

# Submission on issues paper

## **To:**

The New Zealand Productivity Commission

## **Regarding:**

Local government regulatory performance  
Issues paper, July 2012

## **Submitter:**



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## Submission

1. The opportunity to make this submission on the Local government regulatory performance issues paper (**the paper**) is appreciated.
2. Civic Futures Ltd provides public sector agencies with advice and analysis on a range of matters relevant to the scope of the paper, including review and development of bylaws and codes of practice, property development processes, growth modelling and planning and asset management. This submission is made by Greg Marr, Principal, on behalf of Civic Futures Ltd.
3. We would be happy to provide additional comment to the Productivity Commission (**the Commission**) on the matters covered in this submission.

### **1 Summary of submission**

4. This submission:
  - Provides comments on particular introductory matters, including the apparent scope of the paper and the nature of local and central government.
  - Provides comments on some of the specific issues and questions raised in the paper (referenced to page, section or question numbers).

For the convenience of the Commission comments on the specific questions asked in the paper are preceded by the question formatted as below.

Q2 *What are the main economic, social, demographic, technological and environmental trends that are likely to affect local government regulatory functions in the future?*

## **2 Introductory comments**

### *Definition of Regulation*

5. The definition of “regulation” should in our view be amended to account for two particular difficulties with the definition given in the paper (p 2, box 2).
6. Regulation is about “rule making” – the current definition is therefore **too broad**. The reference to “informal instruments” should be removed as this could include areas such as education campaigns or street beautification competitions. Those are clearly not “regulations” or “regulatory activities”. The opportunity to impose a sanction of some form is a key component of “regulation”. This suggests that “self-regulation” (which may be appropriate in some cases) should be excluded from this study of local government regulation.
7. The reference to “managing” behaviour should also be amended to note that regulation can also provide a way to establish “acceptable behaviours” or acceptable approaches (which could be based on social mores, common good, or technical specifications that have been shown to deliver adequate outcomes).
8. The reference in this definition to “achieving outcomes” is supported; regulation should be appropriate and proportional to the issue being addressed.

### *Policy context for the inquiry*

9. Notable for its absence in table 1 (p 3) is any reference to the Building Act 1991, arguably the regulatory area that has had the largest recent impact in New Zealand. As the Commission will be aware, the “regulatory design” elements of this were covered by Mumford (2011). While there has been significant structural and legislative amendment since that act, concerns are still being raised that the right balance has not been achieved (eg. NZ Herald 2012a).

### *The role of local and central government*

10. The enquiry naturally must consider the nature of and relationship between central and local government. We suggest this is consistent with the terms of reference (point 4(f) - “... opportunities **for both central and local government** to improve the regulatory performance in the local government sector”). Central government is responsible for putting “a good policy framework in place” and we suggest that this role should be given more prominence and analysed more critically throughout the paper.
11. In connection with that, it is noted that local government (self-determination of a group of people living close together) is likely to substantially pre-date central government. Many areas that we think of today as unified countries or nations were disparate states or fiefdoms within the last two hundred years, and the reformation of central administrations continues. While within New Zealand local government is structured in a way mandated by central government (and this submission is not advocating a different approach), the existence of local

governance (together with local representation and local accountability) are fundamental to human society regardless of any formal establishment or empowerment by a central agency.

### **3 Comments on chapter 2 “The Commission’s approach”**

#### *Costs and benefits of regulation*

12. We suggest that the “Cost of regulation” information (box 4, p 5) should be followed in any later documents by a statement on the “benefits of regulation”. Regulation is a key part of society<sup>1</sup>, and can be welcomed both by the general public and by businesses who are directly subject to it (for example where it preserves the nature or status of an industry).

Such benefits can include:

- Protecting the public from unsuitable providers / goods:  
The public may not be able to accurately judge competence or suitability of providers; regulation can act as a safety net setting minimum standards of competence (eg. regulation of medical practitioners, or of medicines).
- Protection of public interest, including public health and safety:  
Liquor licensing helps to minimise the potential harm that can arise from improper alcohol sale and consumption. Development controls (eg. through the RMA and the Building Act) can protect human health and safety, environmental values, and property values.
- Reflecting agreed social standards or behaviours (eg. criminal law provisions).
- Ensuring public facilities can be used in a reasonable way, by the public:  
for example, prohibiting damage to public facilities or use of public areas in ways that infringe on others’ rights.

