SOLGM

NEW ZEALAND SOCIETY OF LOCAL GOVERNMENT MANAGERS

SUBMISSION ON THE PRODUCTIVITY COMMISSION DISCUSSION DOCUMENT "LOCAL GOVERNMENT REGULATORY PERFORMANCE"

SEPTEMBER 2012

Who Are We?

The Society of Local Government Managers (SOLGM) thanks the Productivity Commission for the opportunity to comment on Local Government Regulatory Performance (the paper).

SOLGM represents approximately 560 local government managers (including Chief Executives, and other managers with significant management, policy or strategic development responsibilities).

Our vision is "Professional local government management, leading staff and enabling communities to shape their future"

SOLGM represents and supports its members, local government managers and staff through professional development and networking opportunities, membership support services, good practice resources and advocacy work. It is focused on improving the performance and capability of the local government sector and the people working within it.

SOLGM and Local Government New Zealand agreed that the latter would take the primary responsibility for responding to this aspect of the Better Local Government programme.

We have therefore confined ourselves to a few key aspects of the Commission's report, and left the detailed response to the 65 discussion questions to Local Government New Zealand. We focus on policy and decision-making process that result in local authorities being either empowered or required to undertake regulatory roles.

Some Preliminary Thought

What is Local Regulation?

The scope of truly "local regulation", where the entire process from the initial decision to regulate or not to regulate is a local one, are in fact, relatively modest. Only the RMA among the major regulatory frameworks provides significant policy discretion on the part of a local authority. That aside it is only the various discretionary bylaw making powers that are truly "local regulation". We would observe that for the most part the manner in which these powers are exercised is seldom controversial at the national level.

Legal and Constitutional Relationships

We are left a little uneasy by the manner in which the paper repeatedly refers to roles being "delegated" by "central government" to "local government". In fact, what are being discussed in the paper are legislative mandates conferred on local authorities by Parliament. These are not the same thing as "delegations" from the Executive arm of Government. On our reading your paper seems almost to assume a model of the constitutional and legal relationships based on "executive sovereignty" in which Parliament's enactment of legislation is merely the formal process by which Ministers and departments "delegate" power which is theirs inherently and as of right.

The regulatory roles played by local authorities are for the most part specific roles

within complex regularity frameworks. Parliament has mandated local authorities to undertake some roles within these systems and the executive arm of Government to undertake others. The legal obligation on both the local authorities and the executive arm of Government is to act in accordance with the law. Both local authorities and the executive arm of central government are accountable to Parliament and subject to the jurisdiction of the Courts for how they exercise their respective powers. There is no inherent agency or accountability relationship between a local authority and the executive, just because a Minister has promoted the relevant piece of legislation. Such relationship only exists where Parliament has explicitly legislated to create it.

We cannot stress too strongly that the primary obligation on local authorities in undertaking their regulatory roles is to act in accordance with the law, not with what the Minister for the time being or their department might wish the law had said.

It seems to us that your terms of reference risk over stating the extent to which it is valid to evaluate the "performance" of one actor in such a system, separately from an evaluation of the "performance" of the system as a whole. And this implicitly requires some consideration of the quality of the design of the system and the policy advice that underpinned it. The debate about regulation is almost entirely large and complex legislative frameworks designed at the central government level. These legislative frameworks are detailed prescriptive statutes that not only provide for the regulation of some area of private activity but also regulate (and frequently micro-regulate) the manner in which local authorities will undertake their particular roles within the system. It is the framework as a whole that determines the constraints and the incentives facing the individual actors within the system.

This view is reinforced by reading the body of your paper. While at a headline level the paper talks about the "performance" of local authorities, most of its content is a discussion of factors bearing on the design of regulatory frameworks, These are matters controlled by Ministers and there departments, not by local authorities.

