

# Submission: *Towards Better Regulation – Draft Report*

Phil McDermott, 24 January 2013

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## 1 Preamble

This section provides an overview of the Productivity Commission report and provides some generic suggestions. These include adaptation of an approach based on principles to one of “principled pragmatism”, going beyond theory and the impulse for reform to addressing the institutional and capability constraints facing councils and aims primarily to improve the way things are done.

The second section (page 5) provides a review of the Productivity Commission report. The third section (page 18) provides a summary of conclusions arising from this review.

### 1.1 A Whole of Government Approach

The whole of government approach favoured by the Commission is welcomed as a framework for analysing the trade-offs between the localisation of regulatory decisions (and consequent actions) and potential efficiencies available from centralised, large scale production of regulatory services.

***This approach is relevant to the current Constitutional Review and is likely to be most effective if the Commission is able to make a direct connection and contribution to that Review.***

### 1.2 Addressing the duality of the impact of regulation

The terms of reference focus on the productivity of local government as a regulatory agency: how efficiently does it make, implement, and enforce regulations? In addressing this question it seems important to determine how the resulting changes in the regulatory regime impact on “community productivity” – the capacity of businesses, households, and individuals to achieve more with less under a particular regulation or regulatory regime. If the cost of making regulations is falling but they are lifting costs or uncertainty in the community, the net impact may be to reduce aggregate (local, regional, national) productivity.

<p><i>Need to consider the impact of regulations on aggregate productivity as well as the cost of producing and promulgating them</i></p>
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The Commission appears to have focused on the productivity of regulation-making (although addresses the quality of regulations through reference to Regulation Impact Assessment).

It is suggested that the final assessment of options to lift the **quality of regulation-making** should consider and reflect **the quality of regulation** relative to the community’s wider needs; i.e., supplement a whole of government approach with a whole of society perspective.

### 1.3 Key Principles - local democracy and subsidiarity

The Draft Report focuses on local democracy, drawing heavily on the principle of vertical subsidiarity. This holds that decision-making powers, responsibilities and tasks should reside with the least centralised competent authority (level of government). I fully support these two principles – one constitutional (promoting local democracy) and the other organisational (assigning responsibilities to the institutions best placed to weigh up options and consequences).

The Commission also advances the argument that the policy-making body should shoulder responsibility for implementation, enforcement, and monitoring. The reason for combining policy and operations is that “*risk should be allocated to those parties able to manage it through the actions they are able to take*”. This is a third principle informing the Commission’s analysis; the decision-making body should carry the costs of poor decisions.

Principles are often difficult to translate into practice, particularly in a democratic environment which encourages short-termism. Public sector financial accountability is not as straightforward as this third principle suggests. When representatives are elected to make decisions on behalf of the

*Difficulty of aligning political goals with minimising intervention and its costs*

community political risk (loss of electoral support) and economic and fiscal risk (low productivity and high taxes resulting from poor public resource use) tend to be mis-

aligned. Indeed, loose fiscal policy and a populist approach to regulation may boost electoral support even if they result in inefficient investment and over-regulation.

*Excessive consultation may increase public expectations for intervention*

Over-emphasis on consultation to deliver local democracy encourages politicians are encouraged to pander to the cargo-cultish expectations of constituents.

Inflation of public expectations is one of the dilemmas of open ended consultation which can lead to policy/regulatory decisions with adverse long-term impacts on council (and community) productivity.

### 1.3.1 Principled Pragmatism

I have been involved closely in local government reorganisation, review, and reforms and providing advice on governance, planning, policy and investment to councils for 25 years. I remain frustrated that none of the New Zealand reform initiatives have addressed directly the challenges of achieving quality decisions despite addressing organisation, governance, and process issues that might be expected to improve decision-making capacity. Consequently, I favour an approach that tempers

*Need to address realities of policy-and regulation-making shortcomings and not simply redesign institutions and processes*

principles with pragmatism. The Commission has an opportunity to take a lead in this with recommendations that might shift the behaviour of the authorities towards better regulatory outcomes.

A pragmatic approach recognises that multiple objectives, bounded rationality, conflicting interests and motivations, different organisational cultures, and individual agendas mean that political and policy decisions may be ill-founded even if they conform to appropriate practice. In my experience,

*Differences in capacity, competency and experience, not just local conditions, shape regulatory regimes*

differences among councils reflect differences in this organisational milieu as much as differences in local circumstance (the Draft Report over-emphasises the latter in my view).

There may be measures that can be taken to reduce the impact of political and organisational culture on policy outcomes, and these have been addressed in the past: for example, clarifying governance and management structures (1989); enhancing reporting , planning, and financial transparency (1996, 2001); prescribing appropriate processes for decision making (2001); and increasing community input (2001).

## 1.4 Separating regulation-making from implementation

One principle that should be set aside under a pragmatic-realist approach is that of combining policy making with operational responsibilities within the same organisation. Separating policy from implementation makes more sense, and would protect gains that have been made in transparency and accountability through past reforms.

