

5 March 2013
Document: 1156044



Inquiry into Local Government Regulatory Performance
New Zealand Productivity Commission
PO Box 8036
The Terrace
Wellington 6143

Submission on Inquiry into Local Government Regulatory Performance

Introduction

The Taranaki Regional Council (the Council) thanks the New Zealand Productivity Commission (the Commission) for the opportunity to make submissions on the Commission's draft report 'Towards better local regulation.'

The Council makes this submission in recognition of its:

- experience in developing, implementing, monitoring and reviewing a wide range of regulatory functions and responsibilities and
- regional advocacy responsibilities whereby the Council represents the Taranaki region on matters of regional interest and concern.

General comment

The Council congratulates the Commission on a thorough and well researched document. Some important findings have been made in respect of local regulation and equally important questions asked and options presented as to how regulatory performance in the local government sector can be improved.

The Council is in full agreement with the Commission's approach to the Inquiry that because almost all of local government's regulatory functions are devolved or delegated from central government, it has been important (and critically necessary in this Council's view) to look at the regulatory system in its entirety.

The Council notes that while the report contains important findings and good ideas, it is a large document with many findings and this carries with it the risk of losing the key ideas among the detail. Perhaps the final report could highlight or focus on the three or four key issues, findings and responses. Further comment on this is provided at the end of this submission.

Key Points

Key points raised in this submission are:

- The Council agrees with the Commission's findings regarding the role of local government and the need for there to be a clear understanding of the role of local government in New Zealand's regulatory system. In accordance with the principle of subsidiarity New Zealand must promote and support local decision-making where appropriate.
- The finding that regulation making at the central level is below leading practice and is having a material impact on the quality of regulations devolved or delegated to local government is not surprising, and has been of great concern to the Council for several years.
- The Council supports many of the options presented in the draft report for strengthening the quality of analysis underpinning local government regulations and for improving capability and better relationships between central and local government.
- Fundamentally, there is a gap in the machinery of government that needs to be addressed. The establishment of a new instrument in the institutional structure such as a 'Local Government Commission' type body should be considered.
- In general terms the right elements for making decisions about the allocation of regulatory roles have been included in the draft report.
- Allocation of new functions from central to local government must be accompanied by access to appropriate funding, however, if the quality of regulation improves, funding becomes less of an issue.

Role of local government

On page 24 of its report the Commission states that it is important to be clear about the constitutional place of local authorities and, in particular, about the relationship between local and central government. This is because as the Commission notes, these matters will determine what options for the design of the regulatory system are feasible or appropriate.

The Council considers this issue to be of fundamental importance to improving the regulatory performance, not only of local government, but also of New Zealand's regulatory system as a whole.

The Commission notes 'an obvious and growing tension between central and local government' and that a key source of this friction is different understandings of the role of local government in New Zealand's regulatory system 'and indeed in the broader constitutional context' (page 2 of the report). The Council agrees with the Commission's statement (page 2) that there is a tendency in central government to (incorrectly) view councils as operational arms of central agencies, and subservient organisations that must be responsive to the instructions of the Minister. The Commission goes on to note that local authorities view themselves as largely autonomous organisations that have their own funding base and whose leaders are elected by, and accountable to, their local constituents.

In this Council's view, local government, as an independent arm of the governance framework of New Zealand, is important for local democracy and the effective delivery of

public goods and services. Strong local democracy is widely recognised by many commentators as enhancing democracy at all levels. New Zealand is still one of the most highly centralised democracies in the OECD and so having an autonomous, independent system of local government provides a counterbalance to the weight and power of central government.

Local government also enhances democratic participation in public affairs, strengthens communities and ensures the effective and efficient delivery of public goods. It provides local citizens with choices over the way in which their various aspirations and needs in relation to community services and facilities, amenities and infrastructure, are met. It is accountable to its citizens through open and transparent decision-making processes.

While it would appear that the place of local government in our political system does not derive from any formal constitutional entitlement (page 22 of the report), nevertheless local government has and will continue to have a vital role to play in New Zealand's future prosperity.

The Commission's report confirms the widely accepted principle of subsidiarity – that decision-making, powers, responsibilities and tasks should reside with the lowest, or least centralised competent authority (level of government). In the Council's view, the components of good decisions and decision-making processes will increasingly need to recognise that society is becoming more complex, people are better educated and are seeking greater influence over decisions that affect their lives. We need to be more sophisticated in the way we deal with increasingly complex issues – central command and control systems no longer work effectively in modern democracies. Progressive, modern and effective states all recognise the benefits to be gained by more decentralised decision-making – it is the way the world is moving. The challenge for New Zealand is how we promote, supplement and support local decision-making while at the same time reducing the risks of poor decision-making. Certainly the answer is not to centralise and not to supplant local decision-making because this will ultimately be inefficient and unproductive for New Zealand.

