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New Zealand Productivity Commission
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Dear Madam/Sir

Thank you for the opportunity to comment on the Local Government Regulatory Performance Issues Paper. As we perceive the terms of reference, your inquiry is as much about the assignment of regulatory functions to central government as it is local government. Regrettably the title of the paper and much of its content reveals a bias of the authors who seem to be looking for any reason not to assign regulatory delivery at the local level. Regulatory performance by central government, especially in areas where delivery is decentralised, should equally have been subject to fair and balanced scrutiny.

We accept the definition of regulation at page 2 of the paper although would point out that regulations establish a framework of rights and obligations, the subject of which is (usually) to manage the behaviour of people at home, work, or play in order to protect, promote, or maintain some public interest. This may be captured in what you describe as the "standard setting" component of any regulatory regime (page 3) but if not you may wish to reflect further on this.

The power to regulate also involves the exercise of a power of coercion where the regulator has a statutorily protected mandate to require observance of certain rules and standards. In the absence of such a mandate, bodies can only rely on persuasion or some method of payment to get people to behave in certain ways. Traditionally, in our system of government, the power to coerce the populace has resided inside an institution of central or local government. The paper would have benefited from some understanding of the reasons for this and the reasons why in some cases this is no longer so.

As the paper notes regulation in today's society is pervasive and it impacts on most aspects of our lives from before we are born to when we die. At whatever level regulatory intervention is enabled, central or local, that intervention should observe consistent operating principles around effectiveness, efficiency, transparency, clarity, and equity. The use of Regulatory Impact Statements by central government has its equivalent in section 77 of the Local Government Act 2002 (LGA2002) and section 32 of the Resource Management Act (RMA). These devices work to ensure the costs and benefits of regulatory intervention are justified as should be the case. This matter is further addressed in Chapter 6 of the paper. As a general proposition we consider the law in relation to bylaws and rules (under the Resource Management Act) to be

contain sufficient tests as to justification. If there is an issue it is likely to be in the practice but the Commission needs to gather the evidence from Question 27 rather than rely on anecdote.

In terms of the regulatory powers of Local Government the report singles out the RMA, the LGA2002 and others which are listed in Table 2. The RMA is no different from the Building Act for instance so we wonder why it is deserving of this focus unless for some ulterior motive? In answer to Question 4 there are a number of statutes that mandate regulatory interventions which have been omitted:

- Local Government Act 1974 - still a number of residual regulatory powers in relation to roads, sewerage and stormwater, waste management, navigation and safety, and a miscellany of other matters like fire hydrants, parking buildings.

- Fencing of Swimming Pools Act 1987.

- Land Drainage Act 1908.

- Land Transport Management Act 2003 (no direct regulatory effect but does direct where funds are disbursed through Regional Land Transport Strategies).

- Machinery Act 1950 (through the Amusement Device Regulations 1978).

- Reserves Act 1977.

- River Boards Act 1908.

- Soil Conservation and Rivers Control Act 1941.

- Land Transport Act 1998 (this is now the statute governing parking control – the Land Transport (Road Safety and Other Matters) Amendment Act 2011 repealed the Transport Act 1962. It also covers transport services licensing which regional councils are involved with).

The description of the Health Act powers overlooks the numerous regulations around the regulation of premises from offensive trades, hairdressers, crematoriums, camping grounds, etc.

In answer to Question 3 Table 2 does not adequately capture the roles and responsibilities assigned to local government and in a number of respects reveals a disconcerting ignorance about local government responsibilities that could call into question the understanding of the Commission. Note that while the Building Act establishes local authorities who qualify as Building Consent Authorities, there are also residual territorial authority regulatory responsibilities which are quite separate.

The combined effect of Table 2 covers such a wide and diverse range of functions. While the assignment of individual functions to local government is worthy of review, the cumulative impact and synergies of having to perform across the range also needs to be considered. There are funding, capacity, and accountability issues which are often overlooked when central government assigns new responsibilities to local government.

Within the last 10 years, the new or added responsibilities passed on to local government, with attendant extra costs to local government and applicants, have included

- Building Act 2002 - vastly modified responsibilities for territorial authorities and new functions for regional councils in relation to large dams; increased implementation costs were the result.

- Local Government Act 2002 - updated bylaw making powers, development contributions, and other obligations and powers.

- Prostitution Law Reform 2003 - although how much a territorial authority decides to do is discretionary.

- Gambling Act 2003 - preparation of gambling policies a new function, the main impact being a consultation exercise. Current amendment before Parliament may transfer more responsibility to local authorities.