Aiming to internalise policy development and implementation in a single agency underlay the Royal Commission's case for a single Auckland council. However, this creates a challenge of significant structural challenges and management tensions associated with organisations that tend to be monolithic in structure, operate in multiple markets and technologies, and embody diverse cultures and capacities. There are frequently internal contradiction and external inconsistencies in such organisations, in which balancing internal and external alignment is a particular challenge. For example, infrastructure investment might transgress environmental regulation, or economic or social programmes (e.g., affordable housing) may be frustrated by zoning rules (a problem that led to a review and reform of the Auckland Regional Council in 1991 and continues to challenge Auckland Council today).

*The challenge of internalising responsibility in large multi-purpose organisations*

Separation of policy from implementation also introduces the principle of horizontal subsidiarity. Through this the action arising from a policy (whether relating to service delivery or regulation) is undertaken by the agency best placed to implement it. This may be a private or public, for- or not-for profit, voluntary, local, or central organisation. Horizontal subsidiarity increases the opportunity for joint purchasing by local government units which among other things provides access to economies of scale without reducing the responsiveness and transparency required for local democracy.

*Horizontal subsidiarity exploits different competencies of different organisations for implementing regulation*

The alternative, internalising policy development and delivery to achieve economies of scale, will be manifest in a lack of coordination among functional and disciplinary divisions within a large council, diseconomies of scale as a result (reflecting the need for multiple tiers of management and the costs of internal coordination), loss of transparency and local accountability, and a propensity to over-regulate.

*There is a trade of between achieving efficiencies based on economies of scale and effective regulation based on local engagement and responsiveness*

There may be structural measures that can resolve some of the contradictions between the requirements of local democracy for responsive regulation and the more rigid and necessarily bureaucratic (even-handed) strictures of large scale delivery. However, these tend towards complicated matrix management demands and diminished responsiveness to diversity and change in a council's external task environment – the community in its physical setting. In the Auckland case, there continue to be mixed messages over the relevance and effectiveness of local boards, and the policy and regulatory roles of agencies like Auckland Transport and Watercare Services.

*Management challenges of large scale, multi-purpose public service delivery and regulation*

Ultimately, realising the advantages of a focused and responsive policy organisation and the efficiencies of large scale service delivery might best be achieved by a combination of vertical and horizontal subsidiarity – assigning policy development to the lowest level of competent (and

*Principle pragmatism - a practical response to bounded rationality and institutional inertia*

democratic) authority while allowing that efficient delivery (including actioning, monitoring, and enforcing regulations) may be best provided by third parties.

“Principled pragmatism” recognises the reality of organisational constraints and the bounded and qualified rationality of policy makers (officers and politicians, governors and managers) in the search for most effective outcomes from the Commission’s current review – increased council productivity and improved regulation that does not unnecessarily reduce aggregate (community-wide) productivity. Reform might not be the answer – we have had plenty of that over the past two decades. Just doing things better might be.

## 2 Review

This section addresses some of the sections, questions, and issues raised in the Draft Report.

### 2.1 Section 3: Diversity across local authorities

Different physical endowments are a given. So too are variations in population and economic structure. However, the latter are dynamic and it is important not to adopt a deterministic approach that holds that local government effectiveness and efficiency is determined simply by variations in economic and demographic circumstances and prospects at a given point in time.

*Local regulation will reflect the local setting broadly defined and changing circumstances.*

Rather, different circumstances will influence the weight given to different regulatory domains at any one time. High growth areas may need to concentrate on regulations pertaining to physical development; low growth areas more on social capital. It follows that the balance among regulatory priorities will shift over time.

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

The Commission's preoccupation with the role of councils in pursuing regional economic development reflects an on-going debate related to the role of government generally. This has been given new life over the past decade by the adoption by some officers and advisors of the New Economic Geography paradigm which holds that, independent of history and circumstance, inter-urban dynamics will create a tendency for concentration and centralisation of public and private economic resources. It has revived (and revamped) the 1960/70s view that local and regional government could be active and effective economic agents, in this case on the grounds that they

*The New Economic Geography – promoting agglomeration as the new economic mission for local councils*

should pursue policy that will give rise to external economies of scale by encouraging the agglomeration and densification of economic activity.

This view of economic development is open to challenge, raising the possibility that that adherence to it could lead to inappropriate redirection of resources and regulation in local government .

It might be argued that in the case of economic development less regulation is generally more. There continues to be a role for local development agencies, but attempts to promote growth through regulation (relating to zoning, for example) may prove to be ill-founded and counter-productive. The challenge for pro-development councils may be to reduce the burden of regulation without compromising environmental and social values, facilitating rather than seeking to initiate or

*Can we regulate for growth? And should we?*

shape economic growth. Either way, the Draft Report appears to over-emphasise the possible role of councils in promoting development through regulation.

#### 2.1.2 Q3.1 To what extent should local government play an active role in fulfilling its mandate to pursue regional economic development?

This depends on the resources and leverage available to a council and its political mandate. A more germane variation on this question is:

***how might councils allocate resources (funds, organisational capacity, and time) among the four well-beings in the Local Government Act?***

*Need to establish regulatory priorities*

And, what are the grounds for favouring one “well-being” over another? Such a decision needs to reflect local circumstance, the capacity of the council to develop and implement effective and relevant regulations, and an evaluation covering the probability of success, the cost of failure, and opportunity costs arising from a given distribution of resources (including regulatory resources) among other things.

