LOCAL GOVERNMENT REGULATORY PERFORMANCE

SUBMISSION TO THE NEW ZEALAND PRODUCTIVITY COMMISSION

31 AUGUST 2012

BACKGROUND

The Institution of Professional Engineers New Zealand (IPENZ) is the lead national professional body representing the engineering profession in New Zealand. It has approximately 13,000 Members, including a cross-section from engineering students, to practising engineers, to senior Members in positions of responsibility in business. IPENZ is non-aligned and seeks to contribute to the community in matters of national interest giving a learned view on important issues, independent of any commercial interest.

GENERAL

This submission doesn't address all the 65 questions posed in the Issues Document, but focuses on some key issues. For clarity, the issues chosen have been associated with a relevant question within a section, but inevitably the comments do not necessarily align fully with the question.

The Commission should also be aware of a Department of Internal Affairs regulatory guidance document designed to provide guidance to central government officials – "Policy Development Guidelines for Regulatory Functions Involving Local Government"; a copy is attached to this submission.

These Guidelines outline three broad reasons why it may be desirable to involve local authorities in implementing central government regulatory policy. They are:

- Local discretion – to enable choice to be exercised on the limits and extent of the regulatory regime - local objectives may not be best served by a regulatory regime
- Local circumstances – attaining national policy objectives may require implementation that is tailored to local circumstances
- Information or resourcing synergies – local authority implementation may be most cost effective if delivered alongside other regulatory activities.

These issues are generally covered in the Commission's Issues Paper, and it is a useful reference document.

LOCAL GOVERNMENT AND REGULATION (SECTION 3)

Question 4: Are there other statutes that confer significant regulatory responsibilities on local government.

The obvious statute that is missing is the Local Government Act 1974. The relevant Parts that contain regulatory powers are:

- Part 21 – Roads, service lanes and access ways. This has regulatory powers over "private" roads and important safety provisions (e.g. preventing growth encroaching over public roads). In the past there have been proposals to put Part 21 in a Roading Management Powers Act with the current Government Roading Powers Act 1989 provisions that relate to State Highways. A draft Bill has been prepared by the Ministry of Transport and has not had priority, but is long overdue for enactment.
- Part 26 – Sewerage and stormwater drainage by territorial authorities. For example this has powers relating to private drains.
- Part 29 and Part 29A – Land drainage and rivers clearance. Powers include the removal of obstructions from privately owned drainage channels.

These powers should be consolidated in the Local Government Act 2002 and priority be given to enacting the Roading Management Powers Bill.

REGULATORY VARIATION (SECTION 4)

Question 10: Does the way in which a local authority chooses to exercise its regulatory powers – through bylaws or through its District Plan – lead to differences in effectiveness and outcomes for communities?

Differences between parties in within District Plan processes are common – it is often not recognised that planning decision-making is often about dispute resolution between the parties - conflicts and differences of opinion are unavoidable. The emphasis needs to be on providing the best opportunities for resolving these differences and reaching agreement, and recognising this is not feasible in all cases, appeal mechanisms are needed as a backstop.

As a general concept, for the RMA we consider that in many cases (national) consistency is not necessarily best for New Zealand as decisions are based on local value judgements. This is entirely appropriate. We would be concerned if decisions were to be nationally consistent as what is appropriate and acceptable to people in (for example) Auckland is not necessarily what would be appropriate and/or acceptable to people in Invercargill. Thus, we consider it important that the RMA continue to allow for local consideration and decision-making of applications.

WHO SHOULD REGULATE? (SECTION 5)

Question 23: Which other factors might be important for considering whether a regulatory function should be undertaken locally or centrally?

Currently the areas of local government regulation where there is little or no scope for local input include building control, dog control, litter, liquor licensing, and food hygiene. Councils are essentially the delivery arm for central government regulation. In our view what is common about these regulations is they are health and safety related – the rationale is that the same standard should apply throughout New Zealand.

Whether by accident or by design, it seems appropriate that where health and safety issues are involved, regulations should be designed (not necessarily delivered) at the national level.

However, there are many cases of the need for local value judgements to be incorporated within regulation, and by their nature these vary from local authority to local authority. Appropriately these regulatory functions are devolved to local government. They include land use planning (regional and district plans), numbers

of gambling machines, locations of brothels, noise control, and local parking restrictions. It is necessary in a number of cases that local community regulations fall within national regulatory frameworks - particularly regional and district planning. Again while the regulation should be designed at the local level, it may not necessarily be delivered at the local level.

Deciding whether a regulatory function should be undertaken locally or centrally the following issues need to be considered:

- Regulation should be designed nationally if there are health and safety issues involved
- Regulation should be designed locally if local value judgements are involved
- Regulatory design requires case by case decisions on whether community based regulations need to be made within national frameworks – this requires clarity and transparency on the respective national and local interests
- Decisions on delivery i.e. approvals, monitoring and enforcement, need to be based on cost efficiency grounds – economies of scale and scope, and good customer service.