For example it might be seen as a shortcoming of local authorities' that the administration of some regulatory matter is handled differently in different places, where it is important to have a nationally standard approach. But if that is the case, the question has to be asked, *"if it was important to have a standard national approach, why on earth didn't the legislation provide for that"*. If legislation prescribes the processes by which local authorities are to do things, then the fact that those processes may seem ponderous and bureaucratic is not something that is result of any choice or decision by the local authority. Similarly there may well be criticism that local authorities should be more innovative in their approaches to the administration of legislation, but if the relevant statute prescribes in detail how local authorities are to do things, then, in effect, the scope for innovation has been legislated out of the system.

At the end of the day, if the various players acting in accordance with the law does not produce the results that Ministers or their advisors want or may have expected, then fundamentally this is an issue about the content of the legislation and the quality of underpinning policy advice, rather than about the "performance" of local authorities.

We are uneasy that the packaging of the enquiry as being about the ""regulatory performance of local authorities" risks setting local authorities as "proxies" or "scapegoats", where the substantive debates that need to happen are actually about the content and performance of the regulatory frameworks as a whole, and the performance

of the policy development and decision making processes that have produced them.

Good Regulation

We draw the Commission's attention to the recently published (July 2012) Treasury publication - The Best Practice Regulation Model, Principles and Assessments, which contains the best succinct set of principles for identifying good regulation that we have encountered. These include:

1. *proportionality* – the burden of rules and their enforcement should be proportionate to the benefits that are expected to result.
2. *certainty* – the regulatory system should be predictable to provide certainty to regulated entities, and be consistent with other policies.
3. *flexibility* – regulated entities should have scope to adopt least cost and innovative approaches to meeting legal obligations. A regulatory regime is flexible if the underlying regulatory approach is principles of performance-based, and policies and procedures are in place to ensure it is administered flexibly and non-regulatory measures including self regulation are used wherever possible.
4. *durability* – the regulatory system has the capacity to evolve to respond to new information and changing circumstances.
5. *transparency and accountability* – reflected in the principle that rules development and enforcement should be transparent. In essence, regulators must be able to justify decisions and be subject to public scrutiny. This principle also includes non-discrimination, provision for appeals, and a sound legal basis for decisions.
6. *capable regulators* – means that the regulator has the people and systems to operate an efficient and effective regulatory regime. A key indicator is that capability assessments occur at regular intervals, and subject to independent input or review.
7. *growth-supporting* – economic objectives are given an appropriate weighting relative to other specified objectives which could be related to health, safety or environmental protection, or consumer and investor protection. A regime embodies this attribute if the identification and justification of tradeoffs between economic and other objectives are explicit parts of decision-making.

We would however add the principle that a regulatory regime should be *effective* – that is to say it should meet the policy objective or objectives it was established to meet (while not compromising the achievement of other national or local initiatives).

Principles

By and large we agree with the set of factors that the paper identifies as tests for allocating functions between central and local government. We consider that the equally important part of the discussion is ensuring that there are clear and transparent processes in place for trading principles off against each other, and other means of resolving conflict

between the principles.

Section 14 of the Local Government Act places local authorities under a specific obligation to resolve conflicts between the "principles of local government" in an open, transparent and democratically accountable way.

We wonder if the "governance" principle is a euphemism for identification and management of conflicts of interest. We noted the comment that central government may be better placed to manage conflicts of interest – but cannot see how the Commission reached this conclusion. Indeed the existence of conflicts of interest is one reason why local authorities process and issue resource consents for central government's capital projects (and one of the potential key risks which arises when central government calls in a major infrastructural project).

In a similar vein the discussion around the 'competition' principle lacks an evidence base. We hear these claims from time to time and consider them somewhat "overblown". We can see what differences in permitted, discretionary and prohibited activity under the RMA may have an influence on a district's ability to compete. But, literally any piece of research on business location decisions will highlight access to raw materials, access to a pool of appropriately qualified labour, and access to transport and communications links as the main factors. Taxation can play a role, in our experience differences in local tax treatment (that is rates) are where local authorities seek to compete rather than in regulatory treatment. Even at international level, decisions tend to be made on this basis (and regulatory differences, where they factor into a decision tend to be things that the state regulates such as labour law, consumer protection, and commercial law[1])

As to the priorities between principles - clearly the national priority and national consistency principles should have more weighting. While the existence of a policy case for either is not necessarily determinative of which level of government should administer the function they will probably be determinative of which level bears the primary accountability. Where these exist – local government's role is purely as a delivery agent administering a set of nationally set expectations to nationally determined funding, and where the customer's primary point of redress is with a government agency.