The regulatory levers for promoting economic growth in particular are in any case limited. They are most likely to revolve around zoning and building. For example, it can be argued that the high cost of industrial land arising from a highly regulated approach to zoning have discouraged industrial investment in Auckland where employment has tended to lag other parts of the country.

## **2.2 Section 4: Allocating regulatory responsibilities**

### **2.2.1 The Guideline**

The guideline is principled and logical but applying it will be highly demanding on resources, information, and technical competence. It may be that certain regulatory domains should be allocated by prescription and subject to decision-guidelines (and/or NPS) that limit local discretion and variation around national standards and guidelines. This would reinforce a sense of

*Initial screening to determine regulatory domains subject to central resolution*

proportionality that needs to be applied to the process, which would then be applied only to locally distinctive and significant matters by councils themselves.

*Preliminary screening to identify domains primarily subject to local regulation – recognising the propensity for councils to look to government for guidance*

This is in part because most questions incorporated into the guidelines (page 59) can generally be resolved nationally (either by central government or by central government collaborating with local government) for generic areas subject to regulatory intervention.

Other areas will call for a much more sensitive approach to local circumstance and preferences. However, the Draft Report is written as if local variation is all-pervasive. It is notable that with the passing of the Resource Management Act in 1991 many councils actually sought more rather than less guidance from central government which, in turn, resisted as it promoted the principle of local discretion. Consequently this: (1) encouraged planners within councils to adapt practice developed under the Town and Country Planning Act to the new resource management environment with mixed outcomes, (2) saw the Environment Court take the lead in determining environmental/developmental trade-offs in a number of areas, and (3) led to an ongoing series of RMA amendments to iron out mainly procedural and occasionally substantive issues.

### **2.2.2 Initial Use and Refinement of Guidelines**

The Productivity Commission could take the lead in applying the principles outlined (subject to any modifications accepted as a result of submissions) across the activities identified in Table 2.1 to establish a preliminary allocation of regulatory activities by level of government (by way of a

*Productivity Commission could take the lead in preliminary allocation between national and local authorities*

discussion document, perhaps). The onus would then be on local government and other agencies and interested parties to demonstrate why some (if any) may need to be reclassified.

### 2.2.3 Regulatory Impact Statements

Regulatory Impact Statements undertaken at central government level vary greatly in quality, as do their equivalents in local government: the Section 32 analyses prepared under the Resource Management Act. All too often they do little more than go through the motions with insufficient

*RIS and Section 32 analyses of variable quality*

analysis to enable the costs and benefits to be weighed up and fully informed decisions to be made.

Developing and applying a pro forma RIS across the local government domain (Table 2.1) on a consistent basis to justify the high order separation suggested above would be a useful starting point.<sup>1</sup> Consequently activities subject to regional or local regulation can be subjected to local RIS in

*Develop capacity first through national screening and then apply locally*

their own right, qualified, however, by the requirement for competent and rigorous analysis.

## 2.3 Section 5: The funding of regulation

The assumption of new functions by local government is a matter of discretion and subject to community consultation. As the evidence suggests, there has not been a significant movement to expand local government functions despite the provisions of the LGA 2002 and the claims of councils, There has perhaps been a shift in slower growing communities to more involvement in social infrastructure as demands on network and physical infrastructure have scaled back.

Regular referral by local government to an unfunded mandate is most likely a response to changing standards and performance expectations rather than to a raft of new areas of regulation. It need not be a major source of additional costs. The cause of increasing regulatory costs needs careful

*Is the unfunded mandate illusory? Is the issue one of higher expectations and standards for the existing mandate?*

analysis rather than ready acceptance of the unfunded mandate argument. Nor should that argument be accepted as an excuse for under-performance.

Seeking additional national guidelines and exchanging good practice should help achieve higher standards through councils adopting continuous improvement practices. Adopting quality management processes is generally associated with superior organisational performance and the failure to do so a mark of inertia. This is particularly relevant in the public sector where the forces of

*Guidelines, good practice, and quality management programmes to achieve cost effective regulation of higher standards*

inertia are potentially more entrenched but where adoption of higher standards and better practice could reduce costs and enhance performance.

### 2.3.1 Q5.1, Q5.2 Specific and general grants

<sup>1</sup> It would also be useful to identify redundant or unnecessary regulation: the Draft Report as it stands does not highlight the prospects for streamlining and simplification to reduce the burden of regulation without significantly altering outcomes.

The allocation of responsibility for regulation making – including setting standards – should influence the mix of general and specific grants and local funding. Where standards are set nationally or where they are required to conform to international standards funding should be by the taxpayer.

*Maintaining national standards justifies taxpayer funding – with government discretion as to how much to fund councils to reach them*

This may call for some discretionary variation to enable all councils to reach the requisite standard regardless of local capacity. Where this happens, there is a case for central government to maintain a watching brief over a council's regulatory procedures and performance.

Specific grants would reflect the variable nature of local conditions (rather than capacity) influencing the ability to attain national standards: the kiwi habitat case study is a good example.

