Auckland Council
Te Kaunihera o Tāmaki Makaurau

6 March 2013

New Zealand Productivity Commission
PO Box 8036
The Terrace
WELLINGTON 6143

Dear Sir / Madam

Please find attached Auckland Council's submission in response to the Towards better local regulation discussion document.

We would welcome the opportunity to meet with you to discuss our submission and any other aspect of your inquiry into local regulation.

If you require any clarification on the submission, or wish to make arrangements to meet council representatives, please contact Dr Roger Blakeley, Chief Planning Officer on 09 307 6063, or by email at roger.blakeley@aucklandcouncil.govt.nz

Yours sincerely

Doug McKay

Chief Executive

Encl.

Auckland Council
Te Kaunihera o Tāmaki Makaurau

Submission to the

New Zealand Productivity Commission

TOWARDS BETTER LOCAL REGULATION

6 March 2013

INTRODUCTION

1. This is Auckland Council's submission in response to the Productivity Commission's draft report entitled *Toward better local regulation* (the draft report).

2. The address for service is Auckland Council, Private Bag 92300, Victoria Street West, Auckland 1142.

3. Please direct any enquiries to Dr Roger Blakeley, Chief Planning Officer. Phone 09 307 6063 or email roger.blakeley@aucklandcouncil.govt.nz

4. Auckland Council would welcome the opportunity to meet with the Commission to discuss this submission, the draft report and any assistance it is able to offer with further work the Commission is planning to undertake.

5. This submission has been approved by the Auckland Plan Committee of the Auckland Council.

6. Responses to most of the 39 questions raised in the draft report are attached as appendix one. The body of the submission is organised around the following sections:

    - Key messages
    - Summary comments
    - Diversity across local authorities
    - Allocating regulatory responsibilities
    - The funding of regulation
    - Regulation making by central government
    - Local monitoring and enforcement
    - Making resource management decisions and the role of appeals
    - Local regulation and Maori
    - Assessing the regulatory performance of local government

KEY MESSAGES

7. Auckland Council welcomes the opportunity to submit on the draft report and supports many of the Commission's high level messages. In particular Auckland Council:

    - agrees that regulation legitimately varies between jurisdictions to reflect local preferences and asks that the Commission be more explicit in recognising the need for nationally set regulation to take into account Auckland's unique set of circumstances
    - suggests that Auckland's approach to spatial planning can provide opportunities to integrate and simplify the complex array of strategies, plans and policies legislatively

required of local authorities. However, further legislative change regarding the status of the Auckland Plan is required to fully capitalise on this potential

- suggests that the Commission expand its explanation as to why national regulations are sometimes inconsistently applied to include the quality of the drafting and consultation processes
- supports the proposed allocation framework but suggests that it be amended to better support decisions as to what level of government is best placed to take responsibility for a specific regulatory area
- supports the Commission's undertaking to conduct further research into the issue of unfunded mandates
- agrees that there is a need for more clarity around the respective roles of central and local government
- agrees that central government processes have a significant impact on the quality of local regulation
- agrees that there is a lack of evidence to support the view that the passing of the 2002 Local Government Act led to an "explosion" of local regulation and that almost all local regulation is required or empowered by statute law
- reiterates its call for greater provision to be made for the use of infringement notices as a key aspect of a well functioning enforcement system, and supports the Commission's intention to undertake further work in this regard
- suggests that the Commission refrain from making recommendations regarding Environment Court processes as these issues are currently under consideration as part of the wider resource management reforms
- agrees that current provisions to include Maori in resource management decision making are not always adequate
- supports the Commission's finding that a more balanced approach to regulatory performance assessment is required.

SUMMARY COMMENTS

8. Auckland Council notes that much of the discussion in the draft report is consistent with the key messages from its September 2012 submission in response to the Commission's issues paper entitled *Local Government Regulatory Performance*. As such there is much in the draft report that the Council supports.

9. Auckland Council welcomes the discussion in the draft report on the diversity of local communities and their differing preferences in terms of regulatory frameworks. This is an especially important consideration for Auckland given its scale, diverse communities, spatial diversity and unique planning framework. Auckland's new governance structure, and in particular the Auckland Plan and the Unitary Plan, has the potential to bring about a significantly

more integrated, simplified and cost effective approach to legislatively required planning processes. Recent reforms around transport planning and Unitary Plan processes indicate that the government has partially recognised this potential. However, further legislative change is required, particularly as regards the status of the Auckland Plan, before these opportunities can be fully realised.

10. Whilst it is important to reduce any negative impact local regulation may have on economic competitiveness it is also important to recognise the key role good regulation plays in protecting the public good. Auckland Council was pleased to see more recognition of this throughout the draft report compared to the earlier issues paper.

11. The Council welcomes the recognition in the draft report of central government's key role in driving local regulation. The Council concurs with the Commission's view that there has not been an explosion of new local regulation since the 2002 Local Government Act came into effect. Similarly, the Council also agrees with the Commission that the vast majority of local government regulation is required or empowered by statute.

12. The Council also supports the Commission's suggestions for reducing the tensions that exist between central and local government in respect of regulatory matters. The proposed allocation framework should help in this regard. Similarly, the inclusion in Regulatory Impact Statements of a section on local government impact, and the prospect of a more unified approach towards regulation making across government departments, have potential to alleviate this tension. The Council makes a number of other suggestions in this regard in the discussion, later in this submission, of central government regulation making. Among these suggestions the point about the short timeframes generally afforded local authorities for the consideration of central government driven regulatory change, is particularly important for Auckland Council.