We could find no discussion about the relative merits of allocation between territorial authorities and regional councils. We suggest the following matters may be of relevance:

- the scale and nature of an activity to be regulated – an activity that revolves around effects on the natural environment might be a better candidate for regional council involvement than others
- the areas of benefit of the particular activity – an activity where benefits and costs "spillover" from one territorial authority to the neighbouring local authorities might be better allocated to regional councils
- the area over which coordinated activity and enforcement will be most effective.

We would suggest, however, that in any discussion of how roles and responsibilities are shared between levels of government there is an additional important principle which is around the concept of <u>accountability</u> of decision-makers. Most thinking in

1 Nowhere in the so-called "Hobbit Amendment Bill" was there change to the RMA or any other regulatory responsibility of local authorities.

this area is centred on the principle that the costs of any expenditure decision should be clearly identifiable with the agent who has made the decision. We would suggest that the same decision is crucial to policy making around the allocation of regulatory roles. The decision maker who is able to hold themselves out to the public as bringing some benefit in terms of the public good objectives of regularity activity, should also be clearly identified with the associated financial and compliance costs driven by that regulation.

One of the ubiquitous challenges in relationships between levels of government is the fact that the superior coercive power of national over state and/or local government's allows national Governments to "game" this by presenting itself to the public as bringing the benefits of the regulation, while positioning the lower level of government as the tax or fee collector to pay for it, and the "public face" of the frontline regulatory process who will be perceived as responsible for the compliance costs experienced by those whose behavior is being regulated.

We would suggest that much of the debate about the performance of local authorities in their regulatory roles in New Zealand hinges on this accountability disconnect around the design of the regulatory frameworks. The incentives for central government ensure that the legislated regulatory processes it designs are cost effective and proportionate, are significantly weakened where it knows that the costs of administering the system will be collected through a fee levied by a local authority or through local rates because it knows that the public will see the local authority as the agency responsible for the level of those costs. Similarly the incentives to minimize compliance costs are undermined where central government knows that those subject to regulation are likely to see those cost as having been the fault of the local authority "at the front line' rather than the architects of regime behind the scenes.

Deficiencies in Central Government's Policy Process

> *"But what I have learned as Minister is that the problem starts with Central Government. Virtually every government policy impacts on local government. It seems every new Minister's initiative means more costs for local government. New programmes, new initiatives, new rules just rain down on you from above.*
>
> *It's too much. It's overwhelming. And it's costly.*
>
> *"It seems to me that the left hand of government doesn't always know what the right hand is doing. And central government's policy making too often adds up to an impact on local government that lacks coherence and clear direction. We can do better. We need to discuss how we do better."*
>
> Hon Rodney Hide, then Minister of Local Government and Regulatory Reform[2]

We consider that these comments from the former Minister represent a short, if a little simplistic, summary of the issues that central government's policy process creates for local government's regulatory performance.

Central government has not based its consideration of functions on a robust set of policy principles – much less a comprehensive set of the nature that the Better Regulation

2 Hon Rodney Hide (2010), *Smarter Government, Stronger Communities*, speech to the Local Government New Zealand Annual conference, 26 July 2010.

paper offers. There was an attempt to establish a set of principles in 2005 – that was roundly dismissed by the Government of the day as seriously inhibiting its freedom of action[3]. It is instructive that it took a change of Minister before those principles got traction even as a set of guidelines.