Where there is local discretion over whether to regulate and the form that regulation might take, local funding is appropriate (with provision for equalisation or adjustment where the level and

*Funding local regulation locally ensures local accountability*

nature of overspill between jurisdictions makes it absolutely necessary). This facilitates local democracy and ensures political accountability.

### 2.3.2 Section 7: Regulation making by central government

The discussion reinforces the sense of fragmentation that confuses the technical arguments (and principles) around the vertical allocation of regulatory functions with the sort of patch protection and finger pointing that undermines the capacity to collaborate across levels of government. This is compounded by the fact that the mandate for different levels of government does vary and requires

*Fragmentation and patch protection may currently limit collaboration*

an open approach at all levels to reconciling objectives as a precursor to aligning responsibilities.

Collaboration may be easier to achieve horizontally (through collaboration across councils) than vertically. On these grounds, it is important that the vertical allocation exercise is done well and consistently at the outset. This is most likely to be through central government initiating changes

*Vertical collaboration best if central government takes the lead*

and taking responsibility for managing the dialogue, as illustrated in the Case Study in [Box 7.2](#). This illustrates that effective engagement can be achieved without compulsion or prescription.

Engagement might best commence with a commitment to rigorous analysis so that the purpose of

*Engagement enhanced if founded on rigorous analysis rather than simply a search for consensus*

the initiative and scope for collaboration is clear to all parties. The alternative of seeking common ground around which consensus might be fashioned is likely to result in compromise, omission, and weak regulation.

### 2.3.3 Q7.1 Strengthening the quality of analysis underpinning changes to the regulatory functions of local government

*Preconditions for quality regulation*

The measures proposed in [Table 7.1](#) for strengthening the use of existing procedures are favoured (1, 2, 3 and perhaps 4) are preferred to the establishment of additional functions and bodies. However, these options should ideally be implemented in a regime which deals explicitly with:



- (1) **Proportionality:** if the quality of analysis is to be lifted without creating demands for additional resources and reducing the flexibility of regulating authorities, the process should not be applied to “trivial” regulation. This implies some form of pre-screening and clarity of understanding between ministers and officials of outcomes and significance.
- (2) **Capacity:** an improved quality of regulation based on competent policy analysis should be pursued across the board and not simply associated with regulations affecting local government. This implies a shift in values and capability within existing departments that will not be achieved simply by creating new agencies but will, if achieved, enhance mutual understanding and respect between central and local government.
- (3) **Commitment:** having departments “sign up” to quality policy analysis means changing attitudes and behaviour throughout the organisation which need also to be reflected in governance arrangements, CE contracts, and staff recruitment, training, and promotion. Under these circumstances RIS will reflect the quality of thinking and analysis within the department as a whole and not emerge as compilations of variable quality after the event.
- (4) **Collaboration:** a key component of quality policy analysis is the capacity to recognise and engage with affected parties. Both will be improved by the greater understanding and clarity that should result from improved policy analysis and be accompanied by a willingness to collaborate through inter-departmental arrangements (before proposed regulations are tabled with Treasury or the Cabinet Committee).

Better regulation should contribute to the productivity of government generally. With commitment to quality regulation by the executive and departments, there should be no need for additional agencies to audit and enforce: the associated disciplines can be achieved by better collaboration horizontally (across departments) and, where appropriate, vertically (across levels of government).

### 2.3.4 Q7.2 Measures to lift the capability of central government agencies to analyse regulations impacting on local government

**Partnerships** to develop policy and regulations are strongly endorsed. Partnerships pool expertise and understanding, require agencies to align objectives, and gives them a joint commitment to the outcome, including implementation, based on a shared understanding of what can be achieved.

*Partnerships to align objectives and resources*

Partnership should also take advantage of and operate within existing structures without requiring proliferation of agencies or positions.

**Secondments** are also recommended, not simply for the development of regulation but as an important means of professional development. It is too easy for people to enter the workforce in a particular agency or institutional domain (central or local government, public or private business, voluntary sector, etc.) and neither experience nor appreciate the cultures, motivations, competencies, and operations pertaining to the other domains which their actions (including

*Secondments to promote long-term gains in capabilities*

regulations) impinge on. The notion of secondment as training means it should be substantive and meaningful, and not simply a short-term exchange.

**Best practice guidance** material is a useful resource but nothing more. Development of and access to such material should be seen as part of a wider a commitment to quality improvement and not as something which will in itself change the quality of policy making and regulation.

*Best practice guidance as resource material – not an end in itself*

**Training** for MPs to provide an understanding of regulation and regulatory processes should be seen as a wider commitment to training around governance roles and behaviours generally which is essential in local government given the diverse backgrounds of candidates for elected positions.

*Understanding governance roles and responsibilities*

**Strengthening the DIA mandate** would be a superfluous move if the quality of decision making in this area improves generally. The LGA already provides for dealing with poorly performing councils.

*No change in mandate called for*

The aim is to engender a commitment to better performance in the first place.

**Improving availability of data** is not necessary and unlikely to lift the quality of regulation compared with better analysis and monitoring by the relevant agencies. Statistics New Zealand and the reporting requirements placed on central and local government mean that excellent data is readily available if councils and departments are prepared to use it and not rely on supposition, groupthink, precedent, or prejudice to craft (local) regulations.