- Dog Control Amendment Act 2006 - microchipping imposed additional obligations on territorial authorities, established a national dog database which is a good idea but local authorities have to pay central government to run it!

- Waste Minimisation Act 2008 - new obligations to prepare waste management plans.

This list excludes amending legislation (for instance seven sets of amendments to the RMA) and subordinate legislation passed in the form of regulations such as National Policy Statements and National Environmental Regulations under the RMA.

In the pipeline currently there are reforms including

- Food safety - split responsibility proposed between New Zealand Food Safety Authority and local authorities but the latter are expected to be given wider responsibilities.

- Sale of liquor - considerably wider responsibilities, obligations to prepare mandatory alcohol control plans, less discretion around process and more inefficient process (eg no power of deklegation for uncontested decisions), and less ability to recover costs

- Public health reforms - the Health Act 1956 is well over due for review; the Public Health Bill which sought to update this was introduced in 2007 and is languishing on the Parliamentary order paper. It too imposed wider responsibilities on local government and more complex and costly process obligations so reflection is worthwhile.

In addressing what is called a mix of regulatory functions (page 14) the paper touches on a very important matter but does not develop it. In addition to deciding whether regulation is best delivered from the centre or through local agents, how it is delivered is an important aspect. In our view the paper would have benefited greatly had it addressed the concepts of delegated regulatory functions and devolved regulatory functions. Much of the legislation which is within scope falls into either, and in some cases both, of these camps. The example of the Food Act

1981, or more correctly the Food Hygiene Regulations 1974 (prepared under the Health Act 1956) prescribes standards which local authorities enforce by statutory delegation. Likewise the Building Act, with its National Building Code, is a form of delegated legislation where it is delivered through, in the main, local authorities. In contrast the Resource Management Act devolves responsibility, subject to any national prescription, to local authorities.

The difference lies is the extent of discretion a local authority has to administer the responsibilities or the extent to which it can create its own subordinate form of regulatory interventions. The spectrum of possibilities is portrayed in Figure 1.[1]

Figure 1 - Devolved or Delegated Functions

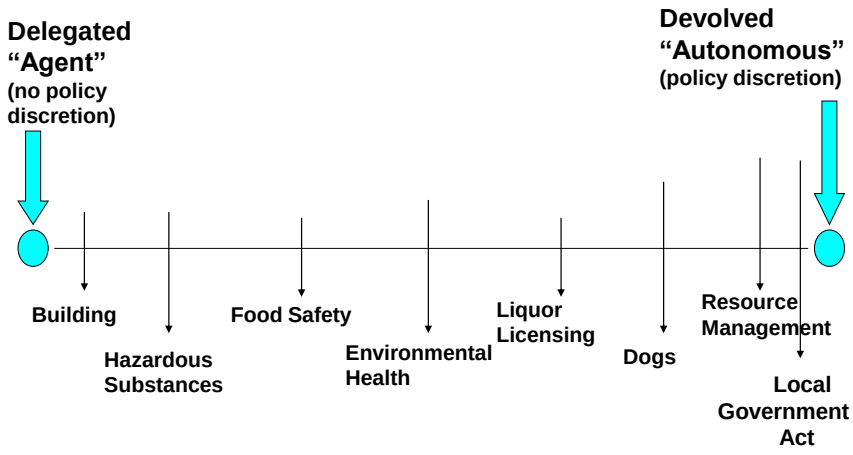



Table 3 in the discussion paper identifies local organisations which purportedly have regulatory responsibilities and Question 5 asks if there are any others. In the main, none of the examples noted have subordinate law making powers. Even where permitting or compliance functions are carried out (eg Lakes Environmental), these functions are carried out in the name of the local authority under delegation. Accountability still rests with the Council. Despite their appearance as a separate statutory entity, local authority based Building Consent Authorities are simply a name on a register with no incorporated legal status. The body corporate which can be sued is still the local authority.