For local democracy to work it requires that communities are free to make decisions on local matters that directly affect them and that councils have the autonomy to respond to community needs. Regulatory requirements imposed by central government could undermine local democracy and the principle of subsidiarity.

There will be cases where central government functions are delegated to the local level to implement because it is more effective and efficient to do so. However, this needs to be done according to clearly understood principles with appropriate funding, reporting and accountability mechanisms in place.

Certainly, enhancing the understanding of the different roles of local and central government will enhance the regulation making process and lead to improved regulatory performance through regulation that is appropriate and fit for purpose. Some of the institutional arrangements listed in Table 7.1 of the report and options for improving capability and consultation, listed in Tables 7.2 and 7.3 could assist in this regard.

Central government processes

The draft report notes that the majority of regulatory functions undertaken by councils arise from statutes emerging from central government and that therefore the ability of councils to deliver the intended regulatory outcomes is inherently linked to the quality of regulation produced at the central level. The Council agrees with this statement.

The draft report contains an open and frank analysis of regulation making by central government. The Commission has found a number of shortcomings in the way regulations are made at the central level including weak incentives for rigorous analysis of regulation, lack of implementation analysis, quality assurance processes that are only partly meeting their intended purpose, an absence of adequate consultation with the local government sector on regulatory proposals and weak lines of accountability. While the Commission notes that these shortcomings are not universal across all agencies, 'they are common enough to be of concern' (page 79).

The finding that regulation making at the central level is below leading practice and is having a material impact on the quality of regulations devolved or delegated to local government is not surprising, and has been of great concern to this Council for several years.

One aspect of central government regulation making examined in the report – that of quality assurance processes involving Regulatory Impact Statements (RISs) prepared for Cabinet – found that external reviews of RIAs conducted for Treasury shows the general standard of RISs to be low. The Commission's own review of six RISs relating to local government regulations introduced since 2009, found that none fully met Treasury's quality assurance criteria.

Like many other councils, this Council has experienced what it has considered to be poor policy analysis including poor problem definition, lack of evidence, inadequate analysis of costs and benefits and a lack of understanding or appreciation of the costs and practicality of implementation at a local level. However the depth of the issues highlighted in chapter 7 of the report involving institutional arrangements (such as weak organisational and ministerial incentives for delivering quality policy advice, lack of coordination among central agencies and poor quality assurance systems) and the need for improved capability and engagement with councils on regulatory issues, are serious, concerning, and need to be addressed.

It has been clearly apparent to this Council that the quality of the regulation making process at the central government level needs improving, certainly as it relates to local government regulatory functions, and the Council welcomes the Commission's findings on this issue and the constructive suggestions that it has put forward for improvement.

The Council agrees with the Commission that a portfolio of measures is needed to strengthen regulatory governance at the central level and that these should focus on the four separate but related themes listed on page 90 of the report:

- Aligned incentives – strengthening accountability of Ministers and public servants for the quality of regulations devolved or delegated to local government.
- Improving capability – lifting the quality of analysis in central government on local government regulation.

- Meaningful consultation – improving the quality of engagement between central and local government on regulatory issues.
- Changing culture – recognising local government as policy partners and co-regulators.

In terms of aligning incentives and strengthening accountability, the Council would support consideration of the first 6 options listed in Table 7.1 (page 92) of the report. Measures such as requiring the Regulatory Impact Assessment Team within Treasury to assess all RIAs impacting local government's regulatory responsibilities, focusing RIS assessment on officials, refusing a place on the Cabinet agenda for proposals without a RIS that fully meets Treasury requirements and strengthening the component of CE performance linked to external reviews of RISs, will all strengthen incentives on ministers and CEs to demand good quality analysis.

The creation of a departmental agency responsible for regulatory quality assurance (Option 9) is worthy of consideration as it would provide a degree of independence and separation between the minister and the agency preparing the RIS. A separate body established by legislation (Option 8) would increase the degree of independence further.

With regard to the options for improving capability, the Council supports all the options put forward in Table 7.2 (page 97). Seconding or contracting staff with local government expertise when agencies are undertaking policy development (Option 1) will provide a greater level of understanding of issues and obstacles to effective implementation. Training for local government councillors and officers when new regulatory responsibilities are passed (Option 2) has been lacking in the past and would be beneficial.

