features of good quality management systems and ways that good practice can be facilitated within councils.
- Councillors have an important governance role in driving performance improvements in local authority regulatory processes. However, it is also possible for councillors to become inappropriately involved in regulatory matters. Where councillors are involved in regulatory decisions, it is important that an appropriate separation is maintained between the governance and advocacy roles of councillors.
- Requirements to use independent hearings panels (IHPs) in resource management decisions can weaken the accountability and ownership that councillors have for regulatory decisions. The impact of further expanding the use of IHPs on councils' decision-making role, and councils' accountability to their communities, should be carefully considered.

## Findings

**F8.1**

While processes have been found to be adequate, there remains considerable room for improvement in local government decision-making processes, specifically in regard to more specific tailoring of regulatory objectives to local conditions, better options analysis and better implementation analysis.

**F8.2**

Regulatory decisions made by local government would benefit from the use of templates that ensure that the key components of the analysis underpinning the regulatory decision, and information used in making decisions, is set out in a standardised format.

**F8.3**

Participants in local authority processes under the Resource Management Act are usually not incentivised to hold back information they already have, but there are incentives to only gather information and evidence once the main issues in contention are clarified. Currently, clarification is more likely to happen after the submissions hearing process.

**F8.4**

Evidence from the success of mediation processes suggests that participants are prepared to compromise and participate constructively in the Resource Management Act decision-making process, if this process is run well.

**F8.5**

The quality of engagement and the initial Resource Management Act decision-making process can reduce the likelihood of appeals.

**F8.6**

Providing more guidance can help reduce inconsistent administration of regulation in some instances, but reducing inconsistency will often be achieved by the local authority concerned improving its management practices.

**F8.7**

Local authorities may have very limited ability to diverge from the recommendations made by independent hearings panels. The requirement to use a hearings panel weakens the accountability of councillors to the community for the decisions made.

**F8.8**

The inclusion of councillors on independent hearings panels can call into question the impartiality of such panels. However, accredited councillors can play an important role on hearings panels and any perceived lack of independence can be managed through strong principles for managing conflicts of interest, quality processes for running hearings panels and competent chairing of hearings panels.

## Recommendations

**R8.1**

Councils should make publicly available on council websites, using a standardised template format, the key components of the analysis underpinning regulatory decisions and the information used in making decisions, to improve transparency.

**R8.2**

The Local Government Act 2002 should be amended to enable local authorities to take an approach to consultation proportionate to the level of discretion they have to regulate, and the significance of the issue.

**R8.3**

The Ministry for the Environment should consider the feasibility of making the Environment Court's mediation capability available to support local authority plan-making processes earlier.

**R8.4**

The Department of Internal Affairs should begin the process to strengthen the statutory requirements on local authorities to separate prosecution decisions from political involvement.

**R8.5**

The Ministry for the Environment should consider the impact of expanded requirements to use independent hearings panels on the decision-making role of councils, and councils' accountability to their communities for the resource management decisions they make.

## 9 Local regulation and Māori

### Key points

- It is generally accepted that the Crown cannot transfer its obligations and responsibilities under the Treaty of Waitangi. The Resource Management Act 1991 (RMA) and Local Government Act 2002 (LGA) impose certain obligations on local authorities in respect of Māori, but they do not delegate to local authorities the Crown's obligations and responsibilities under the Treaty.
- It is the Crown's responsibility to interpret its obligations under the Treaty and to translate these into policy and procedural requirements for local authorities. There is a question about whether or not the policy and procedural requirements in the RMA and LGA, with respect to facilitating participation by Māori in local authorities' decision making, satisfy the Crown's responsibility.
- Local authorities are presented with two particular challenges:
  - Where Māori have a kaitiaki interest in regulation, local authorities are challenged to effectively mesh two governance systems in a way that works for both parties and the community.
  - The decision-making system relies largely on levels of capacity that often are not present in local Māori groups.
- Māori have an interest in the regulatory system, especially for environmental management, that stems from their relationship with the environment (which can include a kaitiaki relationship). Both the RMA and LGA can be interpreted as requiring provision for this relationship to be made in the regulatory decision-making process.
- A kaitiaki relationship is more complicated than a strict question of who owns or who regulates a resource. Māori might have a kaitiaki relationship with an environmental feature that they do not have a legal property title to (notwithstanding native title claims).
- Adequate systems, processes and rules need to be in place to mitigate the perceived risk that recognition of tikanga Māori might be used as an excuse for inappropriate commercial gain by Māori (accepting that such an abuse would run counter to the kaitiakitanga and manaakitanga values that exist within tikanga Māori). The Commission has identified good practice models to help achieve this.
- There are rules within any regulation about who exercises or is involved in the exercise of the powers set out in the regulation. Arguably, it is these process or decision rules (rather than the actual content of the regulation) that are of most importance to maintain, enhance or restore the kaitiaki relationship.
- Local authorities should aim to support Māori who are involved in decision making with sufficient inclusion of tikanga Māori in plans, policies and regulations to be able to meaningfully adjudicate whether or not particular proposals align with tikanga Māori.