We would invite the Commission to compare the degree of rigour and degree of scrutiny which Government applies to decisions around the content of legislation to mandate regulatory responsibilities to local government, with that which it applies to making its own expenditure commitments. If a Minister or department were to propose itself undertaking a new regularity role, it would have to go through quite detailed and exhaustive processes within Government to establish the financial and managerial implications at a level of detail and justify them. The case would have to be made for new appropriation, a detailed business case would need to be made for any capital expenditure required, and approvals sought for the employment of additional staff. The department's planning would be scrutinized closely by the Treasury and the SSC. Other agencies would take an interest in ensuring that excessive compliance costs were not being imposed.

There is no corresponding level of scrutiny of the costs being generated by legislation allocating roles to local authorities. Our experience over many years is that the level of scrutiny applied typically extends no further than a reassurance to Ministers that *"there are no fiscal implications for the Crown"*, and that *"local authorities have the power to recover costs through the rating system or by setting fees"*.

We would instance our current work with the Ministry of Justice around the implementation of the Alcohol Law Reform Bill[4]. This puts in place a whole new process for licensing the sale of liquor. We understand that an early policy decision was that the costs of the system should be recovered through fees paid by licensees. Part of the work we are doing is assessing what the costs of the change in licensing process will be. We do not have the answer at this stage, but the consensus view is that the new process will be significantly more expensive than the old one, and that as a result licensing fees are likely to increase significantly. Inevitably this is going to produce a significant outcry from the industry when the new fees come into effect. Since it will be the local authority that ends up imposing the fees we fully expect that this will be perceived by the public and the media as *"the council putting up the fees"*.

We would suggest that there is a simple thought experiment which the Commission might wish to apply to the various legislative frameworks dealing with the regulatory roles of local authorities. This is simply to ask *"how likely is it that the responsible department would have designed to same framework and procedures, if it were itself going to be responsible for undertaking the role?"*

The Government has introduced new rules around the processes departments need to go through in putting a case to Cabinet for new capital expenditure – generally referred to as the "Better Business Cases" programme. We understand this also applies where a local authority might seek Crown investment into a local project. SOLGM is actively involved in working with the Treasury to adapt this approach as recommended practice

3 That set of principles became the document *Policy Development Guidelines for Regulatory Functions Involving Local Government* issued in 2006.

4 We refer at several points in this submission to our current experience in working the with the Ministry of Justice relation to the Alcohol Law Reform Bill. We would like to make it clear that we do so not to imply any particular criticism of the Ministry or its staff. This is simply the example of commonplace government practice that happens to be "on our desks" at the moment.

for the local government sector. We wonder why, if it is possible to aspire to this degree of rigour in decision making about Government's capital expenditure, that it does not seem possible to bring a similar level of rigour to the financial implications of legislative proposals for local authorities.

Central government agencies established the regulatory impact statement (RIS) requirements as a mechanism to ensure that policy-makers identified all options, and analysed the costs and benefits of options before making recommendations for legislative change. We note that, for the most part, independent analyses of statements across the range of departments have found the quality of RIS has improved.

We do not detect the same level of improvement in RIS as they impact on local government – although they may nonetheless sometimes be beneficial simply by making the absence of analysis more transparent. One can only speculate whether Ministers, the Department of Prime Minister and Cabinet, and the Treasury would tolerate a statement such as the following in a Cabinet paper that proposed change to one of their departmental responsibilities

> *"There is limited evidence to inform the development of these proposals, and the timeframe within which the proposals have been developed has restricted the ability to assess multiple options. As a result the problem analysis and option assessment of specific proposals rely on assumptions that are not, or are only partially tested. The extent of uncertainties and risks are identified and discussed for each proposal.*
>
> *During the legislative process the Department expects feedback on the proposals, and possibly further development of the proposals. Regulatory impacts will continue to be assessed as well. The short timeframe available for formulating and drafting creates a risk that some interventions could be incorrectly aligned, and/or require subsequent amendment to address unforeseen circumstances.*[5]*"*

Our organisation works with legislation and the associated RIS a great deal, and while the above statement is one of the more egregious (and more recent) for its lack of an evidence base or assessment of options, we have noted that identification and evaluation of the costs and benefits of regulatory interventions is often not fully performed or included at all.