#### *Scope of the inquiry*

Q2 *What are the main economic, social, demographic, technological and environmental trends that are likely to affect local government regulatory functions in the future?*

13. The following are likely to be relevant to future regulation design.

- Changes in demographics  
Changes in ethnicities, age distributions and life expectancy are likely to have a range of influences, including shifts in societal norms; calls for different things to be permitted, prohibited or controlled; and different perceptions of risk and who should bear this.
- Changes in growth levels and patterns and environmental and fiscal constraints  
Most of the western world has experienced reduced economic growth over several years; some commentators see these lower growth figures as “the new normal”. This could have many impacts. For example it could lead to policies that perceived as more “growth-friendly”. If councils are operating with

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<sup>1</sup> For example regulation supports conventions on the rule of law; property rights; freedom of speech and assembly.

reduced revenue, then services (including regulatory services) could be reduced, or they may need to be delivered in more cost effective ways.

- Increases in standards and litigation  
The number and extent of written standards tends to increase over time. The Commission has noted drinking water standards as one example of this, and that these can have significant cost implications.
- eGovernment related activities.

#### **4 Comments on chapter 3 “Local government and regulation”**

14. The “purpose and role” of local government (box 5, p 10) should make reference to the proposal (as part of the Local Government Act 2002 amendment bill) to change this to focus on “infrastructure, services and regulatory functions”. That change may be passed into law before the next stage of this enquiry.

This change (and others in the bill) is intended to narrow the scope of activities that local government undertakes, and presumably to increase the focus on the regulatory functions that it delivers.

This is relevant to this enquiry as a study of “improving regulation performance” should recognise that regulation is one of several ways in which outcomes can be pursued (see also comments on q 43). Under certain circumstances, the Better Local Government reforms could increase the use of regulatory tools (if non-regulatory approaches are weakened by those changes).

#### **5 Comments on chapter 4 “Regulatory variation”**

*Q8 To what extent are local preferences a source of regulatory variation in New Zealand? How far should councils, when implementing a national standard, have discretion to reflect local preferences in their bylaws?*

15. Local preferences are a significant and appropriate source of “regulatory variation”. Local Government is (as noted in the report) closest to local communities, and most likely to be directly accountable to them for outcomes.

There is no simple answer to the level of discretion that is suitable when implementing a national standard. The test could instead be to consider if a “national standard” is appropriate; if so then local discretion should be minimised. This may be appropriate where:

- The national interest requires that approach
- The rights of minorities need to be protected (at a national level)
- The operating environment, or preferences, are considered relatively uniform across the country (and so central regulation is adequate and the most cost-effective approach)
- The issue, or stakeholders, are relatively country-wide
- The effects cover a wide part of the country

16. In cases where local variation is to be appropriate, various mechanisms can still be used to achieve some of the benefits of national regulation. For example, model

bylaws or information (eg. <http://www.qualityplanning.org.nz/>; LGNZ, SOLGM) can both help achieve a measure of uniformity and reduce the costs for developing and administering regulation. This also relates to **Question 22** on factors relevant to this balance.

The Commission may wish to familiarise itself with the vast array of information available through the above and other similar bodies; this has been collated voluntarily, and indicates that local government both understands, and actively seeks, regulatory efficiencies of its own accord.

*Q10 Does the way in which a local authority chooses to exercise its regulatory powers – through bylaws or through its District Plan– lead to differences in effectiveness and outcomes for communities?*

17. The answer to this question is “yes” – the selection of the regulatory tool will impact on effectiveness. This does not however mean that having a potential mix of tools is inappropriate or inefficient. Councils need to have a variety of tools to reflect the preferences of their communities, and the way that each community wishes to develop and promote its own approach to desired community outcomes.
18. This question leads to a reflection on the overlapping and inconsistent powers – including for enforcement – that different acts allow. For example:
  - The Litter Act 1979 and the Dog Control Act 1996 allow ready imposition of infringement notices (effectively, instant fines), which can be used as a practical enforcement tool for situations that do not warrant full court prosecution. These are not however generally available for bylaws, and this can create a “regulatory gap” between education / warnings (that are often but not always effective) and full prosecution (that may only be appropriate in extreme cases).
  - Enforcement processes vary significantly under the LGA and (for example) the RMA, Health Act 1956 or the Building Act 2004. For example, provisions to enter land and prevent nuisance or assert public safety can be very different, for an underlying similar issue or event. This can cause cost, risk or delay at enforcement time. The procedural elements of enforcement can be an important issue when designing regulation. In some cases the difference in these enforcement provisions, as set out in empowering acts, seem to have limited rationale.