13. The Commission has raised the possibility of recommending changes to the Environment Court's appeals process. Specifically, it asks whether the *de novo* status of Environment Court appeals should be removed and whether legal standing should be limited. These issues cannot be considered in isolation from the wider reforms of the resource management system currently underway. As such the Council prefers not to make a recommendation on these two specific questions, and respectfully suggests that the Commission take a similar stance at this time.

DIVERSITY ACROSS LOCAL AUTHORITIES

14. Auckland Council is encouraged by the Commission's acknowledgement that local regulation legitimately varies between jurisdictions in response to differing local community preferences.

15. The recognition that regulatory variation is often legitimate is especially important for Auckland given that its unique scale, diversity, governance arrangements and planning framework mean that its communities sometimes have different regulatory needs than other parts of the country. The government has also recognised Auckland's uniqueness, and the need to capitalise on its new governance arrangements as evidenced by its proposed one off process for the approval of the Unitary Plan. Similarly, recent changes to the Land Transport Management Act 2003 (LTMA) mean that Auckland is no longer required to develop a separate regional transport strategy – a strategy that would have essentially duplicated the transport section of the Auckland

Plan.

16. These variations to otherwise nationally applied regulatory frameworks illustrate how spatial planning in Auckland can serve to integrate and simplify the myriad of strategies, policies and plans typically required by the many statutes that govern local authorities. If applied more widely this ultimately has the potential to reduce the number of council planning and strategy documents and help achieve more efficient regulatory functions. However, in Auckland's case this will require further legislative change to aid implementation of the Auckland Plan. In respect of transport, for example, the recent changes to the LTMA compromises the relationship between land use and transport planning by downgrading the links between the Regional Transport Programme and other regional documents (such as the Auckland Plan) whilst at the same time strengthening the level of central direction regional transport planning is subject to.

17. Local variation is not always appropriate however and in many instances clear direction from the government is required. Where local preferences do not vary, clear central direction is often appropriate. Identifying such instances is not a simple task, although the Commission has made a good attempt at this via its regulatory allocation framework (see discussion in the next section).

18. The Commission found that regulatory variation arising from the inconsistent application of nationally set standards, both within and between local authorities, is inappropriate and a cause of frustration for business and other stakeholders. Auckland Council supports this view. However, the Council does question the Commission's diagnosis of the underlying causes of, and solutions to, this inconsistency - differing understandings of regulatory requirements amongst council officers on the ground, which could be resolved though improved officer training and inter-council cooperation. Whilst shortcomings within the local government sector undoubtedly contribute to the inconsistent application of regulatory standards, poor drafting of regulations at central government level, and inadequate guidance for their implementation, are often more important as underlying causes of the problem. The National Environmental Standard for managing soil contaminants provides a case in point. Despite close collaboration between a number of local authorities the lack of adequate centrally driven guidance, and the quality of the original drafting, has meant that differing interpretations as to how the standard should be applied are still common.

ALLOCATING REGULATORY RESPONSIBILITIES

19. The proposed allocation framework lies at the heart of the Commission's suggestions to overcome the tension between central and local government in relation to regulatory matters. If adopted the framework will bring a more structured, principled and transparent approach to decisions as to what level of government is best placed to regulate on a particular issue and as such is welcomed by Auckland Council.

20. The underlying principle of the framework - that in general regulation should be allocated locally unless there is good reason to allocate it elsewhere - is a sound starting point. Similarly, the principles included in the framework are appropriate, particularly the inclusion of a cost/benefit component. The focus on benefits, as well as costs, will ensure policy makers are clear in articulating their reasons for creating new regulation and will help promote a more balanced

understanding amongst stakeholders as to why regulation is necessary.

21. Although the framework is valid in its current format its usefulness could be further enhanced if it were transformed into more of a decision making tool that led users to more definite conclusions than suggested by the existing open ended approach. A flowchart format, with various decision making points along the way, would facilitate this approach. This change would enhance the usability of the framework and give stakeholders something more definite to respond to, without necessarily detracting from its flexibility. Auckland Council suggests that the Commission consider making this change to the framework before making its final recommendations to government.

THE FUNDING OF REGULATION

22. The imposition of new regulatory responsibilities on local government without commensurate funding provision continues to be a significant issue for the sector. Auckland Council is pleased to note the Commission's acknowledgement of the problem of unfunded mandates and its undertaking to carry out additional research on the matter.

23. Unfunded mandates are particularly an issue in relation to regulation that imposes a cost on councils but is set by central government with little room for local discretion in how it is applied. In such instances local government's primary role is that of delivery agent for central government. In the absence of centralised funding the costs of establishing systems to introduce the regulation, and administer it over time, will have to come from local sources. Inevitably this will mean rates increases, cut backs in other areas or increased user charges.

24. While the costs of the ongoing administration of regulations can often be at least partially recovered through fees, the cost of the actual development and review of these regulations must usually be borne by ratepayers. Developing robust evidence based policy and bylaws in response to central government driven regulatory change can require impact assessments, public consultation and notification, staff training, and the establishment of supporting infrastructure such as new IT systems. In a jurisdiction of Auckland's scale these costs can often run to several hundred thousand dollars or more. Given that these processes are externally driven they are typically also difficult to budget for.

25. The cost to ensure Auckland Council is adequately prepared to deliver on its new responsibilities under the Sale and Supply of Liquor Act 2012, for example, will exceed more than $1.5 million. This figure covers project costs to prepare for implementation, such as identifying staff training requirements, changes to organisational processes and the establishment of IT reporting systems. It does not include internal costs, such as the costs of developing a Local Alcohol Policy, or the yet to be determined costs of establishing and administering the District Licensing Committees.

