

## **Towards Better Regulation**

A submission on the Productivity Commission's Draft Report from  
Porirua City Council

07 March 2013

Document Number: 860586

This submission is on behalf of Porirua City Council in response to the Productivity Commission's Draft Report, "Towards Better Local Government". This submission also takes into account the views expressed in Local Government New Zealand's draft submission.

## **Introduction**

At the outset the Council wishes to commend the Productivity Commission on the way it has gone about researching this report. It has been the most inclusive review process that Porirua City Council has been involved with during the 'Better Local Government' reform programme.

The purpose of this submission is to show a general support for the Draft Report. The Council also endorses the submission prepared by Local Government New Zealand. As such the Council's intention is to supplement their submission by emphasising the areas of greatest importance to the Council.

## **Local Government in New Zealand**

The Draft Report objectively articulates a common frustration across Local Government with the relationship between central and Local Government. The dysfunction that exists in relationship is no better illustrated than the regulatory functions of Local Government. At its core is the imbalance of power that exists between central and Local Government. Local Government has itself been the subject of seemingly endless reform since the 1989 amalgamations. In 1992 regions were reduced and amalgamations were stopped, 1996 long term planning and financial strategies were introduced, 2002 a new legal framework was introduced, 2010 new transparency and financial accountability amendments were passed. Now in 2012/13 Local Government is again being reformed. Add to that list the individual changes to legislation that create functions and responsibilities for Local Government. Then add in the variation that exists in the way that Ministries and Departments engage with Councils. The result is an unpredictable environment that does not support efficient administration due to an ever changing form and function of Local Government.

Like business Local Government needs predictability in the environment it operates in. One of the fundamental tenants of the rule of law is that the law is predictable. The function and place of Local Government appears to be highly elastic. But that elasticity comes at the cost of operational efficiency internally. It is also difficult for Councils to shield businesses and individuals from the unpredictable environment.

That rate of change in the last 20 years illustrates the need for greater stability in the foundations of Local Government. Currently a constitutional review is taking place as well as Local Government reform. There has never been a better time to consider the protection and stability that a constitutional separation of Local Government from Central Government could provide to Local Government.

## Diversity across local authorities

We were pleased to see the Commission's finding 3.6 that local variation likely drives different regulatory approaches. Local authorities are best placed to determine the needs of their communities.

It is our belief that if Central Government sets a regulatory standard, and the enforcement of that standard is not dependant on local preferences or variation then it should be administered by Central Government. For example officers of the Ministry of Primary Industries implement their regulations in a homogenous way and maintain accountability where it is most appropriate.

Q3.1 Economic development is a diverse subject it touches every resident, it is inseparable from the health of a region. It is particularly pertinent with respect to the protection of the local environment. In Porirua the harbour and estuary have been identified as critical assets for Porirua's future. But they are threatened by silt and sediment run off from earthworks. At the same time the Council has identified Porirua as an affordable place to live and encourages development which supports the local economy. These two concepts of environmental protection and developing the built environment can appear to be rivals. When considered under the umbrella of 'economic development' Councils can account for the true cost of development and protect the environment in accordance with local preferences.

We manage development carefully to ensure it is encouraged without jeopardising the community's natural assets. The Council uses a mixture of regulatory and non-regulatory tools to manage development:

- investment in infrastructure;
- attaching the true cost of development through development contributions; and
- regulation.

As an example of regulation, the Council's Silt and Sediment Bylaw requires certain protection measures to prevent silt and sediment entering the storm water system and entering the harbour.

Economic development is an important consideration for all Councils whether it is explicitly assessed or not. It allows the broader interests of the community to be protected from the narrow interests of the individual.

## Allocating regulatory responsibilities

One of the difficulties in relation to allocation of regulatory responsibilities resides in the structure of Local Government. Because territorial authorities are not subordinate to regional Councils there is a legitimate concern that allocating greater responsibilities to territorial authorities could result in a discordant approach to regulation. The discussion of economic development above is a primary example of this. Within the Wellington Region each Council

indirectly competes for ratepayers, businesses, events. Economic development for a region is as interconnected as water catchment protection, but currently it is considered by individual Councils with respect to limited coordination through a Council controlled organisation, Grow Wellington. Economic development policy should be the function of regional and not territorial authorities to facilitate greater collaboration.