*Data already exists*

### 2.3.5 Improving engagement on regulatory issues

There are already many examples of formal and informal engagement (including “leader” forums) in local government. In addition, LGNZ is already a highly informed and effective lobby group for the sector, and SOLGM an excellent voice for local government management.

*Channels already in place – just need to be used to good effect*

The channels already exist for better consultation. The question is how prepared central government is to use them.

### 2.3.6 The risks around consultation

The following comments are based on observation, analysis, and consultation around council engagement with communities through consultation, as well as running a research business that specialised in qualitative and quantitative surveys for public agencies.

*Mandatory consultation procedures not favoured*

- The risk with setting out mandatory procedures is that councils (and officials) will revert to box ticking.
- There is also a risk that the fact of having undertaken consultation will be used to give the stamp of authority to whatever decision is taken without necessarily reflecting the content of the consultation.

- Over-consultation is seen as costly and may lead to cynicism and dis-engagement. On the other hand, open ended consultation raises expectations and can deflect the process from its original (regulatory) purpose.

*Partnership approach favoured, supplemented by focused consultation*

The partnership approach outlined in [Section 7.4](#) is likely to be more effective in aligning central and local government understanding of regulatory needs,

expectations, and practice than prescribing formal consultation requirements. At the same time, lack of consultation or communication should never be accepted as a reason for regulatory or policy failure.

## 2.4 Local Government Cooperation

*Cross-council collaboration best initiated on an issue-by-issue basis*

Cooperation across councils secures the economies of scale and access to expertise required on an issue by issue basis, while enabling the protection of local democracy

and flexibility of purpose and operations that cannot be maintained when organisations are amalgamated to deliver the same benefits. Indeed, given the multiple functions of councils, the capacity to collaborate on an issue by issue basis with the appropriate partners is a more important mechanism for achieving efficiencies and achieving appropriate outputs (regulations) and outcomes (changes in behaviour) than seeking to internalise diverse functions within a single, large organisation.

### 2.4.1 Q8.1 The benefits and costs of cooperation

*Long-term benefits of collaboration*

The analysis, including [Case Study 8.3](#), is largely static – highlighting the immediate savings that might be made in

providing services as a result of collaboration for specific purposes. The benefits in collaboration are potentially enduring and dynamic, increasing the experience and competence of politicians and officers, and contributing potentially to processes of continuous quality improvement and strengthening the financial foundation of the councils involved (by reducing unnecessary expenditure to achieve a given outcome).

#### Box 8.6 Cluster analysis

This analysis is not particularly helpful and the resulting clusters unlikely to be a sound basis for collaboration. The grounds for this conclusion are expanded below.

The clusters derived from any multivariate analysis are a function of the variables selected, data transformation, and technique adopted. The cluster derived for present purposes is based on a very coarse (single digit level) structural representation of labour markets across highly skewed data. This is a partial and mechanistic approach to suggesting groupings of councils for collaboration.

*Clusters displayed are arbitrary and reflect choice of data and methodology*

Ideally, any parsing exercise intended to group councils with common interests will select and transform data on the basis of a combination context and theoretical expectations. (This is a necessary approach to quality policy analysis generally). The example given is based on an unproven

expectation that the differentiation of councils according to high order economic activity will align their regulatory challenges, needs, and commitments. This is a highly singular and contestable view.

For present purposes, we might expect collaboration to reflect a range of circumstances, e.g.:

- Physical setting and associated values, hazards, and settlement issues;
- Rate of population growth (or decline);
- Population and employment densities (as markers of levels of urbanisation);
- Population size and composition;
- Workforce status;
- Personal and (especially) household income;
- Built environment covering private and public buildings, roads and other infrastructure (age, state, maintenance and replacement requirements);
- Community aspirations, expectations, and need.

Several of these determinants of cross-council interests will be influenced by economic structure. However, physical propinquity is likely to be as important as commonality in economic profiles: city and hinterland relationships tend to be particularly important and call for constructive collaboration

*Collaboration and partnerships should be based on issues and circumstance rather than an arbitrary grouping of councils, and are not fixed*

(which may be a more effective means of achieving productivity gains and reflecting local circumstance than bundling cities and hinterlands into a single unitary council).

Labour market catchments (p125) are a useful basis for collaborating where there are overlapping economic interests. Indeed, if amalgamations are to take place in local government, an emphasis on communities of interest (rather than physical catchments) might commence with an assessment of labour markets and their interdependence (although that does not presume that labour market

*Labour markets useful for defining communities of interest*

definition – which tends to be arbitrary at the boundaries – is necessarily the only or even the best grounds for delimiting communities of interest on the ground.

## 2.5 Section 9: Local authorities as regulators

*Are councillors really elected to “grow their economies?”*

The argument by LGNZ that “councillors are elected in most cases to grow their local economy” is highly debatable: there tend to be both pro- and anti-growth

members in most councils. The implication that councillors opt for an active role in “growing” their economies may also confuse a natural parochialism with a commitment to a particular ideology or policy set. How local economies might be “grown” by council actions and the resulting policies are both discretionary and debatable, as can be seen for example from the history of economic initiatives in Auckland over the past two decades.