26. Recently there has been a shift towards *enabling* local authorities to make policies on specific issues rather than *requiring* them to do so. This is often promoted as the empowerment of local government. However, when local authorities are enabled to take on responsibility in respect of issues of national significance or that are of concern to all New Zealanders, then the shift towards local solutions should not absolve central government of any financial responsibility for

the development and implementation of any associated regulations.

27. Auckland Council suggests that the Commission consider working up a set of principles to provide guidance as to when it is appropriate for central government to provide funding to cover the costs of nationally set locally administered regulation. These principles could cover (but not be limited to) issues such as:

    - the extent to which local authorities have genuine discretion in terms of the development and implementation of the regulation
    - the extent to which the costs of regulation can legitimately be recovered through user charges (i.e. the extent to which the activities that give rise to the need for regulation can be readily attributed to specific individuals/organisations)
    - the scale of resources needed to develop and implement the regulatory change and the capacity of individual local authorities to meet those costs.

REGULATION MAKING BY CENTRAL GOVERNMENT

28. As acknowledged by the Commission it is not possible to adequately address the regulatory performance of councils without also considering central government's dominant role in driving local regulation. In this respect the Commission's recognition of the fact that almost all local regulation is either required or empowered by statute is welcome.

29. The Commission has found a number of reasons why central government processes are often not as effective as they should be in creating good local regulation including:

    - the tendency of central government agencies to operate independently of one another and thereby confer regulatory responsibilities on councils with little regard for their interaction with and impact on existing regulatory functions
    - the generally poor level of consultation with local government on the design of new regulation
    - poor understanding within central government of the financial, capacity and risk management constraints faced by local government in implementing regulations set centrally
    - the tendency of central government to treat councils as arms of the state rather than partners in regulation making.

30. Numerous examples can be cited in support of these findings. However, rather than focusing on examples of poor practice it is more constructive to outline things central government agencies might consider doing in order to improve the effectiveness of local regulation:

    - early and meaningful consultation with the sector: inadequate consultation both prior to the development of new or changed regulation, and subsequent to its drafting, is perhaps the single most significant factor underlying local government frustration with central government regulatory processes. The short time frames central government agencies usually allocate for consultation on regulatory changes are a constant challenge for

Auckland Council, given its uniquely complex governance arrangements (as established in statute). It is often not possible for officers, local boards, the governing body, the IMSB and the council's statutory advisory panels to give proposals for regulatory change the consideration they warrant, let alone consult adequately with affected stakeholders, given central government's timeframes.

- the provision of timely and appropriate (to the complexity of the regulatory matter in question) guidance on implementation
- greater responsiveness to local government advocacy on regulatory matters (the sector's long standing, but as yet unheeded, calls for greater provision for the use of infringement notices for example - see the discussion later in this submission)
- greater recognition at central government level that local authorities and the communities they represent have diverse interests and priorities. Consequently it is sometimes legitimate that regulatory responses vary between jurisdictions
- including a section in Regulatory Impact Statements on the effect a regulatory change would have on local authorities would help government departments focus on the issue

LOCAL MONITORING AND ENFORCEMENT

31. Auckland Council supports the Commission's view that the ideal enforcement strategy is one that strikes a balance between persuasion and coercion in order to ensure regulatory compliance.

32. There are a number of enforcement related issues that need to be addressed as part of a well performing regulatory system. The first of these is related to the use of infringement notices. Currently infringement notices are available for use in relation to regulations made under a number of statutes such as the Resource Management Act 1991, the Building Act 2004 and the Land Transport Act 1998. However, the majority of local authority bylaws are made under the auspices of the Local Government Act 2002, which does not allow for the use of infringement notices unless explicitly established by the Minister. Efforts to have infringement notices established in this way have largely failed to date.

33. Allowing councils to specify, following appropriate community consultation, the failures/breaches that would be subject to an infringement notice would greatly improve the effectiveness of the enforcement system. The enforcement of bylaws made under the Local Government Act in relation to issues such as graffiti, illegal street trading and car window washing, would be considerably enhanced if more instantaneous and cost effective mechanisms, such as infringement notices, were available. Where infringement notices are not available the enforcement of bylaws relies on tools that are often time and resource intensive (prosecution) or do little to act as a deterrent (e.g. seizure of the mops and buckets of car window washers).

34. It should be noted that three Auckland police districts (Counties Manukau, Auckland City and Waitemata) are supportive of the increased use of infringement notices for public nuisance related bylaw breaches.

35. The local government sector has long advocated to central government on this issue and Auckland Council repeats its 2012 recommendation to the Commission that the infringement offence system be made more generally available to local authorities. Auckland Council also

supports the Commission's undertaking to conduct further research on this matter.

36. A second issue related to the enforcement system is that even where infringement notices are available, the fines local authorities are able to impose are often inadequate as an effective deterrent. Many breaches of district plan rules, for example, incur fines that are significantly less than the cost of applying for a resource consent in the first place. Infringement fines have not been changed for over ten years and need to be reviewed. The Commission should recommend to government that it undertake this review as soon as possible and give consideration to what changes might be required to enhance the use of infringement notices as an effective deterrent mechanism.

MAKING RESOURCE MANAGEMENT DECISIONS AND THE ROLE OF APPEALS

37. Auckland Council suggests that the issues raised in the Commission's discussion of resource management decision making, particularly in relation to potential changes to the Environment Court's appeal procedures, need to be considered in light of recent and detailed scrutiny of these same issues through various law reform and government advisory group processes. The proposal to remove Environment Court merit appeals was one of the most hotly debated aspects of the RMA law reform put forward in 2009 (ultimately enacted as the Resource Management (Simplifying and Streamlining) Amendment Act 2010).