SOLGM notes that there is currently no mechanism, process or agency that considers the total or cumulative impact that establishment of regulatory responsibilities, or transfers of functions to local government have on the sector as whole. The Department of Internal Affairs is the policy agency with lead responsibility for the system, and does devote resource to secondary policy work (i.e. responding to the initiatives of other government departments). However, in our experience[6] the Department takes an initiative by initiative approach to this work with little attempt to take a whole of government/whole of system approach. We would also note that the Department tends to be reactive rather than proactive – that is to say that their involvement is often once Cabinet papers are "in circulation".

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5 Department of Internal Affairs (2012), Regulatory Impact Statement: Local Government Amendment Bill, page 1. Note that this Bill covers the change to the basic framework under which local government operates – including the exercise of regulatory functions, and comes from what is essentially a official's "disclaimer of opinion" on aspects of the package.

6 Disclosure statement – the two primary authors of this submission are former employees of the Department of Internal Affairs.

Likewise issues that arise where different pieces of legislation interface or interact are often not identified and resolved. The paper cites the case of the opening of the Calendar Girls venue in Wellington, and various regulatory issues that delayed the opening of this venue. Without knowing the specifics of the case, it appears to us that the issue around the sequencing of building consents and liquor licensing is an issue of legislative design rather than regulatory implementation i.e. the two pieces of legislation do not "talk to each other".

The "silo" nature of government departmental organization and the tendency for policy and legislative processes to follow the silo structure also seem to us problematic. The different pieces of legislation conferring regulatory roles are "owned' by a variety of departments, policy issues are dealt with by different Cabinet Committees, and legislation scrutinized by different Parliamentary Committees. However, the world beyond government in which local authorities undertake their roles is highly interconnected.

There are currently Bills before Parliament to implement new regulatory regimes for the sale of alcohol, and for food safety. In local communities many businesses are subject to both forms of regulation (most obviously because premises licensed to sell alcohol are also required to sell food) and territorial authorities play the front line roles in both these regulatory systems. Most local authorities group these two inspection roles in a single operational arm (public health inspection or similar) and in small councils in particular rely on multi skilled staff working across both regimes. The degree of interconnectedness seems obvious and the expectation that changes to one may affect the other would seem fairly self evident.

However in terms of the government policy and legislative processes they are completely separated, and the directions of change proposed are completely different. The Alcohol Law Reform Bill has been developed by the Ministry of Justice and considered by the Justice and Electoral Select Committee. The Food Bill was developed in the former Food Safety Authority (now part of the Ministry of Primary Industries), and referred to the Primary Production Select Committee. Not only does this separateness in the policy and legislative process seem at odds with the close inter-relationship of their subject matters, but despite both dealing with roles played by local authorities, neither was considered by the Local Government and Environment Select Committee. It is also notable that although both the above pieces of legislation involve roles being played by local authorities, they are each being developed by an agency which we do not believe would regard knowledge of the local sector as part of their core staff competencies. The result however is that there are staff of local authorities who are, in effect, having the two halves of their job redesigned by two different and unconnected central government processes.

These kinds of policy "disconnects" arise because there is no strong mechanism for coordinating policy at the whole of government level. Initiatives are pursued by different departments, more often than not reporting to different Ministers each with different objectives. Once legislation starts the Parliamentary process more often than not legislation will be referred to different Select Committees for scrutiny.

We would like to offer several ideas for your consideration.

Firstly, the principles you develop as part of this review must be codified and inserted into the guidelines for RIS. Without this the Commission's work will have broadly the same practical effect as the 2006 Policy Development Guidelines – that is something that departments might consider and apply, but equally might not even be aware of.