Therefore the issues of who designs and who delivers regulation need to be considered separately for each form of regulation.

The missing factor is providing good customer service, to ensure, for example that on-site inspections are timely.

In particular we have views on where building regulation should be delivered. Due to concerns about Building Consent Authorities' (BCAs') capability, we support a move towards a national authority, potentially with regional offices to achieve consistency of application of the Building Code. Alternatively local authority amalgamations will enable in-house knowledge to be built up and retained, and thus increase consistency of interpretation and application across the country. This is particularly important for complex commercial work for which BCAs need more expertise than for residential work.

While we prefer delivery national authority delivery, we note building control will still require local input as there are a number of site-specific aspects that must be considered in approving building construction. These include site topography, foundation conditions, wind and snow conditions and the configuration of water, wastewater and stormwater services. To ensure appropriate consideration of site-specific aspects we recommend local input take place via staff in the regional branches of the national BCA.

GETTING REGULATION RIGHT (SECTION 6)

We note the Issues Document refers to the characteristics of good regulation, and draw the Commission's attention to a paper by Peter Mumford on best practice regulation[i].

The key attributes of best practice regulation identified in this paper are growth supporting, proportional, flexible and durable, certain and predictable, transparent and accountable and capable regulators.

Question 27: Does the local government regulation-making process lead to good regulation? If there is evidence to show that it does not work, how could it be improved?

The regulatory-making processes of local government are intricately linked to central government regulatory-making processes and standard setting. Standards, developed by Standards NZ without government funding, are often cited in regulation. This is particularly relevant for the Building Act 2004 and Resource Management Act 1991.

In the case of the Building Act 2004 there are Standards for calculating wind, snow and earthquake loads on buildings and the way the loads interact with the timber, steel, or concrete parts of structures. These Standards contribute to demonstrating compliance with the Building Code. The largest issue associated with the use of Standards occurs when a slight variation of a New Zealand Standard is used by a BCA. This creates confusion, and lowers the likelihood of correct application of the approved regulated Standard. We do not consider it appropriate for a regulator (e.g. a BCA) to create a slightly modified variant to a Standard.

In the Resource Management Act 1991, the standards referred to in District Plans include the Code of Practice for Urban Subdivision (NZS 4404:2004). In turn this Standard refers to a number of standards relating to earthworks, roading, water supply, wastewater and stormwater.

An important issue is the Standards New Zealand industry consensus methodology that is used for developing what is essentially regulation. For example we are aware of some practical issues within the development process that many of our Members are involved in. Some Standards are very intricate and with the need to achieve consensus, this can mean alternatives are inserted in a Standard, resulting in inconsistency, ambiguity, and misinterpretation. Committee membership is also important. A balanced committee must be sought and there must be strong protocols in place to ensure resolution of issues (such as those that arise when a committee is dominated by an organisation, or where there are strongly polarised views, or where commercial interests are given undue weight).

The key issue with Standards, is that regulations may inadvertently be reliant on Standards that are (in effect) industry self regulation, and incorporate the flaws inherent in consensus agreements.

New Zealand Standards may also contain implicit public policy objectives. The example we have raised with the Canterbury Royal Commission is that current commercial building standards implicitly have an objective of protecting lives; the question is raised as to whether the objective should be more explicit and set at a higher level, such as ensuring building serviceability post earthquake events.

These interdependencies need to be better understood, and regulation – whether central government devolved to local government, or local government, needs to have explicit public policy objectives, and needs to be in alignment, in policy terms, with the Standards that are cited.

Question 30: How might central government better work with local authorities on the design, implementation and funding of delegated regulatory functions?

Central government design of regulation and local government implementation would be improved if the legislation contained explicit regulatory policy objectives. We note that the legislation relating to dog control, food hygiene, litter, and liquor licensing do not include purpose statements setting out Government's policy objectives. These omissions do not provide a sound foundation for good regulation, or for local government implementation.

Question 33: To what extent is the effective implementation of regulations delegated to local government hampered by capability issues in local authorities? Do capability issues vary between areas of regulation?

There are significant variations in regulatory practice due to varying levels of capability in local authorities.

Building

Under the Building Act 2004, verification methods and alternative solutions in particular require the regulator and decision maker to be highly competent and have significant skills. Few BCAs can reasonably be expected to hold the necessary skills required and therefore many outsource this function. For complex commercial building work extensive expertise may also be required and the level of expertise needed is also often beyond that of the average BCA.

The BCA accreditation process led by the Department of Building and Housing does not appear to have led to improved consistency. For example when the seven Auckland local authorities combined it was apparent that one consent application would have received different treatment depending on which of the previous local authorities it was lodged with.

Acoustics

In the acoustics field the skills available to BCAs are very limited, and even small environmental noise assessments of residential sound insulation work are contracted out – with varying responses depending on the consultant involved.