38. The proposal was rejected at the time, but the debate has continued as part of a wider discussion within the resource management community on the issue of plan agility, and in particular the need to improve the process for the preparation of RMA planning documents (which in the case of regional or district plans comprise both policy frameworks and the regulatory mechanisms – rules - to implement policy).

39. A series of reports, discussion papers and articles released in 2012 (including the Land and Water Forum's reports on collaborative approaches to plan making and the Technical Advisory Group's second report) have continued to express concern at the time taken to get planning documents through the Schedule 1 RMA process and discuss options for amending that process. The proposals for a streamlined process for Auckland's Unitary Plan, which include enhanced consultation, a panel of independent commissioners, increased formality in the council hearings process and restrictions on appeal rights, have formed part of this debate and have attracted extensive public comment.

40. Any discussion of constraints that could be placed on the appellate jurisdiction of the Environment Court needs to be set squarely in this context. The objective of any reform in this area should be to improve planning processes in order to deliver, within an acceptable timeframe, high quality plans that give greater certainty to businesses and communities and are capable of responding to resource issues in a timely fashion.

41. Making changes to the jurisdiction of the Environment Court and the scope of existing appeal rights, on the basis that they incentivise perverse behaviour and dis-incentivise full public participation, does not provide a systemic approach to resolving the problem of cost and delays in the plan making process. As such Auckland Council respectfully suggests that the Commission refrain from making recommendations on the role of Environment Court at this time

and instead defer to the ongoing consideration of these issues occurring as part of the wider resource management reforms.

LOCAL REGULATION AND MAORI

42. Regulatory functions are often of particular interest to Maori, especially in respect of natural resources. The Commission has outlined the importance of including Maori in regulatory processes and questions whether this is happening adequately at present.

43. This is a critical issue for Auckland Council. As set out in the strategic directions of the Auckland Plan, Auckland Council is committed to enabling the Treaty of Waitangi. The development of sustainable relationships with Maori and Maori engagement in decision making, are crucial aspects of this. A number of mechanisms have been established in this regard. The Independent Maori Statutory Board (IMSB) provides advice to Council on issues of significance for Maori in Auckland, has a role in ensuring the Council acts in accordance with its statutory provisions relating to the Treaty and ensures Maori representation on governing body committees. However, it is important to note that the IMSB does not represent iwi per se. Additional engagement with iwi is undertaken through mechanisms such as collective iwi forums, voluntary co-management agreements in relation to sites of significance to Mana Whenua and the provision of resource consent application summary sheets to Mana Whenua groups. The Council is still working with Mana Whenua on these and other initiatives to determine how it can better engage with Maori on resource management decision making, other regulatory processes and, more generally, deliver against the relevant aspirations of the Auckland Plan.

44. Auckland Council has identified a number of principles that are key to effective engagement with Mana Whenua including:

    - agreed and early engagement processes
    - a commitment to provide funding commensurate with the extent of engagement requirements and the significance of specific decisions
    - information that is presented in a manner that is appropriate to the participant's level of knowledge.

45. The Commission correctly identified capacity issues as a significant impediment to the ability of smaller iwi to fully participate in the regulatory process, particularly in light of the focus on timeliness. On the other hand, however, it is also keen to streamline regulatory processes and reduce the amount of delay applicants may face. Marrying these two aspirations is likely to be challenging, especially in Auckland where 19 iwi have been officially identified. The Council is exploring ways to help build capacity both within iwi and in terms of the knowledge of its own staff, although funding constraints continue to be an issue. The Council's Maori Responsiveness Framework, for example, will introduce protocols to facilitate more effective engagement with Maori and will require all staff to undergo appropriate training.

ASSESSING THE REGULATORY PERFORMANCE OF LOCAL GOVERNMENT

46. Auckland Council supports the Commission's view that a greater focus on outcomes, rather than just processing timeframes, would result in a more balanced regulatory performance assessment framework.

47. The current focus on time frames and other transactional measures as the primary means of assessing regulatory performance (rather than focussing on the impact of regulatory activities) can result in the perverse outcome of process becoming more important than outcome. Whilst a local authority may meet its performance requirements for RMA process related timeframes, for example, this says nothing about the quality of the outcomes from those processes. Consequently, it is not uncommon for matters that should, ideally, have been fully resolved as part of the consent process, to be dealt with subsequently as a condition of consent.

48. The issues with the over emphasis on timeliness illustrates a broader point around the importance of ensuring performance assessment frameworks are tailored to reflect the purpose of the specific regulation they are to measure. This can necessitate a case by case approach to measuring the outcomes of specific regulation. In some cases national performance frameworks are appropriate, whereas in others more flexibility to fit with local circumstances is required.

APPENDIX ONE: RESPONSES TO SELECTED QUESTIONS

3.1 To what extent should local government plan an active role in pursuing regional economic development?

Local government has a significant role in pursuing regional economic development, and Auckland Council is an important example of this. Further to this, international cities expert Greg Clark (as part of his work informing the Royal Commission into Auckland Governance) identified two key roles for local government in promoting economic development:

- Ensuring that public services that have significant impact on economic development are delivered in a very robust and effective way; and
- Delivering specific economic development activities and programmes in close cooperation and collaboration with the private sector and central government.

Auckland Council (including its CCOs) plays a variety of roles and undertake a range of activities that make significant direct or indirect contributions to the achievement of economic development in Auckland and New Zealand. The range of roles played by Council includes as planners, funders, regulators, investors, leaders, partners and facilitators. Auckland Council also regularly works collaboratively and in partnership, with business, industry, employers, central government, other local government and tertiary providers to make Auckland a more desirable place to live, work, visit and invest.