Second, all legislation with regulatory or fiscal implications for local government needs to be subjected to a formal review to ensure impacts have been identified and properly addressed in the policy process. We see this as operating in a similar way to the vetting Te Puni Kokiri provides on proposals with implications for Māori, or the Ministry of Women's affairs applies on gender issues, or even the Bill of Rights Act vetting (this would be our preference). This would most properly sit within an adequately resourced Department of Internal Affairs – and would be accompanied by the ability to refer papers back to Departments for further work.

Third, we submit that all local government related legislation should be referred to a common committee during the parliamentary process. Issues relating to local government functions and performance would then receive scrutiny by the same committee that is considering the legislation that sets the basic framework for local government. Referral to a common committee (we use the nomenclature of the current Parliament and call it the Local Government and Environment Select Committee) could either be the sole scrutiny by Select Committee or be an additional step in the process (that is to say that an Alcohol Law Reform Bill might go to the Justice and Electoral Committee first, and then the Local Government and Environment Committee).

Implementation Concerns

This is another deficiency in the way central government makes policy that impacts on local government, but we considered was worth a separate discussion because it underpins the paper's discussion about regulatory capacity. Implementation concerns are often "left until last" or on occasion "glossed over".

Implementation and the Policy Development Process

Our experience is that Government agencies typically consult local government at the political level (usually through Local Government New Zealand) at an early stage at the level of – *"do you think the headline policy intent a good idea?"* We see this as appropriate. However we believe that there is a lot of scope for improvement of the more detailed design of legislation by a greater willingness to include managers and staff of local authorities in the more detailed development process.

Our observation is that practice in this regard is highly variable among government agencies and through time in the willingness of government agencies to do this. Our perception is that in the absence of clear guidelines and rules of engagement around bringing outsiders "inside the tent" there is understandable nervousness among departments that this might somehow be risky in terms of the conventions of secrecy around Cabinet decision-making. We are not aware however of any instances where adverse consequences have flowed from this sort of engagement.

The price however of not doing so is that departments deny themselves access to a great deal of information which might actually better inform the consideration of options during the policy development process. These days most policy and legislative development is undertaken in theoretically oriented policy agencies. We would suggest that rigorous analysis of policy options also requires the sort of information and insight that comes from those with a more hands-on operational involvement. In dealing with the local authority roles in regulatory areas it is generally going to be local authority staff and managers who have the knowledge experience and information to bring this complementary perspective.

We are conscious that Ministers are currently interested in ways to get a more whole of government approach to policy thinking within central government. We would suggest that improving the quality of the regulatory frameworks that span local and central government requires a whole of government perspective spanning central and local government.

SOLGM's experiences with implementation of previous legislation have provided us with the following set of critical principles for implementation:

Principle One: Start Early - Officials should not turn up in the office the day after the enactment of the legislation and start thinking about what to do about implementation. While the roll-out of implementation support programmes necessarily follows enactment (which in turn follows the policy advice), the design and development of the implementation programme should start earlier. Elements of this should be concurrent with the policy and legislative processes. Indeed it is difficult to see how a rigorous assessment of policy options can be undertaken without commencing the identification of the costs and practicalities of their being implemented.

Principle Two: Work With the Stakeholders - For any legislative initiative impacting on local government there will be a range of groups with a stake in successful implementation. This includes not only the national sector organisations such as Local Government New Zealand and SOLGM but also related professional organisations, and a variety of occupational institutes and associations. Engagement with these stakeholders can do a lot towards achieving effective implementation.

Principle Three: A Separate Process – SOLGM has been pleased to see the increasing willingness of central government to engage with local government during the process of policy development. While engagement with local government on implementation is likely to involve many of the same stakeholders, it is should be set up as a separate process and work-stream. This is to separate consideration of "the means of making it happen" from debate over "the desirability of making it happen." Early work towards implementation can inform aspects of policy advice and legislative design, but should not become confused with the policy and legislative processes.