A general lifting of capability in policy development including problem definition, cost-benefit analysis, implementation analysis etc (Option 4) is needed.

A local government sector-specific RIA requirement (Option 7) has merit and, among other things will promote greater consistency among agencies dealing with local government regulation.

A number of the options for improving consultation with the local government sector (Table 7.3, page 100) are supported. Establishing a Leaders Forum for key areas of local government regulation has considerable merit. Issues of local sector representation could be managed through LGNZ. However, statutory consultation requirements for all policy issues involving local government regulations (Option 6) or mandating 'select committee type' consultation (Option 3) have disadvantages as noted in the report. A number of pragmatic consultation mechanisms and processes can be developed, some of which are noted in the report, and these will work well if there is a culture of recognising central and local government as policy partners (this issue is addressed in section 7.4 of the Commission's report).

The Council agrees with the Commission that to improve regulatory outcomes, better relationships are needed (section 7.4). The Council also agrees that cultural changes are required in many central government agencies based on a greater appreciation of the role and functions of local government and recognition of the place and importance of local government in the policy system. The Council agrees that without changes to the

organisational culture of central government agencies, the measures outlined elsewhere in the report are likely to be met with resistance and fail to deliver their full value.

The Council also agrees that a shift towards a more inclusive and cooperative approach by central government agencies will be of limited value unless local authorities are equally willing to embrace the role of 'policy partner'. For its part the Taranaki Regional Council would certainly welcome a closer relationship with central government agencies in the development of regulation. There have been instances where consultation and collaboration in the policy development process has worked well for this Council, especially when this has been early on in the process before decisions have been made.

Regional councils have established various interest groups made up of representatives from all regional councils who meet regularly to discuss issues of mutual concern, and share information and approaches etc on regional council regulatory functions. These mechanisms could be used more by central government agencies in their policy development processes.

Fundamentally though, the issues raised by the Commission are 'machinery of government' issues. There is clearly a serious gap in the machinery of government that needs to be addressed. Possibly, the establishment of a new instrument in the institutional structure could address this issue. It could be a 'Local Government Commission' type body that understands the role of local government and can provide policy options and advice to the Government on local government affairs across the board. It could take on a number of the roles and responsibilities identified in the Commission's report for improving regulation making at the central government level in respect of local government. If we can get the 'top of the funnel' right ie at central government level where most local regulatory functions originate, then local government will perform better.

The Council considers that the Commission needs to drive this issue hard. Local government is simply too important for New Zealand's future and that of its regional and local communities, not to provide a much needed boost in capability, focus and heightened awareness in central government policy processes.

A stronger partnership where each level of government recognises and understands the role of the other will increase the effectiveness of both.

Allocation of roles

The Council agrees that any framework for allocating regulatory responsibilities between different levels of government should be underpinned by the principle of subsidiarity – that regulatory functions should be performed closest to the community that is affected, unless there is good reason to centralise.

The Council considers that in general terms the right elements for making decisions about the allocation of regulatory roles have been included in the guidelines in chapter 4. Critical elements of the magnitude and distribution of benefits and costs, capability and risks, governance and accountability mechanisms, are present in the framework.

In relation to benefits and costs, the Council considers that if the benefit of local regulation accrues nationally the local jurisdiction should be funded or assisted to provide the regulatory function.

The funding of regulation

The allocation of regulatory responsibilities inevitably has implications for funding. The Council endorses the local government sector's strongly held view that central government passes regulatory functions to local authorities without sufficient consideration of the funding implications for councils (refer finding F5.1 page 67 of the report).

The Council agrees with comments made by Local Government New Zealand (page 66 of the report) regarding 'unfunded mandates' ie: the government imposing additional responsibilities and costs onto local government without the funding necessary for their provision.

The funding implications for local government of central government decisions on local regulation must be recognised and fully considered in the policy process. Too often such costs are given only superficial attention or are ignored altogether on the assumption that councils will simply pick up the costs. Allocation of new functions from central to local government must be accompanied by access to appropriate funding.

A current example is the proposal in the Resource Management Act Reform Bill for the making of Regulations that would require local councils to monitor certain indicators according to specified methods and to report on these. The Regulations would be to achieve nationally consistent monitoring data for national state of the environment reporting purposes. Councils are required to monitor and report on the state of the environment in their region or district but have no mandate for national reporting. National reporting is a function of the Ministry for the Environment. If councils were to assist in the national monitoring and reporting system, agreement would need to be reached on how this function would be funded. This could be a case where specific payments could be made reflecting the additional sites, sampling frequencies, different methods, or analyses etc required to carry out the task.