Auckland Council also delivers a range of economic development activities and programmes (frequently in collaboration with central government) to enhance business collaboration and provide opportunities for growth - e.g. the Regional Partnership Programme in Auckland, which is delivered by Auckland Tourism, Events and Economic Development (ATEED) and funded by New Zealand Trade and Enterprise is a clear example of this, providing business capability assessments and facilitating capability training and the provision of R&D grants.

It has also been recognized that in order for cities to compete internationally for the people and resources they need, sources of competitive advantage such as innovation, connectivity, image and identity also need to be pursued. This is where councils can play a role in supporting such things as broadband deployment, the development of clusters and precincts in key sectors of competitive advantage, attraction of foreign direct investment and growing the visitor economy through regional marketing and event facilitation and delivery.

All this highlights the importance of Auckland's role in NZ and how we need a strong regulatory mandate to drive growth and efficiencies locally. The importance of economically strong regions is recognised by the Commission, and the OECD research it sights which highlights the importance of promoting regional growth for the national economy.

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

Yes, although no provision has been made for consideration of international commitments made by the government that have be put in place by regulation, e.g climate change, biodiversity etc.

4.2 Are the guidelines practical enough to be used in designing or evaluating regulatory regimes?

Yes, provided provision is made for variations arising in each case. For example, there may be instances where the cost benefit evaluation is challenging due to the considerations that are difficult to quantify.

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

Yes, although no provision has been made for a case study relating to the use by the local authorities of bylaws.

4.4 Should such analysis be a requirement in regulatory impact statements or be a required component of advice to Ministers when regulation is being contemplated?

Yes, although it should serve only as a guideline and provision should be made for variations, depending on circumstances.

4.5 Should the guidelines be used in evaluations of regulatory regimes?

See discussion I the body of the submission.

5.1 Do any regulatory functions lend themselves to specific grants? If so, what is it about those functions that make them suitable for specific grants?

Yes. Circumstances where the introduction of regulations or amendments to existing regulations impose costs on local authorities can arise. The type and nature of regulation can be placed on a spectrum, where:

- at one end, regulations may be invited by local government, may involve some discretion or scope for local policy and delegate a level of decision making to elected representatives in consultation with their local communities
- to the other, where regulation is merely implemented by local authorities without any discretion or delegation of local decision making

In the latter, local authorities are more in the role of delivery agents for central government. It is in this circumstance that the question of imposed costs is most at issue. Such costs may be associated with the introduction of a new or changed regulatory role and may also continue as operational costs. Another is the extent to which local authorities find themselves having to make resources available, by compromising existing financial plans. Similarly, the scale of any imposed costs can be influenced by a range of factors including:

- timeframe for implementation
- scale of resource required to implement, both human and capital
- the degree of technical skills and/or equipment that might be provided
- extent to which its introduction has been signalled or is unplanned (requiring local authorities to 'find' the resource from within existing budgets)
- extent to which the regulations might provide for objection and appeal processes or commit local authorities to participation in subsequent processes

It is suggested that each instance needs to be considered on its merits as the scale of any imposed costs will vary, and may be capable of being mitigated. For example, training, tools and other forms of assistance might be provided to local authorities to assist with the regulations introduction. Further, it is possible the regulations or amendments may include elements from both ends of the spectrum simultaneously.

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

A needs assessment for general grants could be undertaken on the basis of nature and size of the local authority and its jurisdiction. Indicators could include:

- The size of the local authority – including the quantum of customers, resource base and staff.
- The scale of the issues faced.
- The nature of the regulations (how many people are affected).
- The relative value/expense of provision (are there economies of scale achieved in larger LAs?)
- The willingness/ability to pay
- Are there any cost recoverable actions?
- Is there a specific local government failure?

7.1 What measures, or combinations of measures, would be most effective in strengthening the quality of analysis underpinning changes to the regulatory functions of local government?

7.2 What measures, or combinations of measures, would be most effective in lifting the capability of central government agencies to analyse regulations impacting on local government?

7.1 and 7.2: This is discussed in the "central government and local regulation" section of this submission. The measures the Commission points to are sound. Meaningful consultation is the key starting point – what are the objectives of the regulatory change? what options have been discounted and why? In terms of the actual analysis relevant issues include:

- what will be the distribution effect of regulation on places and communities?
- are there any unintended consequences of implementing new regulatory functions, e.g. is it assumed that the change will be adopted immediately or might people do the opposite/ take advantage of the threshold of change?
- what is the cost to local authorities both in the short and long term?

8.1 What are the benefits and costs of cooperation? Are there any studies that quantify these benefits and costs?

There are numerous benefits and costs of cooperation, however we are not aware of any studies that have specifically quantified these.

The Auckland Council is currently engaged in the Upper North Island Strategic Alliance (UNISA) and this has provided numerous benefits in terms of pooling resources and expertise to address issues of strategic cross boundary significance. For example, a major study into the future of freight in the UNISA area is underway and all of the UNISA members have contributed funding to undertake an Upper North Island Ports Study to establish future demands against existing infrastructure provision. Such work leads to cost savings and a shared common understanding of strategic issues facing the partners involved.

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

Bylaws may only be made when they are the most appropriate manner of dealing with an issue and are not a preferred way of dealing with such issues. Where contractual relationships are possible between the council or council controlled organisations and users of services these are preferred for a number of legal and practical reasons.

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

Risk based monitoring programmes are primarily used by Licensing and Compliance in the areas of Food Premise Inspections and Liquor License inspections.

For the Health and Hygiene Bylaw the licensing itself is risk based (procedures breaking the skin (tattooing) require a licence versus not breaking the skin (sun beds) do not require a licence).

The barriers to risk based monitoring tend to hinge on whether the risk in the activity being monitored can be accurately quantified.