Principle Four: A Single Shared Plan - SOLGM and other sector stakeholders will often see it as part of their role to support the implementation of the new legislation by local authorities (they may for instance have existing good practice guidance they will need to revise). If the actions of central government agencies and local government sector organisations are not co-ordinated in some way however, then there are risks that some work on some issues will be duplicated while others falls between the cracks. A single agreed common plan of action around the implementation proceeds avoids these risks and is likely to lead to the most effective use of the available resources.

Principle Five: Use the Proven Technology - Stakeholder organisations will generally have the established and effective channels of communications with their constituents within local authorities. They may already have tools and guidance material that are widely known, recognised and used within local authorities. Government agencies should be encouraged to use these rather than establishing competing channels and tools.

Principle Six: Clarity About Audiences and Needs - In implementing legislative change affecting local government there are a range of audiences, spanning elected local authority members, managers, and hands on practitioners in the specific affected areas of work. Their needs and the best means of addressing them are likely to differ. For instance, we would argue that the technology developed by our Legal Compliance Programme would often be best available technology for meeting the needs of managers and practitioners, but it does not address the needs of elected members.

Principle Seven: Linkage to Select Committee Process - If work on developing guidance material as part of an implementation programme is started early enough there are opportunities for this to feed back in a positive way into the Select Committee process. This reflects our experience with the development of the legal compliance programme modules. The detailed work undertaken to identify the practical means of complying with legislation sometimes highlights technical shortcomings in the legislation that is being worked on – gaps and disconnects, inconsistencies and contradictions, and areas of clarity. If the effort is made to start this work early there is the opportunity for these sorts of issues to be addressed prior to enactment.

Principle Eight: Life-Cycle Approach - Once legislation is enacted there is a necessary ongoing maintenance task for the administering department. New issues may arise, areas of uncertainty or contradiction may come to light, provisions may be interpreted in unexpected ways by either practitioners or the Courts or both. The ability of a department to respond effectively and properly maintain the legislation depends on the strength of its feedback systems from users. Engaging openly with stakeholders on implementation can assist this by establishing the foundation of relationships that can ensure open information flows into the future.

Implementation Resources

The Australian Productivity Commission identified a lack of central government guidance as a key issue in the implementation of regulations in Australia. As a management organisation we would like to concur with this comment, and signal our concern that there is no uniform approach within central government to supporting implementation with resources and guidance. In particular a clear set of expectations from central government is desirable.

Transfers, Amendments, and the Planning Process

Central government sometime seems as though it is unaware of or has little regard for manner in which local authorities make service, policy and funding decisions. In particular, the role of the LTP as the primary vehicle for debates between levels of service is ignored. If central government wants LG to pick up a major function or allocate public accountable funds to others then the optimum time to provide local government with advice of this is around a year prior to adoption of an LTP. In this way the funding and other consequences can be assessed and weighed up against other funding and expenditure proposals.

This "early warning" will become all the more important if central government proceeds with proposals to establish a set of benchmarks to assess financial prudence. We suspect at least one of these measures will focus on the level of rates increase, in which case competition for priority places in the queue intensifies. Central government needs to recognize that a transfer of a function to local government "crowds out" expenditure

on other priorities and that the earlier the notification the easier these transfers can be accommodated.

Ideally central government would be providing local authorities with notice of its intended transfer including the funding regime around 12 months before adoption of an LTP (and certainly no later than nine months). So, with the next LTPs required by 30 June 2015, then councils would need advice of other policy initiatives no later than 30 June 2014.

Notification post LTP may require amendment of an LTP, depending on the nature of the transfer, and any consequent "crowding out" of other expenditure. It's also not clear whether local authorities starting or ceasing regulatory because of the requirements of other legislation actually triggers the amendment process under section 97 of the Local Government Act.

Funding of Regulatory Functions

The paper correctly notes that "how a local authority funds its regulatory activities matters for good regulatory outcomes".

However, the paper's discussion of the funding principles of section 101(3) is incomplete in at least two material respects.