### Recommendations

#### R9.1

Local authorities should aim to support Māori who are involved in decision making with sufficient inclusion of tikanga Māori in plans, policies and regulations to be able to meaningfully adjudicate whether particular proposals align with tikanga Māori.

# 10 Monitoring and enforcement

## Key points

- Monitoring and enforcement activities are critical to effective regulation. Investment in good policy-making processes can be significantly undermined if monitoring and enforcement are done poorly.
- The Commission has reviewed local authority practices against four features of an effective enforcement strategy: a risk-based approach, sufficient compliance monitoring, adequate enforcement tools and sufficient penalties to deter non-compliance.
- There are indications of a low level of prioritisation of monitoring and enforcement resources based on risks. This situation can be improved by pooling experience and databases among councils to identify trends and patterns in compliance, and encouraging councils to separate their monitoring and enforcement activities and budgets from consent processing activities and budgets. Improvements in monitoring will also come about through formal coordination between councils and other monitoring and enforcement agencies.
- Improvements in enforcement tools and penalties are required. Constraints on the use of infringement notices—combined with the low level of fines where infringement notices can be used—can inhibit councils' capacity to encourage compliance with regulation. To address this:
  - The agencies responsible for regulation that local government enforces should work with Local Government New Zealand (LGNZ) to identify regulations that could usefully be supported by infringement notices and identify penalty levels that are disproportionately low, relative to the offence.
  - Section 259 in the Local Government Act 2002 (LGA)—relating to the empowerment of infringement notices—should be amended to enable regulations to be made for infringement notices for similar kinds of bylaws across local authorities, rather than on a council-specific and bylaw-specific basis.
- Taken together, these proposals will improve council enforcement strategies and enhance the ability of the wider regulatory system to generate desired outcomes.

## Findings

### F10.1

Strategies that councils can use to maintain monitoring and enforcement priorities while meeting statutory timeframes include:

- allocation of consent processing and consent monitoring responsibilities to two different teams; and
- a ring-fenced budget for monitoring and enforcement activities

## Recommendations

### R10.1

To promote risk-based allocation of monitoring and enforcement resources in councils, the Department of Internal Affairs, Local Government New Zealand and the Society of Local Government Managers should identify opportunities to pool regulatory experience and databases among councils and central government regulators, to identify trends and patterns in compliance. This work should involve the Privacy Commissioner in order to protect the integrity of private information.

### R10.2

Territorial authorities should formally coordinate with other monitoring and enforcement agencies, including the police, when administering, monitoring and enforcing liquor licensing.

### R10.3

Agencies responsible for regulations that local government enforces should work with Local Government New Zealand to identify regulations that could usefully be supported by infringement notices and penalty levels that need to be increased.

### R10.4

Section 259 of the Local Government Act 2002—relating to the empowerment of infringement notices—should be amended to enable regulations to be made for infringement notices for similar kinds of bylaws across local authorities, rather than on a council-specific and bylaw-specific basis.