The long term sustainability of taxes on property (rates) to fund an increasing range of regulatory responsibilities (as well as all the other functions local government is expected to deliver) is likely to remain an issue for local government over the long term.

However, if the quality of regulation improves, their design allows more efficient implementation and there is greater 'ownership' of regulation, costs will become less of an issue.

Resource management decisions and appeals

The Commission comments on the resource management decision-making process and in particular on the role of the Environment Court as an appellate court.

The Taranaki Regional Council has made submissions to various reviews of resource management decision-making, law and practice over the years. The Council is convinced

that local decision-making by elected members of the community should remain at the heart of resource management. Where there are clearly national interests involved, the Resource Management Act provides various mechanisms for those interests to be addressed.

Resource management decision-making is essentially a values-based jurisprudence where decisions are made that affect the local community. It is therefore appropriate that elected members of the community, who are accountable to the community, make those decisions. The Council does have some concerns over the role of the Environment Court as an appellate court that hears cases *de novo* and which can substitute its decisions – often on broad policy issues – for those of the elected and accountable council. This has created some weaknesses and perverse outcomes which have been identified by parties to the RMA decision-making process and discussed in the Commission's report (chapter 12). A review of the role of the Environment Court would be appropriate in this Council's view.

A review of the Resource Management Act plan making process to increase 'plan agility' would also be appropriate, although the Council notes that it developed its full suite of regional plans in reasonable timeframes over a decade ago through a highly consultative process with key stakeholders and the community. The Council is continuing its collaborative approach in the reviews of its plans which it expects will greatly reduce the potential for appeals. These processes are, however, not without cost, and take time but lead to a greater understanding of issues and the need for certain regulatory responses among all parties.

The discussion of resource management decision-making, including proposals by the Land and Water Forum to enhance council decision-making through collaborative processes, and debates around *de novo* hearings at the Environment Court, are all interrelated and raise broader issues regarding the nature of local democracy – and particularly representative vs participatory models of democracy. The report of the Local Government Efficiency Taskforce released in November last year concluded that the Government should confirm the representative model of democracy for local government and that this would achieve efficiencies in local government processes.

As noted earlier, the Council considers that local decision-making by elected members of the community should remain at the heart of resource management.

If the Government wants capacity, capability and skills at the local government level then it follows that local government must be given the power to make decisions and to be accountable for those decisions.

Focus of final report

As noted at the beginning of this submission, the draft report is a large document with many important findings and good ideas but there is a risk that the key issues and ideas will get lost among the large number of individual findings.

The Council suggests that to get more prominent exposure of its major findings, the Commission consider perhaps highlighting or focusing on the three or four key issues and package the findings and recommendations under these.

Some possible key themes could include the following:

1. Local government has and will continue to have a vital role to play in New Zealand's future

This should focus on the principle of subsidiarity already discussed in the Commission's report. As noted earlier in this submission (under Role of local government) society is becoming more sophisticated and the issues more complex. Central command and control systems no longer work and modern, effective states of comparable 'cultures' to New Zealand are moving towards more decentralised models. The importance of local government to New Zealand's future needs to be recognised and the sector supported and assisted not supplanted by greater centralisation which would be inefficient and unproductive for New Zealand.

2. There is a gap in the machinery of government that needs to be addressed

This should emphasise, as the report does, that good local regulation requires high quality policy development at the central level but that there are serious gaps in understanding, capability etc in central policy making processes. It must recognise different roles and responsibilities and the need for buy-in from local government and that this needs to occur early in a proper machinery of government way. The potential for putting in place a Local Government Commission for this purpose could be discussed.

3. Representative vs participatory democracy

A number of issues raised in the draft report such as capability, agility, innovation and timeliness (including those dealing with resource management decision-making), are interrelated and would benefit from a discussion under this theme. As already noted, the report of the Local Government Efficiency Taskforce released in November last year spent some time discussing this issue in the context of more efficient decision-making.

Conclusion

The Council once again thanks the Commission for the opportunity to make submissions on the draft report 'Towards better regulation'.

The Council considers that the report has been well researched and makes some important findings for consideration by both central and local government.

The Council agrees with the Commission that to improve local regulatory outcomes, better relationships and a greater recognition of the place and importance of local government in the policy system are needed. The draft report provides some constructive ideas for a way forward.

The Commission should consider highlighting in some way in the final report, a small number of key issues or themes so that these are not lost among the large number of individual findings.

Yours faithfully

A handwritten signature in blue ink, appearing to be 'BG Chamberlain', written in a cursive style.

BG Chamberlain
Chief Executive