The paper has omitted to mention section 101(3)(a)(i) – "the community outcomes to which the activity primarily contributes". Omitting this consideration seems strange to us as this requirement is direct legislative recognition of the paper's conclusion that the funding arrangements for regulatory activities affect their outcomes. Section 101(3)(b) also points in this direction – while adding statutory signals that a local authority should consider the wider impact of its funding decisions on "the four wellbeings"[7].

The paper has also omitted section 101(3)(a)(v) – "*the costs and benefits of funding an activity distinctly from other activities*". In short, while the other considerations might point to a particular funding solution there may be some administrative cost or other rationale for not funding them separately from other activities e.g via the general rate. For example, a local authority where the frequency of a particular regulated activity is low might elect to fund via the general rate than go through the process of establishing a separate fee regime.

While the paper mentions the exacerbator pays principle (section 101(a)(3)(iv) it does not feature in the discussion that follows. This omission is also surprising since the idea of exacerbator pays is a standard principle of regulatory economics.

In short, a local authority's funding decision involves a wider set of considerations that just who benefits from an activity.

The report comments on differences between the degree of public and private benefit assessed across a set of six, not necessarily representative territorial authorities. The report expresses surprise in the degree of variation. We agree that in each case there is an outlier or two, but by and large differences are in the order of 10-20 percent. The broad nature and different composition of different types of groups may also account for variation.

7 The Commission should note that the Local Government Amendment Bill currently before Parliament will remove the references to wellbeing and replace with the word "community" i.e retaining the intent of the requirement while removing the term wellbeing.

The report fails to recognize that there are no uniform technical answers to what is a public good and what's a private good. For example, in a community with a large teenage unemployment issue and a few leisure opportunities, there could be an issue with young people and alcohol abuse, in which case Sale of Liquor Act functions might be viewed as more of a public good. Similarly a university or polytechnic town might have the same view.

We should also note that the interface between other legislation and section 101(3) introduces a degree of artificiality into the analysis of benefits. Some older legislation constrains local authorities ability to recover fees to a specific dollar amount. It is not clear that legislators have access to the right information, or the right incentives to be able to set a price that bears relationship to the cost of a service. Such legislation is not often reviewed, and associated regulations are reviewed even less frequently. The obvious result is that the maxima become dated and over time bear less and less relationship to the cost of the activity. An often repeated story is that of the official who made a round trip of four hours to inspect an amusement device for which the council could recover the princely sum of $12 because the Hawkers, Peddlers and Itinerant Traders regulations constrain the fee.

SOLGM notes that modern statute allows local authorities to recover cost on an "actual and reasonable basis. However these powers generally tend to allow for recovery of the cost of processing applications, undertaking inspections and the like. Few, if any, actually allow for recovery of the cost of developing policies (one recent example being the Gambling Act 2003). Even fewer treat risk/contingency management costs (such as liability insurance) as a reasonable cost.

If pricing powers do not allow for recovery of full costs then local authorities are left with no alternative other than to fund from the general rate. Some have sought to defend this on the grounds that regulation protects the public and thus there is a public good element to these services which local taxation should meet. On the other hand, judgments about the public and private good elements of services are made through the processes under the Local Government Act 2002 and statutory prohibitions of this type ride roughshod over these disciplines.

We recommend that the Commission broaden its analysis of the funding and charging powers available to local authorities. It might also like to look at the Sale of Liquor Act, the regulation of amusement devices, and the Land Transport Act and regulation of overweight vehicles as examples. We also recommend that the Commission consider whether actual and reasonable cost should include just the cost of carrying out an inspection, providing a permit etc.

We would also make the point that the discretion local authorities have over how the cost of regulatory activities is allocated between fee payers and ratepayers will generally be a less significant driver of the general level of costs faced by those being regulated, than the nature of the process that are written into the legislation and which local authorities are required to follow.

Developing workforce capability and leading excellence in local government

New Zealand Society of Local Government Managers (SOLGM)

8th Floor, Civic Assurance House
114-118 Lambton Quay, Wellington

PO Box 5538
Wellington 6145

Phone 04 978 1280 Fax 04 978 1285
info@solgm.org.nz www.solgm.org.nz