Q4.1-2 The first criterion for the allocation of responsibilities on page 59 of the Draft Report is to identify where the costs and benefits fall. On many issues the costs and benefits will cross boundaries within a region.

e.g. public transport is a Local Government function managed by Wellington Regional Council. Their train services cross territorial boundaries and the stations are maintained by the Regional Council. But because regional councils can't purchase land they must coordinate parking capacity at stations with the relevant territorial authorities. Consider also that public transport competes with a revenue stream for territorial authority of parking fees.

e.g. in developing local alcohol policies territorial authorities will be examining how to safely transport intoxicated people in the region. However public transport is managed by the Wellington Regional Council and most nights trains stop around 12.00 PM. Giving effect to coordinated closing hours set by local alcohol policies will be difficult in the region without also coordinating public transport. Because of the mismatch in functions it will be difficult to find a mutually beneficial solution.

Local Governments structural arrangements do not facilitate coordination for the benefit of regions. Instead of a vertical hierarchical structure that would facilitate coordination territorial authorities and regional Councils are functionally separate under the Local Government Act 2002. By bringing public transport, roading and parking under one Council controlled organisation in Auckland their new structure is already producing progressive transport policies.

In Sir Geoffrey and Matthew Palmer's fourth edition of *Bridled Power* they look into the future of Local Government and question the role of regional Councils.<sup>1</sup> At the time they saw two primary functions of regional governance, that of transport and resource management and they questioned whether regional governance is necessary. But alternatively they considered that regional Councils may be a more suitable vehicle for a greater devolution of Central Government powers. With the new reorganisation provisions it is possible that a transition towards more unitary authorities will occur and the growth of an even less constitutionally secure body, the local board. The current situation is constitutionally compromised when compared to

---

<sup>1</sup> Sir Geoffrey Palmer and Matthew Palmer, *Bridled Power; New Zealand's Constitution and Government*, 4th ed. (Melbourne: Oxford University Press, 2004), 260.

most other Westminster systems of government which create separation between the branches of government.

Many see the rise of unitary authorities or strengthening of regional authorities as a threat to local democracy and the centralisation of power. An opposite argument can also be made that the current structure of Local Government has only encouraged delegation of implementation tasks as opposed to true devolution of Central Government power. When the emphasis shifts to decision making at the regional level where there is more secure and greater funding, more capacity to make better decisions and an overarching vision for economic development and spatial planning, then maybe Central Government may feel more inclined to devolve policy decision making to Local Government.

Currently the structure and form of Local Government in New Zealand is a significant driver in the allocation of functions. We agree with the guidelines to evaluate and reallocate regulatory roles. But without a broader functional scope at the regional level we believe it is unlikely Central Government will devolve more functions to Local Government. Devolution not delegation provides the best alignment of responsibility and political accountability. If the choice is between local and central only without a regional option, then we believe that territorial authorities will continue to act as an administrator and implementer of Central Government policy and standard setting.

## Regulation making

### The funding of regulation

Changes in legislation that alter or create new administrative requirements have substantial setup cost for Councils.

Grants that assist with meeting these costs may alleviate impact of cost on the quality of implementation. Councils struggle to recoup these costs through fees alone and as a result much of the implementation cost of a new regime is carried by the ratepayer. For example the cost to alter existing software and databases to capture the new information required to implement the new Sale and Supply of Alcohol Act 2012 will not be recovered from fees. The costs may seem negligible but for regulatory budgets, which in your Draft Report only account for around 6% of a Councils budget, setup fees are a considerable obstacle. Budgeting for legislative changes can be very difficult. Take the Food Bill for example. This Bill was introduced to the House of Representatives in May 2010. Three years on and it's yet to progress to the second reading. If that Bill becomes law it will bring substantial changes to the information that needs to be maintained and will require tens of thousands of dollars investment by each territorial authority. Porirua City Council has held off developing a bylaw to regulate food service in the district in anticipation of the new legislation. The Food Bill remains an unknown and impossible to budget for.