*Q16 To what extent does variation in regulatory practice matter?*

19. This is, as the Commission notes, a key point for this enquiry. If local variation does not matter (ie. has no adverse effects) then this enquiry would be substantially simplified. As a starting point, all four of the identified sources of variation (p 18) are considered to be proper recognitions of the diversity of local communities.

This question also links to the discussion for question 8 on situations where centralised regulation might be appropriate.

20. There are however two elements to this that should be considered.
  - Where the local *rules* are different – which would generally be because local circumstances or preferences are different. This arguably represents a

decision (as the Commission might put it) that the additional costs involved are worth bearing to reflect local uniqueness. If there is limited “cross-border” activity, or where the local uniqueness is widely understood and accepted, then the associated costs may be negligible.

- Where the local *interpretation* is different – which might mean that the centralised rules are unclear. In such cases users (both councils and their communities) may be forced to develop case law to seek certainty. Fencing of swimming pools is an example of this, where legislation put a particular approach in place, however different councils have interpreted this in different ways. This uncertainty imposes costs that could be avoided by better regulation.

## **6 Comments on chapter 5 “Who should regulate?”**

Q22 Which of the factors discussed in this chapter are the most important for allocating regulatory functions locally or centrally?

Q23 Which other factors might be important for considering whether a regulatory function should be undertaken locally or centrally?

21. The key factors are suggested to be:

- Preferences – consistent with democratic operation
- Information – which can point to regulation over a wider or narrower area
- National priorities – for matters which are generally recognised as the domain of central government, or where the issue or stakeholders are substantially the same
- Governance – including access to decision-makers and their accountability

22. Other factors that should be considered are:

- Local priorities – issues that are very important for one community might not even exist in another  
This is considered to be separate to “preferences” as that word carries the idea of minor differences in preferred approach. A community should be free to choose where its resources are used (ie. to address which issues).
- Risk / uncertainty – centralised regulation represents greater risk if the regulation is inadequate or inappropriate (“having all the eggs in one basket”). Where significantly new approaches are being put in place, risks should be carefully considered, especially where the centralised regulation prevents local variations.

## **7 Comments on chapter 6 “Getting regulation right”**

Q26 Do local authority significance policies allow for adequate consideration of the present and future costs and benefits of local government regulation-making?

23. Consideration of “significance” (as defined in the LGA and assessed against the significance policy) is a standard part of decision-making. As the Commission will be aware, a “significant” decision follows generally the same route as any other decision that is subject to use of the special consultative procedure, except that a

greater level of detail would usually be recorded through the process. This includes consideration of present and future costs (LGA s77), regardless of whether the decision is formally significant.

*Q27 Does the local government regulation-making process lead to good regulation? If there is evidence to show that it does not, how could the process be improved?*

24. Existing local government processes are considered to generally lead to “good regulation”, as outlined by the Commission (p 36 and box 14). All of the elements noted there have an alignment with the requirements of the LGA (in particular Part 6, Planning, decision-making, and accountability) or recognised best practice<sup>2</sup>.

#### *The process for regulations made by central government*

25. The requirements of the special consultative procedure are considered to mirror most of the requirements included in the Regulatory Impact Analysis (RIA) process, such as identifying the problem, identifying options, assessment of costs and benefits, and consultation. See LGA s77, s155.

It is noted that on occasion comprehensive regulatory impact statements are not provided for central government legislative changes.

*Q43 For which aspects of the regulatory process (eg, approval, monitoring, enforcement and appeals) could compliance costs to business be reduced without compromising the intent of the regulation? How could this be done?*

26. Considering the appropriate level of compliance costs is part of good regulation; this is not a separate matter.

As noted elsewhere (eg. comments in relation to p 5 and p 52) – the intent is not that regulation is cost- or time-free. Regulation must be seen as a way for the community’s expectations to be explained, for proposals to be tested against that, and for sanctions to be imposed, or applications declined, where appropriate. The “delay” quoted in the case study (box 17 p 44-45) represents the time for this process to be followed.