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

Compliance with district and regional plans could be subject to more proactive monitoring. Currently the only data that is available is that where consents have been applied for and compliance monitoring has been done against the conditions of consent **or** a complaint is made. If people carry out work on their land that they consider is in accordance with the rules or if no person makes a formal complaint to the Council the activity remains unchecked. Therefore, it is unknown to what extent all sites comply with the provisions of the plans. The true scale of compliance or noncompliance with our plans is unknown or based on disproportionate information.

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

Infringement regimes for bylaws, liquor licensing should be expanded into the RMA area. RMA infringement fines are limited and many "mid-range" offences that could effectively be dealt with by infringement are not possible as the fines are too low.

Where infringement regimes exist they have continued to account for a recognizable proportion of cases. Their use has been on the rise over the time that they have been in place. Infringement notices under the Dog Control Act 1996 have continued to become a significant part of the enforcement response as the fines better match the range of offences. Under the RMA the variety of fines and level of those fines is more limited and therefore the fines "fit" less of the offences that occur. While extremely useful their use is not as extensive as in dog control.

All bylaws would be enforced more efficiently, and would therefore be more effective, if they were subject to the infringement notice regime. Without recourse to infringement notices bylaws breaches are addressed through prosecution, the associated legal costs of which are often disproportionate to the nature of the offence. Specific regulatory areas where the enforcement of bylaws would benefit from an extension of the infringement notice system include:

- The keeping of animals, birds and bees - noise, smell, dust, flies, issues offensive to occupiers of adjacent properties or a threat to health. This includes issues such as crowing roosters, the keeping of poultry, bee hives causing a nuisance.

- Public Places Bylaw - Unlicensed street traders/sale of goods/stalls in public places, hawkers, buskers, offensive behaviour, obstructions, nuisances, damage to public property.

- Signs in public places - including temporary signs, real estate signs, election signs, posters placed in breach of Bylaw. (note: signs are currently controlled by a bylaw in some areas and the District Plan in others). Currently in the former Waitakere City Council area, for example, signs are controlled by the District Plan and officers utilise the RMA infringement notice regime to deal efficiently with offences. One visit, one fine, action is prompt. By comparison the other six legacy Councils controlled signs with bylaws. Officers repeatedly have to return to the same site to convince offenders to remove signs or have to seize the signs and hold them for six months before disposal. This results in more cost and a less effective process.

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

No there is not sufficient activity. The number of fines and prosecutions for the volume of issues is still extremely low when compared with the total number of cases. Many councils rely on a single person for any one area of compliance. This person may have limited experience and is not able to manage all significant cases. If a number of significant cases require response the limited number of staff available means that the "capacity" to respond is limited.

The use of more extensive enforcement powers requires experienced and trained staff. The range of training opportunities and the breadth of experience in many places is limited. This limited experience and training limits the amount of enforcement action that is taken.

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

Yes fine levels should be reviewed. The level of the fine is supposed to provide a deterrent. However the breach of a rule in a district plan is a $300 fine. The cost of applying for a resource consent is usually in excess of 10 times this amount. Therefore the "deterrent" effect is minimal and does not impact on some offenders.

10.6 Is sufficient monitoring of liquor licences occurring? What evidence and data exists that would provide insights into the adequacy of current monitoring effort?

While there is no definition of "sufficient monitoring" for liquor licences, it is considered that the monitoring done by Auckland Council is adequate. This relates to an annual inspection and additional inspections of high risk premises.

The evidence/data available in relation to this would be the recording of the rate of compliance found upon inspection.

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

For licensing related matters the burden of proof is "beyond reasonable doubt", irrespective of the scale of the alleged offence. This also applies to infringement notice offences which are applied as if they were subject to a District Court appeal.

10.8 Is the different 'gradient' in the use of compliance options because there are missing intermediate options?

Yes, a different "gradient" in the use of compliance options occurs with most bylaws offences. Generally one can either cajole/convince an offender to comply, or seize goods, or go to a full prosecution. Due to the general low level of offence dealt with by bylaws a low level enforcement mechanism is required, i.e. an infringement notice regime.

10.9 Are the more severe penalties not being used because there is insufficient monitoring activity by LAs to build sufficient proof for their use?

No, the penalties are not related to the level of monitoring activity or collection of evidence.

The severity of penalties depends on court judgements. A bylaw prosecution for infestation of cockroaches/vermin in a food outlet (in the former Waitakere City Council area) carries a maximum penalty of $20,000. However judges typically hand down fines of $1000 - $1500. In setting the penalty the Judges also have to ensure that they are being consistent with similar penalties for similar offending.

The former Waitakere City Council obtained penalties under the Building Act up to approximately. $45,000, and up to approximately $50,000 under the RMA for major breaches of those Acts (including the imprisonment of one individual).

10.10 Why are relatively few licences varied?

Essentially because there is very little demand for variation. In relation to food premises, for example, there is very little demand from takeaway establishments seeking the necessary amendments to their licence in order to change their operations and premises to that of a restaurant.

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

The very low number of consents declined is due to a number of factors, an important one being the resource consent process improving the applications. Many applications are changed significantly either through council staff advising and negotiating better outcomes or through the imposition of agreed conditions that will ensure an acceptable outcome.

Either way the consents department prioritises communication with the applicant to ensure that the best possible application is made initially or through the process to ensure that the customer is aware of all issues that may affect them. Auckland Council engages with applicants in a number of ways including:

- Pre -application meetings are used to ensure that the developer/applicant is aware of all planning and development issues/constraints, etc on the site and what information to

provide with the application. Pre-application engagement is not a statutory process and is not governed by sections of the RMA but is a service available to customers who look to the council for information and advice both around planning and other requirements but also potential costs and fees before formally lodging their applications. At the same time, it allows council to get a feel for a proposal, to understand the customer's goals, get the right people involved, help influence outcomes, help anticipate when the application may be coming in, and the quality of the application being considered. A review of the pre application meeting process has identified that pre-applications have a positive influence on reducing both rejections when the application is lodged and further information requests. Currently Auckland Council subsidises the cost of pre-application meetings as it recognizes the value of them.