# 11 Improving regulatory performance assessment

## Key points

- Hundreds of regulatory staff and decision makers throughout New Zealand frequently gather information about the performance of a regulatory activity, process or system, and reflect critically on this information. When done well, such activities drive continuous improvement in the way regulation is undertaken.
- Leading practice in performance assessments include some outcome-based annual reports by local authorities, practical Society of Local Government Managers (SOLGM) guidance material, some of the regulatory performance frameworks administered by central government and strong auditor/local authority interaction.
- However, Chapter 4 noted several key weaknesses in current performance assessment practice.
  - Weak system mindset and insufficient feedback loops between central and local government—current performance assessment arrangements do not adequately recognise that regulatory performance is the 'sum of individual parts' of the overall system.
  - Lack of balance in what is measured—local government performance measures are often dominated by measures of timeliness and transactional measures, when a broader range of measures might contribute to better regulatory outcomes.
  - Insufficient focus on use of performance information—nearly six out of ten councils (58%) do not use performance information to improve the administration of their regulatory functions.
- The Commission proposes a package of initiatives to improve performance assessment:
  - The Department of Internal Affairs (DIA) should work with local authorities to remove any instances where authorities provide the same data to more than one department, and make central government administrative datasets available to local authorities to assist in the assessment of regulatory performance.
  - The DIA should work with Local Government New Zealand (LGNZ) and SOLGM to assess the case for common measures of regulatory services, and prepare a framework for implementation.
  - The Treasury, LGNZ and SOLGM should jointly trial a 'health check' of a regulatory regime, in which experts from local and central government would summarise the problems and opportunities in a specific area of local government regulation.
- Taken together, this package should help rebalance the performance assessment framework for local government and promote its usefulness.

## Findings

**F11.1**

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

- Society of Local Government Managers guidance material;
- some 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; and
- auditor/local authority interaction.

**F11.2**

Performance assessment should be most frequent when there is evidence of performance shortfalls and when the potential for performance improvements is the greatest. For regulations where performance improvements would not add significant value, assessment may not need to be so regular.

**F11.3**

As practical steps to increasing the use of performance information by decision makers, performance reports can highlight the benefits of using performance information to improve performance and seek feedback from local government decision makers on the preferred format for reporting.

## Recommendations

**R11.1**

The Department of Internal Affairs should work with local authorities to:

- remove any instances where authorities provide the same data to more than one department; and
- make central government administrative datasets available to local authorities to assist in the assessment of regulatory performance.

**R11.2**

The Department of Internal Affairs should work with Local Government New Zealand and the Society for Local Government Managers to assess the case for common measures of regulatory services, and prepare a framework for implementation.

**R11.3**

The Treasury, Local Government New Zealand and the Society for Local Government Managers should jointly trial the concept of a 'health check' of a regulatory regime, in which experts from local and central government would summarise the problems and opportunities in an area of local government regulation.

# 12 Making it happen

## Key points

- Local government regulation is mostly shaped by central government. To operate effectively, New Zealand's regulatory regime needs effective engagement and collaboration between the two levels of government.
- At present, there are diverse understandings and attitudes towards the respective roles, responsibilities, accountabilities and constitutional settings of the two levels of government.
- To encourage the achievement of good regulatory outcomes by local government, nine functions need to be performed, involving both levels of government. Responsibility does not appear to have been allocated for some of these functions.
- These gaps, combined with the current lack of effective engagement between the two levels of government, suggest that new organisational arrangements may be needed to bring about the effective implementation of the reform agenda proposed in this report.
- Effective relationships between leaders can improve the situation, but enduring improvement requires an effective institutional structure to give substance and support to engagement between the two levels of government.
- This structure needs to involve both politicians and officials with the support of a small secretariat. Elements of the necessary structure already exist, but require more status and priority.
- Each level of government should:
  - review whether its current organisations are capable of developing and implementing a reform programme for local government regulation; and
  - jointly consider establishing a new inter-governmental forum, the purpose of which would be to initiate, develop and monitor the implementation of significant initiatives to improve the achievement of regulatory outcomes that require cooperative action by both levels of government.

## Recommendations

### R12.1

Each level of government should:

- review whether its current organisations are capable of developing and implementing a reform programme for local government regulation;
- jointly consider establishing new inter-governmental arrangements, the purpose of which would be to initiate, develop and monitor the implementation of significant initiatives to improve the achievement of regulatory outcomes that require cooperative action by both levels of government.





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