Regulating for economic growth highlights the question of how councils manage regulatory risk given their limited capacity to influence on growth (except in a negative sense, when over-regulation might deter or deflect growth).

*From conservative risk aversion to prudent risk management*

While councils are generally *risk averse* (consequently reluctant to innovate and perhaps excessively reliant on precedent and committed to the status quo to limit the possibility of litigation), they do not necessarily manage risk effectively. *Risk management* aims to reduce policy/regulatory failure by: (1) aligning objectives across regulatory domains and agencies (avoiding conflicting outcomes and the costs of duplication); (2) considering contingencies, their consequences, and methods for eliminating or reducing them in the design of policies and regulations; and (3) exploring alternatives (including the option of not regulating).

## 2.6 Political involvement in regulatory matters

*Councillors elected to make decisions on behalf of all constituents*

The role of councillors can be debated: I favour the interpretation that they are elected to make decisions on behalf of their constituents – the challenge is for them to accept responsibility for decisions that serve the needs of the wider community rather than acting on behalf of interest groups or partisan supporters (whose views they may nevertheless bring to the table in the advocacy role noted by the Commission).

*Importance of clarity over governance*

Clarity of the governance role is critical and needs to be addressed following each election as part of the council induction process. There are varied models but the LGA has set out some clear and effective guidelines which can inform relations among councillors, between councillors and their constituents, and between the council and management. Getting these relationships established at the outset will contribute significantly to the quality of policy/regulatory decision making.

### 2.6.1 Councillors as planners – p.138

*Councils have responsibility for plans as method of regulation and for decisions implementing them.*

The plan is a regulatory document based on policy analysis and consultation for which politicians take responsibility, advised by senior council officers (most often drawing on the advice of their planners). Provided they act in an impartial manner in the interests of the community and do not favour sectional interests, councillors have an entitlement if not responsibility (which they may choose to delegate) to sit on the Hearings Panels charged with interpreting their plans. Otherwise, policy-making becomes undemocratic. However, safeguards need to be in place to avoid councillors from simply exercising their personal prejudices through planning decisions.

*Clarity of plan preparation would reduce need for consent hearings*

**Ideally, there would be no need for councillors to participate in the interpretation of plans if those plans were written clearly, without ambiguity, and less reliant on discretionary consents which lack clearly set out conditions and decision rules. Ambiguous or fuzzy plan-making that relies excessively on *post hoc* (or *ad hoc*) interpretation is a sign of poor regulatory performance.**

### 2.6.2 Councils regulating services where they are the provider

My view is influenced by the issues of conflicting roles which led to an in-depth review of the Auckland Regional Council in 1991 (the Titter Report) and subsequent changes in that council's

structure and operations. Transparency, clarity of objectives, and the capacity to monitor and enforce regulations all depend on the separation of responsibilities for regulating activities and participating in those activities.

I agree with the Land and Water Forum position on separating planning from the consenting process, a separation which again requires a high quality of policy and regulation-making. Such a

*Separate planning from implementation via consent process – but avoid excessive complexity*

separation should encourage and enable greater consistency in the application of policy and provide clearer channels for monitoring and modifying regulations in which enforcement and compliance issues arise.

### 2.6.3 9.5 Client focus

There is an important issue of interstation to be addressed in this section. Most businesses would be very concerned if they recorded levels of client dissatisfaction anywhere near those identified with local government services as a result of the survey reported. The fact of majority support for the various comments regarding local government performance in the survey does not in some way

*Business survey offers no grounds for complacency*

offset or compensate for the significant share that either disagreed or expressed dissatisfaction.

The focus of this analysis should be on the failures and their significance if we are to achieve improvements. Again, this goes to adopting - or promoting – a culture of continuous improvement and quality performance. The run-of-mill response to questions on matters that should be routine (or with which respondents had little experience) is of less relevance than the experiences of the dissatisfied minority. (This is quite apart from the impact of definition of the target population and response bias which are not reported). This is especially the case if the focus is on the impact of

*Important to address shortcomings*

regulations rather than councils' performance in producing those regulations.

## 2.7 10 Local monitoring and enforcement

*Over-regulation risks non-compliance*

Related to the legitimacy question (p.148) over-regulation or regulation in areas in which councils are not deemed competent risks undermining compliance.

*Collaboration with key stakeholders, public education, and the quality of analysis will influence compliance.*

Where new or novel regulations are introduced legitimacy can be conferred through collaboration with stakeholders and if necessary engagement with and education of the wider community to facilitate public support. The key, though, will be the quality of policy analysis behind them. Without that education and engagement become coercive.

*If there is a public benefit regulations should attract some public funding – with users paying a share equivalent to the private benefit.*

Legitimacy is tied up with funding. The proposition that councils might recover the (full) costs of regulations suggests that they have minimal public benefit: i.e., that the behaviours they engender and the standards they promote have no external benefits for which it might be

expected that the public might assume some of the costs. If all costs are recovered from “users”, the democratic checks and balances associated with good governance are lost. This also raises the

possibility that the regulations are redundant. Worse, councils are encouraged to pursue cost recovery rather than quality and efficiency gains under conditions of monopoly and coercive statutory powers.