27. Common approaches used within good practice regulation will include:

- Clear identification of the issues and outcomes involved
- Early consultation with industry / those likely to be directly or materially affected
- Thorough evaluation of whether regulation is actually necessary (ie can the outcomes be achieved through the industry’s voluntary efforts or self-regulation, or other approaches)
- Appropriate advice and enforcement practices (eg making the rules clear and readily available, alongside the reasons for the rules; issuing advice and education before warnings and enforcement where this is effective)
- Ongoing reference or stakeholder groups, once regulation is in place (providing an ongoing dialogue and a range of forums where issues can be raised)
- Publication of review information

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<sup>2</sup> See for example SOLGM Legal Compliance Modules; LGNZ KnowHow; [www.qualityplanning.org.nz](http://www.qualityplanning.org.nz)

28. Allowing a simpler enforcement approach (eg. infringement notices – see discussion on q 10) could clearly reduce enforcement costs for all parties.

### *Reviewing existing regulations*

Q48 *Are the current processes for reviewing existing regulation adequate? Could they be improved?*

29. Legislation could be amended to make it clear that a lower threshold applies for retention of an existing regulation (eg. a bylaw) than the making of a new bylaw. The current construction of the bylaw review provisions of the LGA (s 158-160) applies the same process for review as for a bylaw first being made. This may not be necessary if the bylaw is operating as intended.

Q51 *Is there a sufficient range of mechanisms for resolving disputes and reviewing regulatory decisions of local authorities?*

30. Yes.

The paper's table focuses on external and formal mechanisms. However, councils are public bodies and provide a range of mechanisms closely related to decision-making and the potential for disputes over these, including:

- Discussion with decision-makers
- Public / transparent decision-making processes (reflecting natural justice), including consultation and notification requirements (eg. LGA / RMA)
- Advice of appeal / review opportunities alongside decisions
- Formal delegations (including review by senior members or elected members, de novo where appropriate)
- Correspondence through the chief executive
- Approaches via LGOIMA / Ombudsman
- Public forums at committees
- Direct approach to the mayor or other elected members
- Media / public reporting

## **8 Comments on chapter 7 “How should regulatory performance be assessed?”**

31. The issues paper includes in its monitoring section (p 52, emphasis added):

*For example, the Department of Building and Housing undertakes Technical Reviews of local authority performance under the Building Act 2004. These reviews assess local authority compliance with statutory timeframes for issuing compliance schedules and how well local authorities monitored the timeliness of owners providing building warrants of fitness to the local authority. Similar reviews are undertaken every two years by the Ministry for the Environment to assess compliance with timeframe requirements in the RMA.*

32. This extract highlights a key difficulty with “performance monitoring”. Measuring timeliness is relatively easy; measuring the quality of decision-making (or of regulation itself) is much more difficult (as noted p56). Outcomes sought are



influenced by many factors.

There is a presumption (underlying the LGA and RMA as examples) that third parties will often be affected by decisions, and the right of those parties to have input to the decision-making process is carefully prescribed. This inevitably involves time and cost, and, for applicants, risk. It is however inappropriate to cast those impacts as uniformly negative within New Zealand society.

*Q63 Of the performance indicators commonly collected by local authorities, do any naturally lend themselves to systematic benchmarking of regulatory performance?*

*Q64 What new performance indicators could meaningfully measure the regulatory performance of local government?*

33. Regulation often involves both a direct customer and indirect customers<sup>3</sup>.

The direct customer (eg. an applicant for a resource consent) will often initiate the process, is bound by it, and carries at least some of the direct and indirect costs.

Indirect customers – sometimes nominally the wider public – may be much less directly affected, and even largely unaware of efforts undertaken on their behalf on a day to day basis.

34. Satisfaction surveys can cover both direct and indirect customers, if carefully designed and if their limitations are understood<sup>4</sup>. They can therefore have a place in understanding performance trends – though variations across New Zealand would mean they would not generally be appropriate for benchmarking between councils.

## **9 Conclusion**

35. Thank you for the opportunity to make this submission. We would be happy to provide further clarification of any points we have made.

## **10 References**

Mumford 2011: “Best practice regulation: Setting Targets and Detecting Vulnerabilities”, Page 36 – Policy Quarterly – Volume 7, Issue 3 – August 2011, accessed Jun 2012 from <http://ips.ac.nz/publications/files/f34b30a11f9.pdf>

NZ Herald 2012a: “Councils dread 'Leaky Buildings II’”, 30 July 2012, accessed Aug 2012 from [http://www.nzherald.co.nz/business/news/article.cfm?c\\_id=3&objectid=10823103](http://www.nzherald.co.nz/business/news/article.cfm?c_id=3&objectid=10823103)

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<sup>3</sup> This can also be thought of in terms of the public good, an approach the Commission will be familiar with.

<sup>4</sup> The 2010 report by Audit New Zealand on Performance Measures has several caveats for satisfaction measures.