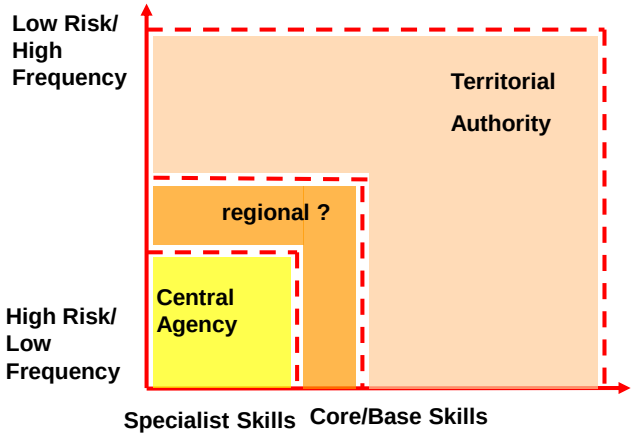
The point can be made that there are delegated regulatory functions that are carried out by non-government agents. These normally provide a certification or verification role that a government standard has been met – warrant of fitness checks, electrical inspection certificates, hazardous substances test certificates. These agents carry any liabilities associated with, and are accountable to party that has delegated the power and function. There are also a small number non local authority based Building Consent Authorities which can perform a (limited) range of processing functions under the Building Act, in this case under an accreditation from the Department of Building and Housing. There are also examples of reserve trusts that may have bylaw making powers under the Reserves Act but in the main responsibility for reserve

[1] Not this is a different concept than that of centralisation verses decentralisation discussed in Chapter 5 of the discussion paper

management lies either with central government through the Department of Conservation or a local authority. The Public Health sections in District Health Boards, in our understanding, operate under delegation from the Director General of Health, performing decentralised delivery of regulatory responsibilities.

The paper therefore fails to adequately analyse and explain some of the factors around the current assignment of regulatory powers. But how to assign regulatory responsibility between central and local government, or any other entity is of critical importance. Chapter 5 identifies a number of factors that go into the mix. We agree that sufficient capability and capacity is an issue; the paper asserts that local government may have problems but in our experience so too does central government in many areas. The factors influencing assignment are not always unilateral and the optimum assignment is the interplay between factors. By way of example Figure 2 might exemplify one way of dealing with high risk/highly specialised areas of regulatory need. The response of regional councils to group together to deal with the regulation of dams under the Building Act is a good example of managing a high risk/low frequency regulatory demand but this could have equally been a central government function. Why isn't it? Rather that suggesting central government did not want the function, perhaps it was accepted there were synergies with resource consent functions and that a local presence justified the assignment.

Figure 2 : Risk & Specialisation




In addition to the factors identified in Table 4 of the paper, which we accept are relevant, any decision on assignment should also address issues around monitoring and reporting, enforcement and adjudication. These may be linked with the governance, capability and capacity, and economies of scale factors identified in the paper but deciding who is best placed to monitor and enforce regulations in any particular setting will more than likely influence location of the function.

The Commission views its terms of reference as steering towards an efficiency–focused approach to subsidiarily. That could be too limiting as customer service has to be a

consideration. Scale economies may lead to a drive to regionalise and centralise the delivery of some regulatory functions, even if through shared service delivery by a number of local authorities. The reality is that the quality of services is affected by distance, and peripheral regions would suffer from efficiency driven centralisation by receiving poorer and ineffective service.

The enforceability of regulations is not sufficiently captured in the discussion paper. It is another area of legislative variability that requires attention. For instance access to infringement fines for breaches at the low end of the impact scale apply under some regimes and not others. To this end the Bylaws Act 1910 needs updating as summary conviction is disproportionate to the likely level of offending against a bylaw (and even this is a confused area of law given the prospect of infringement fines under the LGA2002 at some future date).

Question 25 asks if the location of regulatory functions should be reconsidered. Before responding, we would like to state the reasons for local government involvement and interest in the regulation of activities as these were understated in the discussion paper. The reasons include:

- Local government exists, and has a statutory concern for the social, economic, environmental, and cultural well-being of communities, as required by the LGA2002 (notwithstanding the proposed amendments to the purpose of local government);
- Opportunity to reflect local aspirations and to share the responsibilities of governance;
- Local government is local and has a presence at a community level where regulation is often delivered (local authority regulatory service centres are located in most towns and cities);
- Ease of access by the public to records, information and advice, and the permits, licences, and conditions that may be issued as part of the delivery of regulatory services;
- Proximity to object of enforcement where this is necessary;
- Opportunity to integrate regulation across the range of local government functions, including the integration of regulatory services so that all of the consents required to undertake a project may be obtained in one place - a one-stop “customer focused” approach.

One of the reasons for continued local government involvement is because it has the local presence and systems infrastructure to deliver regulatory services. Where responsibilities are devolved and where there is genuine local interest in the outcomes, that may be all well and good. But if local government is simply going to administer delegated legislation and enforce national standards, is this not best left to an instrument of central government? Perhaps the following local government functions could be further debated:

- Amusement device regulations - arguably a Department of Labour responsibility but until regulations are reviewed, including ridiculous application fee which is fixed at $10, still local government responsibility.