***It follows that the inability to achieve full cost recovery is not a failure of regulation. The attempt to do so suggests that the regulation may lack legitimacy as not reflecting the usual grounds for intervention: market failure, managing externalities, or achieving mandatory (high) standards.***

## 2.8 11 The cost impact on businesses

This section addresses the productivity impacts of local government regulation on the wider community. Extrapolation of the examples and issues canvassed is that these costs are likely to be considerably greater than the costs within the local government sector of poor regulation. Lifting the quality of regulation therefore offers a double benefit: lower costs of government and better performance in other sectors.

*The survey of business suggests substantial private costs arising from implementation of council regulation*

The survey of the nature of business' experiences with council regulation (Section 11.3) again suffers from not quantifying the costs to the tail of the distribution, comprising those companies that had frequent contact with local government, or to the majority expressing dissatisfaction with the time and costs involved.

## 2.9 12 Making resource management decisions

The costs and consequences of the 2% of resource consent or plan change applications proceeding to Court are disproportionately high, and unusual in terms of leading to determination of policy and regulation rather than simply interpretation. Nevertheless, the focus in this chapter on appellate procedures risks swamping the more pervasive impacts of the implementation of the RMA on the efficiency of local government in its regulatory role, and its impacts on the productivity of investment generally.

*Emphasis on issues arising from operation of the Environment Court are important but should not cloud wider and substantial private cost effects of plan development and implementation*

The direct and indirect costs of plan preparation and administration are substantial, with a very large share being transferred to or incurred by the private sector as a result of unnecessary delays or deflections of investment. This situation stands regardless of the answer to question 12.1 (why are so few applications declined). Question 12.2 is critical and the Productivity Commission could usefully take a lead on it.

*The Land and Water Forum proposal*

The LWF model (Figure 12.3) is complex and while it might improve the quality of decisions in a particular domain it does not address the procedures for issuing consents and especially for dealing with the exceptions, alternative methods, or the changing conditions that underlie many resource consent applications. It requires considerable non-statutory input which is a useful adjunct to formal planning, but also has the potential to complicate matters if not subject to the rigorous analysis required to bring it into the statutory process and to meaningful public input to avoid – or limit – capture of the agenda and the debate by “specialists” rather than by the community and its elected representatives.

## 2.10 14 Assessing regulatory performance

*Simplicity and responsiveness should influence design*

In assessing performance assessment options, attention should be given to simplicity and responsiveness.

Detailed and complex prescribed cycles of assessment, reporting and responding which involve several agencies are likely to be resource intensive, become ends in themselves, and impede responsiveness to changes in circumstance and emergent regulatory shortcomings.

Instead, councils as regulating authorities could adopt quality improvement programmes which would involve internalising the monitoring of regulation, link it to outcomes rather than just outputs, and in the process modify their behaviour in response to monitoring results on a continuous basis.

*Using monitoring to promote continuous improvement and external focus*

Ideally this will engender a culture within councils that is more responsive to relating the impact of its regulation to goals and the four well-beings identified in the LGA and more externally rather than internally focused.

For significant regulation, a project-based approach would ensure that an appropriate framework for monitoring is established at the outset, as part of the goal setting stage of regulation-making.

### **Continuous improvement – effecting a culture shift and focusing on achieving outcomes**

There is a need to strike a balance between internal and external monitoring. Encouraging internal monitoring regimes should lead to more active adoption of improved regulatory processes and outputs, a central tenet of quality management and quality improvement programmes.

*A quality culture goes to the heart of quality regulation*

Giving weight to internal quality improvement goes to the heart of good policy/regulation-making whereby a culture that is responsive to outcomes and not simply outputs

(Figure 14.1) is encouraged. (Benchmarking generally focuses on outputs – the particular regulations – and not outcomes and so may be better treated as a diagnostic tool rather than measurement of performance).

Continuous improvement focuses the provider (the regulating authority) on client or customer outcomes – in this case how far the regulations influence the behaviour of firms, households, or

*From an output to an outcome focus*

individuals (the intermediate outcomes) to bring about the desired final outcome by way of, say, safety, health and hygiene, investment, or environmental quality .

External monitoring (by the Audit Office, the relevant minister, the Parliamentary Commissioner for the Environment, or any other external agency) may address both intermediate and final outcomes and relate these to the quality of regulation, but unlike quality improvement programmes is occasional in nature, tends to be reactive, and is likely to be slow in effecting desirable change.



## **A project focus establishes performance criteria at the outset**

Addressing both proportionality and collaboration should lead councils to focus much of their regulatory effort on significant local issues, either individually or through partnerships directed towards regulation in areas of common interest.

*Establish the monitoring framework as part of policy development at the outset of regulation making*

The CityScope Consultant's [report to NZTA](#) on performance monitoring for integrated transport and land use projects reviewed international practice and developed a process which highlighted the need to identify the expected outputs at project design phase and monitored project planning and implementation so that the basis for any shortfall in outcomes could be identified and addressed as part of a continuous learning process. A similar approach might be adopted for significant regulations. The identification of a monitoring framework at the outset should be seen as an intrinsic art of regulation-making which will ensure that relevance and purpose are not lost sight of and that deficient regulation can be quickly rectified or discontinued.