- The use of Key Account managers who act as an intermediary between the developer and the planner to ensure the customer has as smooth a path as possible through the consent process. This approach is used for identified key and regular customers such as universities, energy and telco companies, land development companies, hospitals etc
- dedicated project managers or lead planners to ensure that all consents required for a development or project are processed together in an integrated manner i.e. the structure of Auckland Council which undertakes both regional and territorial functions means we no longer have the situation where the land use consents may be granted but they still need regional consents to undertake the project.
- Initial and regular phone and email contact with the applicant by the processing planner to advise them that they will be dealing with the consent and to discuss time frames, site visits, any issues arising etc.
- sharing of conditions – before any conditions are finalized on a consent they are discussed and usually agreed with the applicant.

However, it should be noted that the Council agrees that there are a number of simple or straightforward activities (referred to as low risk in the Commission's question) that could perhaps be permitted rather than require a consent.

12.4 Overall, would it be feasible to narrow the legal scope of appeals?

If the objective of any process changes is to reduce delay and cost, while continuing to provide quality and certainty in RMA planning documents, the whole process requires scrutiny, not just the right of appeal or the jurisdiction of the Environment Court. The Court is well-respected for its specialist expertise, and provides a necessary check on decisions made under a complex statute, often by elected representatives. Those decisions often require a balance to be struck between the rights of the community and those of private property owners. Council decisions do not always achieve the right balance; the availability of judicial scrutiny for those decisions is important, and the scope of that scrutiny likely needs to extend beyond points of law in view of the fact-based judgments required under Part 2 of the RMA.

Even if plan appeals do not go to a full hearing (most do not), the Court adds value by facilitating mediation and issue resolution, often to the point where no hearing is necessary. There are many measures that could be implemented to improve the plan preparation process to the point where demands on the Court's time and expertise could naturally decrease over time.

Such a significant change to the scope of Environment Court appeals under the RMA would require careful analysis and widespread consultation, since it would undercut the Act's very clear reliance on full public participation as a fundamental touchstone of quality decision making.

12.5 Would it be feasible to narrow legal standing?

Recent reforms to the RMA have placed constraints on standing; s274 parties must now demonstrate that they have an interest greater than the public generally, and the scope for trade competitors to appeal on what are lightly disguised commercial grounds has been substantially curtailed.

Any further narrowing of standing risks a challenge to the basic principles of public participation that are integral to the RMA and to the concept of sustainable management. Planning decisions have been placed deliberately into the hands of local communities on the basis that they are best equipped to develop the regulatory framework to address the resource use issues facing them. As

a result private individuals, business owners and community groups have a far greater stake in the plan making process than in many other jurisdictions where plan making is done at a national or state level and participation is limited to submissions with no right of appeal.

The wide standing provisions in the RMA provide a level playing field for all parts of the community. Vexatious litigation in the Environment Court is rare (it would be helpful to have some research on that) and there are funding sources available now to assist those groups who would otherwise struggle to participate but who nevertheless represent an important aspect of the public interest.

Changes to the standing provisions may be technically feasible, but the more pertinent enquiry is whether they are desirable.

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

Most of the processes for making bylaws and for plan making are distinct. Both processes provide for public notice to be given and for public hearings to be held but the grounds of decision making are distinct. The features that are in common tend to be administrative, such as the internal administrative management of submissions. The bylaw making process can be improved upon by adopting the plan change hearings process.

13.1 Are there any other ways that local authorities include Maori in decision making that should be considered?

Not that the Council is aware of. However, we note the use of Relationship Agreements with Mana Whenua as a platform for overarching commitment to establishing processes for decision making engagement, including consultation under the RMA.

Invariably however, the mechanisms subsequently agreed upon involve Maori committees (Forums, committees, collectives that input to consent applications and district plan changes), co-management agreements, and committees that have JMA characteristics, RMA consent consultation protocols, the use of cultural impact assessments in decision making on consents, and district plan changes.

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

Arrangements that resource dedicated Mana Whenua presence, and engagement with Council officers over consent applications, and district plan changes – former Papakura District Council.

This arrangement involved resourcing 5 Mana Whenua groups to spend 5 hours per week at the Council. Mana Whenua representatives were available to work with officers on Council consent applications, district plan changes, and other environmental initiatives as agreed.

Efficiencies were promoted in the model because close regular contact built trust, and good will which cut down engagement processing requirements, and capitalised on Council human resources.

13.3 What more intermediate options could there be for including Maori in RMA decision-making? (In light of the current lack of delivery under existing mechanisms such as iwi management plans, s33 transfers, s36B JMAs)

Council can relate to the Commission's example of relationships developed over time culminating in voluntary co-management agreements over sites of significance to Mana Whenua.[1]

Examples of this from legacy councils include:

- transfer of ownership in council owned portion of Pukaki lagoon to Mana Whenua, and commitment to developing a reserve management plan, and co-management committee over the area
- Co-management agreement and committee for Waiomanu reserve
- Co-management agreement and committee for Pukekiwiriki Reserve

Council further notes that relationships with Mana Whenua **have** developed over many years, due in large part, to statutory requirements that necessitate consultation and engagement with Maori.

Council notes that explicit provision for Maori participation in council decision making processes is already made in the LGA. We further note that this requirement applies to any Council decision making, including that carried out under the RMA, and other statutes.