- Navigation and Safety - why does not Maritime New Zealand take over responsibility for pilotage in our major ports. MNZ sets the performance standards, yet local government carries the liabilities which are often disproportionate to the capacity to deliver.

- Rural Fire - a vexed issue as people resources come from local communities but should not NZ Fire Service take on a country-wide responsibility; and why should local rates fund rural fire protection but insurance levies fund urban fire protection?

- Food Safety - NZFSA sets the standards, appoints the "verifiers", let them run the process from the centre.

- Building Act – we seem to getting close to the point where except for the connections with property records, resource management, use of council infrastructure, you have to wonder why local government would want to be the regulator of this activity. DBH can take it over with all its attendant liabilities!

While we do not necessarily promote change for the sake of it because it is unlikely to be cheaper if central government is involved in the above examples, there needs to be an acceptance on the part of central government that if it gives local government powers of intervention and control, it should not unreasonably fetter that power, and should provide sufficient powers to ensure the cost of delivering regulatory services can be properly met. Compliance costs are usually able to be recovered from those affected by regulation. However, in most cases, the cost of developing local regulatory policy is not recoverable and therefore impacts on rates.

In our view the Productivity Commission should develop principles around the assignment of regulatory functions that should

- be transparent;
- reflect the balance of national and local/regional interests in the outcomes sought;
- align governance and accountability arrangements and funding responsibilities with the extent of discretion conferred;
- in relation to local government functions, be consistent with the Local Government Act 2002 and other regulatory responsibilities; and
- fairly recognise risk, liability, transition, and implementation issues.

Central government is accountable to the national community. Each local authority is accountable to its respective local or regional community. This means there may not be a single "local government view" on a policy issue, just as there may not be a single discernable community-wide view. Complicating the relationship is that central government, through Parliament, can exercise power over local government. Other than political limits, there are no limits to the exercise of this power. Central government could, in theory, abolish local government entirely. Local government possesses no similar significant powers.[2] Given the

[2] While under the Local Government Act 2002 local authorities can make certain bylaws that bind the Crown, the Minister of Local Government can exempt the Crown from specific bylaws if he/she deems it in the national interest to do so.

nature of this relationship, it is even more important that central government functionaries properly assess the assignment of regulatory functions to local government.

On review we think the Department of Internal Affairs guidance document *Policy development guidelines for regulatory functions involving local government* is a good document but do wonder whether central government departments have taken it into account since 2006. The Alcohol Reform Bill for instance shows little evidence of having addressed administrative efficiency from a local government perspective. Some departments are obviously better than others in engaging with the local government sector around new regulations.

Successful regulation depends on public support and understanding. Under ideal circumstances, regulation should be a backstop that is only required when behavioural change has not been otherwise achieved. Questions often arise about who has lead responsibility for promoting public understanding of new regulatory regimes, i.e., whether it is central or local government.

Local authorities will be most effective in implementing regulatory responsibilities if they are empowered to work with communities to achieve necessary behavioural change. Too often, local government officers are left with a residual enforcement role (the community "vice squad"). More collaboration between central and local government is required.

Another aspect of good regulatory design is around accountability. Accountability arrangements are sometimes not clear. Should local government officers be accountable to the council, the community, or to a central government agency? Is local government a partner, contractor, stakeholder, contestable service provider, preferred supplier, or government agency? Greater certainty is required in each instance, about the exact role expected of local government and its employees. Current legislation has a confused mix of accountabilities.

A related matter concerns responsibility for information-gathering, monitoring, and audit of the delivery of regulatory responsibilities. Multiple agencies may be involved in the audit of local government, including the Office of the Auditor-General, the Parliamentary Commissioner for the Environment, the Ombudsman, and the central government department with lead responsibility for any particular regulation. Audit, monitoring, and information-gathering demands may be made of local government with sometimes limited ability to recover the cost of these demands. We do not see this as a capability issue but more so a co-ordination issue for central government agencies.

In order to ensure performance, the Building Act includes a costly and expensive accreditation process. This is not a good model and should not be applied to other regulatory tasks. Local government generally has never shied away from the need to put in place systems and processes that provide assurance of an ability to achieve quality in the delivery of legislative requirements. However, the cost and effort involved in the building accreditation process, in our view, is disproportionate to the benefits. Local government is either capable of performing a regulatory service or it is not; why should local government agencies be accredited if central government departments are not?