Planning

There is also an issue with councillors being involved as “independent” Planning Commissioners. This is different to councillors who are on a planning committee but where councillors are attempting to act independently. Although there are accreditation processes in place to ensure Commissioners have the requisite skills, the fundamental issue is that councillors are unable to be truly independent as they cannot realistically divorce themselves from their role as community representatives. An important element of independence is being seen to be independent.

Question 37: Are opportunities for regulatory co-ordination being missed?

For infrastructure, currently some projects trigger consents and approvals under a range of legislation. These include:

- The Resource Management Act 1991 – designations are required by Requiring Authorities, and resource consents are required for most infrastructure projects. With the exception of proposals of national significance, decisions may be appealed to the Environment Court.
- The Building Act 2004 – building consents are needed for any structure deemed to be a building
- The Historic Places Act 1993 – the Historic Places Trust can set conditions for archaeological sites and these may be appealed to the Environment Court
- The Reserves Act 1977 – the Minister of Conservation has wide-ranging powers in the control and management of reserves

- The Local Government Act 1974 – road stopping (Schedule 10) – if the council decides against objections, they are required to be considered by the Environment Court
- The Public Works Act 1981 – a person with interest in the land intended to be taken may object to the Environment Court.

Submitters can use this range of legislation to appeal against a project a number of times. This causes lengthy delays and increases costs.

Larger roading projects can also require building consents for each separate structure, such as bridges, culverts and retaining walls. It would be a considerable improvement to consolidate the building consent requirements for a package of "buildings" on such a project. This would require amendments to the Building Act 2004.

IPENZ believes the range of legislation impacting on infrastructure – particularly infrastructure of national significance, should be rationalized and consolidated so projects are subjected to one approval process and one appeal process. This would provide more streamlined and better integrated processes and more certainty for applicants.

Question 41: In what ways are regulatory areas unnecessarily costly?

While it is important that local regulation is tailored to the needs of local communities, there are some instances, particularly where bylaws are used, where the administrative costs for small changes can be excessive.

An example is the Dog Control Act 1996 where small changes to dog exercise areas, under the provisions of Section 20, require the use of the Special Consultative Procedures under Section 156 of the Local Government Act 2002. Also local authorities are prohibited from delegating bylaw making powers to sub-committees under Section 161; hence these have to be approved by the full council.

Although the example is based on the Dog Control Act 1996, the key point is that amending local regulations that use a bylaw mechanism is a very cumbersome process, even for quite small amendments.

HOW SHOULD REGULATORY PERFORMANCE BE ASSESSED? (SECTION 7)

The Issues Document outlines some better practice features for the design of performance indicators. This is a reasonably well traversed area and we draw the Commissions attention to three references:

- Report of the Controller and Auditor General – *Local Government: Improving the Usefulness of Annual Reports* – September 2011
- The Controller and Auditor General 2009: *Forecast no-financial information reports: Guidance for Entities*
- Institute of Chartered Accountants of New Zealand 2002: *Technical Practice Aid No.9 Service Performance Reporting*.

The Commission will also probably be aware that the Department of Internal Affairs is currently designing standard performance measures relating to infrastructure, under the provisions of Section 261B of the Local Government Act 2002.

We are fully supportive of developing performance indicators that provide a good overall picture of performance, and allow comparisons between local authorities.

One of the issues not raised is the compliance costs of collecting data to enable performance to be adequately reported. Another important point is that often an absolute figure for performance has little meaning, whereas showing a trend conveys much more contextual information. We suggest that trends over five years be reported.

It is also important to recognise that KPIs are not the sole source of information on performance. KPIs, particularly where non-compliance is reported, needs to be accompanied by management reporting or a commentary. Without this, performance measures can convey a false picture of performance. For example the Ministry for the Environment's 2010/2011 survey of RMA performance[ii] shows there has been an improvement in the compliance with statutory time limits and has now reached 95% - "the highest than in any other survey year". What the survey doesn't say is that this is related to a lower number of consent applications being processed (arising from the downturn in the economy), rather than improved performance.

Therefore performance measures, particularly if they are standardized, need to be accompanied by guidance notes that should include the need to show trends, the need for an associated commentary, and on interpretation issues.

We are aware that the Ministry for the Environment has been investigating improvements to environmental reporting including the respective roles of the Ministry, the Environmental Protection Agency, regional councils and the Parliamentary Commissioner for the Environment. Our understanding is that amendments to the RMA are being proposed and we suggest the Commission draw on this analysis.

CONCLUSION

IPENZ appreciates the opportunity to make this submission and is able to provide further clarification if required.

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[i] Mumford P. (2011), Best Practice Regulation: Setting Targets and Detecting Vulnerability, *Policy Quarterly, Vol.* 7 36-47.

[ii] Ministry for the Environment, 2011, *Resource Management Act: Survey of Local Authorities 2010/2011*: Ministry for the Environment.