Despite this, there could be some merit in exploring explicit legislative provision requiring local authorities to **agree, and implement** with Mana Whenua best practice mechanisms for local authority and Mana Whenua decision making engagement under the RMA.

There may also be some merit in the Commission considering reforms proposed by the Waitangi Tribunal in relation to the RMA. Auckland Council has not reached a position on these matters however some initial thinking that may be helpful to the Commission is set out in the table below.

Summary of Tribunal recommendations	Initial thoughts
Iwi management plans Legislative change and other initiatives: • MFE to fund the development of iwi management plans that are capable of integration with existing RMA policies, and plans • Legislative change to require iwi / council consultation on iwi management plans, and processes for plan provisions that are not agreed • Legislative change to give agreed aspects of iwi management plans the status of other RMA policies, and plans regarding natural resource use decision making under the RMA	Council is of the view that robust iwi management plans, agreed by Council, and with the force of regional / district plans would address frustrations, uncertainties, and cost considerations arising from compliance with Treaty and Maori statutory requirements under the current regulatory regime in respect of: • consent application consultation, and • unitary plan consultation This is because iwi management plans would have the effect of regional policies, and district plans under the RMA. This will alleviate the scope and scale of consent application consultation, and unitary plan consultation required presently with Mana Whenua. Council acknowledges that long term gains in cost efficiency, and effective provision for kaitiakitanga would require intensive short to medium term resource outlay by Mana Whenua, the MFE, and Council in terms of developing, and agreeing the iwi management plans. Democratic accountability for agreement with the iwi management plans should be addressed either through: • Council's representative mandate, in which case formal statutory consultation

[1] Ngai Tahu with Environment Canterbury regarding Te Waihora

	regarding council agreement need not be carried out, or • a participatory approach, in which formal statutory consultation is carried out to inform Council's decisions about agreement or otherwise with proposed iwi management plans
National policy statements on Kaitiakitanga and Mana Whenua decision making engagement under the RMA • That MFE develop a national policy statement on Maori participation in resource management processes, including iwi resource management plans, and arrangements for kaitiaki control, partnership, and influence on environmental decision-making	While Council is proactive in its desire to enable the Treaty of Waitangi, it acknowledges that the proposed national policy statement would provide added impetus and certainty to developing a Unitary plan that delivers on kaitiaki aspirations. This is because Council's Unitary plan would have to be consistent with the proposed national policy statement.
Improved mechanisms for delivering control to Mana Whenua • amend s33 transfers, s36B JMAs, and s188 HPA provisions to remove unnecessary barriers to uptake • require local authorities to regularly review their activities regarding s33 and 36B with reports to the Parliamentary Commissioner for the Environment on reasons for using / not using these provisions.	Again, while Council will explore s33 transfers, and s36B JMAs as part of giving effect to its strategic direction to enable the Treaty of Waitangi, it acknowledges that uptake would be made easier, and impetus for uptake enhanced, by the proposed reforms.

13.4 What are some examples of decision-making systems well-tailored to Maori involvement? (The Commission is keen to hear about ways to tailor decision-making processes to the level of capability present amongst participants, without compromising the integrity of their involvement.)

In Auckland Council's experience designing decision making systems that enable good engagement, relative to participant capability includes the following principles:

Principle	Rationale
Agree engagement processes with Mana Whenua where ever possible	Identifying and agreeing engagement processes with Mana Whenua is a key means to enable each party to prioritise its resource allocation, relative to capability considerations, and the significance of proposed initiatives.
Early engagement	Frontloads Mana Whenua interests, views, and responses to proposals. Affords participants time to seek direction, and mandate on issues from their respective governance entities if required. Substantive engagement is not pressurised / compromised by formal statutory consultation timeframes.
A commitment to funding relative to engagement requirements, and the significance of decisions in relation to Mana	Where expert cultural advice is required (for instance cultural impact assessments) funding is necessary for Mana Whenua to

Whenua interests	produce it, or outsource production where capability within Mana Whenua organisations is unavailable. As part of cultural impact assessments, Mana Whenua may wish to commission their own technical advice, such as archaeological / or engineering reports. General Mana Whenua participation in forums, and committees requires consideration of resourcing time spent at meetings; and time spent in meeting preparation, and follow up. Where engagement requires Mana Whenua governance sign off to proposals, or initiatives, costs for this governance engagement need to be addressed. In general terms, the higher the impact of proposals or initiatives on Mana Whenua interests, the higher, the engagement requirements, and therefore costs.
Information provision in ways that suit the participants, and the participants level of knowledge about the subject matter of engagement	Papers, presentations, and verbal information should be easy to understand, and clearly describe the potential relevance of the subject matter to Mana Whenua interests. Mana Whenua have a preference for face to face engagement, supported by written information supplied prior to meetings.

14.1 How have LAs used the SOLGM guide on performance management frameworks - or other guidance material - to assess LG regulatory performance?

The SOLGM material is often referenced in the development of performance measures, levels of service etc. Other guidance material used includes the NAMS documentation.

14.3 Have LAs encountered difficulties in dealing with different performance assessment frameworks across different forms of regulation? Which forms of regulation do a good job of establishing performance assessment frameworks, in legislation or by other means?

The performance frameworks in relation to the LGA and the RMA differ and reflect the purpose of specific legislation. Aspects of the RMA framework are arguably more difficult than the LGA i.e. the effectiveness and efficiency components. Other frameworks offer flexibility i.e. the former provisions in the LGA regarding community outcomes reporting. Broadly speaking the performance frameworks need to reflect the purpose for which they are set up i.e. if national comparisons are something to be achieved then that will necessarily drive a performance framework that is built on certain components over others.