Question 34 invites a response around regulatory cooperation and coordination. Collaboration between neighbouring local authorities is one means to deliver regulatory

tasks. It is not new and examples of shared services, reverse contracting, transfer of powers exist today. How risk and liability are dealt with is always an issue.

Cooperation is also possible through reciprocal recognition. For instance DoC rangers have been appointed animal control officers to help control dogs on beaches adjoining the Abel Tasman National Park and our Harbourmaster is an Honorary Warden under the Conservation Act and Marine Reserves Act. We have biosecurity officers who are warranted to perform their duties in the adjoining local authority area of Nelson City. We would think the Commission should recommend that any new regulatory responsibilities enacted by central government should include provisions that allow collaboration to occur.

In relation to funding of regulatory functions the discussion paper notes under the heading "Misallocation of regulatory costs" (page 45) the variability in the public/private benefit split. The paper suggests that if the split is wrong councils may end up overcharging applicants - the corollary of under charging the general rate payer or subsidising applicants is not noted. What is at issue is how costs are recovered. Any assessment of local authorities would confirm high variability but not just because of the public/private split. Some councils, like Tasman District Council, will recover 100% of the costs associated with processing permits from applicants yet the overall recovery is much less because of non-chargeable work to the same cost centre (e.g. public enquiries, responding to complaints, cost of appeals to the Environment Court, etc).

In those situations where local government is acting as the regulatory agent of central government, an argument exists for the costs to at least be shared between central and local government.

The discussion paper asks two questions about "political interference" in regulatory administration (Questions 47 and 47). In our view the Commission may fall into the same misunderstanding as the OAG. The law is perhaps clumsy in that section 338 of the RMA says any person can lay an information within six months after the time when the contravention first became known, or should have become known, to the local authority (emphasis added). The local authority is not the chief executive or a staff member. Rather it is the body corporate represented by the elected representatives. For efficiency and other reasons a local authority would normally delegate this power to staff but it opens up a wider issue around who is the regulator and are powers of decision or action inherent in a body such as a local authority or warranted office holder. There are a range of models in the various laws administered by, or on behalf of, local authorities. The law needs to be clear and generally is; what is perhaps more of a challenge are the delegation instruments that are used in the making of regulatory decisions or the warranted powers that go with a designated office holder.

There has been a temptation amongst central government officials to be suspicious of elected representatives – this has lead to the appointment of so-called independent commissioners to stand in the stead of the elected representatives. The RMA and the proposed Alcohol Reform Bill have such provisions. Where a local authority chooses to use such agents for workload management or conflict of interest reasons is appropriate but to have a statutory presumption requiring their use often confuses the doctrine of accountability. Independent commissioners (who are nearly always paid more to do the same job) are not

electorally responsible for decisions they might make whereas elected representatives are. Accordingly if a function is delegated or devolved to a local authority there needs to be a good understanding of the role of the decision maker.

The opportunities to review regulatory decisions and actions are as variable as the types of regulatory responsibilities. Table 7 seeks to characterise the dispute mechanisms available in simple terms. The reality is that different types of decisions will involve different review mechanisms. For instance a decision to grant an off-license to sell liquor involves a different process to challenge than an infringement fine for an unregistered dog, which are both different from contesting a decision to request further information from an applicant seeking resource consent. The paper suggests appeals should be heard by "an authority" other than the body making the original decision. Where that decision has been made by a staff member on behalf of a local authority, it is appropriate that internal review mechanisms are in place before someone has to go to the cost of appealing to an independent (often judicial) authority. The discussion paper could have acknowledged to role of the Ombudsman in reviewing local authority regulatory decisions.

The discussion paper concludes with a section on monitoring regulatory performance. This is currently achieved in various ways. For instance Ministry for the Environment conducts biennial reviews of RMA administration. Local authorities are obliged to submit an annual report to the Department of Internal Affairs about dog control administration and the Ministry of Justice on sale of liquor administration. In addition local authorities are accountable to their communities and performance management is an integral part of the Annual Report under the LGA2002. Customer satisfaction surveys are conducted although this is reliant on local authorities doing this voluntarily. As Figure 11 in the paper demonstrates benchmarking will work where quantitative comparisons can be made (e.g. number of dogs registered, percentage of permits processed within statutory timeframes). It is less easily suited to qualitative assessments where local circumstances make comparisons difficult. Despite their imperfections, satisfaction surveys help track trends from one year to the next within the impacted community.

We are happy to respond to any further questions.

Yours faithfully

Dennis Bush-King
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