## 3 Conclusions

### 3.1 Scope and Approach

- There is a need to distinguish between gains in local government productivity as a result of changing regulatory practice and impacts on the productivity of the wider economy.
- A whole of government approach and emphases on local democracy and vertical subsidiarity are endorsed.
- It is difficult to align political goals with the goal of fiscal prudence and efficiency in local government – a problem of incentives under local democracy. This calls for the pragmatic application of principles, acknowledging the institutional and behavioural constraints on council decision-making and regulation.

### 3.2 Internalising Functions, Scale, and Effectiveness

- The challenge of internalising multiple responsibilities in multi-sector organisations - councils – suggests that responsibilities for developing regulations and for implementing them should be separated. This opens the way for productivity gains through recourse to horizontal subsidiarity-assigning implementation to the private or public agencies best equipped to deliver.
- There is a trade-off between pursuit of economies of scale through creating large, multi-functional organisations, and the responsiveness and effectiveness of smaller, more focused organisations.

### 3.3 Regulating the economy

- The report’s emphasis on councils as economic development agencies that might promote growth through regulation is surprising, but reflects the current preoccupation of some officers and politicians with the options of agglomeration and densification associated with the “new Economic Geography”. It should not be central to an analysis of the location and quality of regulation.
- Individual councils will need to establish their own regulatory priorities among the four “well-beings” based, among other things, on consultation over community outcomes.
- The Productivity Commission could take the lead in screening regulations with respect to the appropriate level of government based on material assembled. This would identify the “residual” regulatory functions that sit clearly within the ambit of local government, while further developing the guidelines for quality Regulatory Impact Statements that can be applied nationally and locally.

### 3.4 Funding regulation

- To the extent that it exists the “unfunded :mandate” is influenced more by changing standards and expectations than changing functions, and could be addressed in part by adapting practices to changed expectations.
- Maintaining national standards, however, should attract taxpayer funding and this should reflect both the costs imposed by changes in those standards from time-to-time and differential funding in support of those councils with greater compliance challenges. .
- Funding local regulation locally lifts local accountability.

- If there is a public benefit in regulating health, safety, or environmental standards, for example, a share of it should be met by the public sector – the ratepayer in local councils. If there is no public benefit (i.e., 100% user pays) the role of council in imposing regulation is questionable.
- The apparently low cost of regulatory activities identified in the partial survey of councils presumably results from high levels of cost recovery from users and relatively limited definitions of regulation (relative, for example, to the Productivity Commission’s definition, Box 1.3, page 7)

### 3.5 Collaboration and regulation-making

- Vertical collaboration – where regulations are developed jointly – will be best effected if central government takes the lead.
- Collaboration will be enhanced if founded on rigorous analysis and outcome rather than consensus focused.
- The quality of policy analysis underlying regulations is central to their legitimacy and effectiveness. This is not without cost and requires prior consideration of significance and proportionality, capacity to do it well (if at all), collaboration, and commitment among the agencies involved (rather than patch protection).
- Partnerships need to be based on aligning objectives and resources for particular regulatory issues or domains in which the partners share a common interest.
- Secondments can lead to long term gains in capacity and learning and not just the execution of individual policy and regulation-making processes.
- The relationships, data, and communication channels for effective collaboration already exist; the issue is one of implementing good practice based, where appropriate, on partnerships, sound analysis, and focused consultation.
- Cross-council consultation is best designed around issues and not an arbitrary grouping of council on one or other (or more) dimension of activity.
- Collaboration among proximate councils (in, for example city-hinterland relationships) is likely to lead to more locally sensitive regulation than amalgamating rural and urban councils.

### 3.6 The roles of councillors and their plans

- Councillors are elected to make decisions on behalf of all constituents, not “to grow economies”.
- Clarity over governance and management roles is critical to effective local government.
- Plans are regulatory documents for which councillors must take responsibility, advised by senior officers.
- The implementation of plans through consenting processing should be separated from plan preparation – which requires plans to be unambiguous and straightforward.
- Greater clarity of plans and rules would reduce the costs of their implementation through the consent process (more effectively than continuously modifying the RMA would).

### 3.7 The costs of regulation

- The survey of businesses raises serious issues of costs and regulatory shortcomings which are not consistent with the provision of quality regulation-making or delivery. It is important to address these shortcomings in the Productivity Commission report.
- Emphasis on the issues associated with the Environment Court, while important and demanding a response, should not detract attention from the substantial and pervasive costs of operating

the RMA through the plan and resource consent process. Improvements might be achieved by aggressively promoting improved practice rather than through endless reforms.

### **3.8 Achieving quality regulation**

- Simplicity and responsiveness should influence regulatory design.
- Councils should be required to adopt management practices to actively lift the quality of their regulatory functions. A quality culture goes to the heart of quality regulation.
- Monitoring should be an integral part of regulatory design and implementation through which an outcome (not output) focus and continuous improvement can be promoted within councils.