We support the principles for funding including the use of marginal cost to determine appropriate levels of funding as it is appropriate to the size and capability of each Council. However we foresee the determining and demonstrating what the marginal cost is as problematic. A matrix that takes account of estimated fixed costs and estimated cost per rate payer may provide a simple method of determining grant size.

## Regulation making by Central Government

The new Sale and Supply of Alcohol Act 2012 illustrates the 'accountability buffer' problem well. The most considerable changes to the regulatory controls on the sale and supply of alcohol are changes that impact Local Government. The success or failure of the new Act is largely dependent on the implementation of the Act by Local Government. Despite this the Ministry of Justice has provided no funding; and guidance on implementation amounted to a few fact sheets posted on the ministry's website a month after the Act came into force.

Q7.1 It is our belief that most Ministries and Departments do not demonstrate an appreciation the impacts on Local Government that policy and legislative changes have. The Regulatory Impact Statement is an important quality assurance tool in Central Government policy development. We believe that a requirement to consider the impact on Local Government, in particular the costs of implementation that are being shifted to Local Government need to be considered during policy development. Although the regulatory impact statement comes late in the policy making process it is an assessment of the analysis that has occurred earlier. Adding Local Government as an assessment criterion may positively impact the analysis that occurs earlier in the process.

Another tool may be a set of principles that all Ministries and Departments are required to use when Local Government is identified as a stakeholder in a policy. These principles should guide how Ministries and Departments collaborate or consult with Local Government.

We believe that the core problem is the difference in perspectives on the role of Local Government. The mismatch in understanding exists between the community, the Council and Central Government. Communities often appear to believe that Councils have greater control over their functions than they really do. Councils are pulled between broad community expectation and Central Governments limited view on a Council's role. Communities frequently do not understand that much of the regulation carried out by Local Government is simply implementation of Central Government policy. Conversely Central Government fails to provide the necessary discretion to Councils to accommodate community preferences. On this basis we would support a finding that the accountability buffer and mismatched expectations results in a democratically undesirable disconnect between the political costs of regulation and policy decision making.

## Local authorities as regulators

The cost of enforcement acts as a significant barrier to developing regulations beyond the specific duties arising from legislation. Enforceability is a major consideration in developing local regulation.

The cost of prosecution may also seem disproportionate to the offence. For example prosecuting a person for illegally dumping waste may cost tens of thousands of dollars. Even though prosecution might be more appropriate given the level of offending, an infringement is more likely to be used because of the low administration cost to the Council.

The risk averse nature of Local Government is exacerbated by a lack of knowledge or expertise. This is because in defending a Council prosecution the validity of the regulation will most likely be challenged.

In combination, both the risk averse nature of and the cost of enforcement in our view act as significant detractors from exercising the Council's power of general competence.

### Q9.1 Pooled funding mechanisms for prosecutions

A major component of the decision; whether or not to prosecute, are budget constraints. As such Councillors in adopting budgets are inadvertently limiting the number of prosecutions that can be carried out annually. Officers at the Council support a greater separation between Councillors and the decision to prosecute. We believe that a pooled funding scheme should be explored.

Another pooled fund could be used to encourage Councils to be more progressive with their regulation. Just as court costs may be minimised for a test case, a pooled fund to bring cases that are of interest to the Local Government sector would minimise apprehension around regulatory validity.

### Q9.2 Use of bylaws to restrict access to services.

The structural arrangements of most Councils would make this difficult. The areas of a Council that provide services are unlikely to be the same as those that draft and review bylaws. It is also unlikely that such a bylaw would be valid because the Local Government Act requires analysis on whether the problem the bylaw seeks to solve and whether a bylaw is in fact the most appropriate way of remedying the problem. Such a bylaw is likely to fail this analysis.

## Finally

We would like to support Local Government New Zealand in its submission to the Productivity Commission. We would also like to commend the Productivity Commission on the way it has consulted with Local Government and presented a well-researched Draft Report.

Nick Law

**POLICY ANALYST / BUSINESS ADVISOR**

Approved for submission by:

David Rolfe

**GENERAL MANAGER ENVIRONMENT AND REGULATORY SERVICES**