Submission of the Society of Local Government Managers On the Productivity Commission Draft Report *Towards Better Local Regulation*

The Society of Local Government Managers (SOLGM) thanks the Commission for the opportunity to make a submission on *Towards Better Local Regulation*.

First, SOLGM wishes to congratulate the Commission for the progress it has made to date. The comments on the relationship between central and local government, and the constitutional position of the sector were important points to make.

As with our first submission, we have not attempted to engage with the entire range of questions, but have chosen to focus on areas where we disagree or wish to amplify on issues raised in the document.

We have had the benefit of viewing a draft of LGNZ's submission, with which we generally agree.

Allocating Regulatory Responsibilities

SOLGM agrees with the principles/criteria that the Commission has offered as the basis for a rational allocation of functions between central and local government.

We are unclear whether the Commission intends that these criteria would have equal weight. The criteria that focus on homogeneity of preferences and the existence of spillover benefits are the "circuit breakers".

The paper would benefit from some clearer statements around the allocation of roles and responsibilities between the different spheres of local governance i.e. are the criteria for allocating functions between territorial and regional authorities merely based on geography?

We concur with the comments on pages 53 and 54 that suggest that the management of risk should be a criteria and that management of risk, especially legal risks underpins the performance of many local government functions. We would further add that New Zealand's legal system and its reliance on joint and several liability as a tenet of the law of restitution is one of the primary drivers behind the design of inspection regimes. The Commission might usefully consider some of the proposals in the Law Commission paper *Review of Joint and Several Liability* and how these incentivize the management of risk in local government[1].

The Commission has asked whether the criteria should be a requirement of the Regulatory Impact Statement (RIS) or part of advice to Ministers when contemplating regulation. The short

[1] A copy of SOLGM's submission to the review is available on request.

answer to both is “of course”, but would add that the criteria should form part of the analysis long before a RIS is prepared. These criteria should be a standard tool in the making of regulatory policy and apply at the earliest point of the process.

And finally in this section, SOLGM asks how the Commission intends to socialise these principles/criteria into the central government process. The Government intends that principles and guidelines would be non-binding, but this does not mean that they should not have to consider these principles in policy analysis and explain why they are not relevant or were ignored.

Funding

This is another area where the Commission has taken on many of the comments we made in our last submission – in particular around the completeness of the section 101(3) analysis, and in accepting that there is no uniform technical answer to what is and is not a public good.

It has long been a policy position of both *Local Government New Zealand* and SOLGM that there should be better identification of the national good component of activities the sector undertakes. This is especially true where the activity is a function that we are required to provide under statute. Our joint submission to the 2007 Independent Inquiry into local authority rates held that:

“The inquiry provides an opportunity for a robust debate as to what constitutes national good, including criteria and methodologies for determining what is “national good” and a strategy for investment in national good infrastructure and services. Some of these criteria might include:

- *the presence of externalities/spillover benefits the sorts of national good are essentially examples of what economists refer to as “spillover” benefits i.e. a piece of supposedly local infrastructure that generates benefits beyond the district (often referred to as externalities). A simple test of this argument is: who would be worse off if a particular piece of infrastructure were absent? If the only losers were local users, there are no externalities; if other significant losers can be identified beyond the locality, then externalities exist. A good example of this sort of argument being used “on the ground” is the $11 million scheme established in 2005 to fund some toilets and other tourism related infrastructure in small communities.*

- *promotion of equity in outcomes - A related issue is when the level of service is not completely determined locally, in particular when there are minimum national standards. In this case, local taxpayers may receive more benefits than they would choose (and be prepared to pay for) without the external minima. Typically, there may be some externalities generating such external minima, e.g. costs which would be imposed on taxpayers outside the locality. Such externalities do not necessarily have to result from actual external costs. They may also result from people’s preferences, in particular that people in high-benefit areas would prefer to see other areas enjoying a similar level of benefits, to the extent that they might be prepared to make some contribution to them. Good examples of funding that illustrate this criterion in action of the include funding (on a*

matching basis) for sewage disposal schemes in small communities and to enable small communities to meet the New Zealand Drinking Water Standards.

- *the size of the local funding base – this criterion is typically linked with equity in outcomes in that some infrastructure may be necessary for other reasons but the cost may be beyond the financial capability of the local district to afford. For this reason funding from central government for infrastructural development is generally either targeted only at lower income communities (as is the case with sewage and drinking water subsidies) or has some recognition of "ability to pay" (as is the case with most land transport funding)[2]."*

The Commission might note that much of this discussion is (broadly) consistent with the criteria the Commission has recommended as principles for allocating functions between central and local government. We consider it is also consistent with the principles for funding that the Commission refers to on page 69.

SOLGM agrees that local government should not expect funding from central government without an appropriate accountability regime. New Zealand's public finance legislation will not permit funding without accountability. In some instances where a national good case can be made (such as the RMA and Building Act) reporting obligations already exist. We also note that there is a difference between accountability, and the use of funding as a lever for other desired objectives.

Improving Central Government Regulatory Governance

"In my view, the lesson is not that regulation or deregulation is bad, but that bad regulation is bad[3]"

SOLGM views this as the particularly important section of the report. Many of the "whole of system" issues the Commission refers to can be traced back to issues with regulatory governance.

We should note that on occasion local government has contributed to occasionally not always helped itself. Some regulatory statures had their genesis in a request from the sector. Prostitution reform is one such example, and the National Dog Database is another. In the former case, this was an issue raised by a single local authority, in the latter case the database had its genesis in the debate around microchipping of dogs which itself grew out of a request form a small group of metropolitan local authorities. Perhaps this is an example where the RIS criteria for proposals being *"commensurate to scale*" (described on page 73) would be appropriately applied.

[2] SOLGM and *Local Government New Zealand (2007), Getting Real: Funding the True Cost of Local Communities* pp 37-38.

[3] Ferguson (2012), *The Great Degenaration: How Institutions Decay and Economies Die* (kindle edition)

Quality of Analysis

Our previous submission described a number of flaws we often see in policy analysis. In most instances, the options in Table 7.1 need not apply to local government matters alone. Each of these options carries some cost, but we suggest that the cost of an ill-advised or misaligned regulatory policy (interpreting badly drafted law, unnecessary compliance, and lost opportunities) is real and important.

We agree that implementation concerns are poorly understood, and generally left for last. We refer you to the eight principles of effective implementation that we included with our previous submission. Effective regulation requires both good policy design and good implementation – and when viewed in this light poor implementation is a risk for both local and central government.

We support the three options for improving the quality of RIS (options one, two and eight). Ideally RIAT or an independent body would review all RIS. Treasury is able to exercise a degree of "suasion" over Ministers that other potential options may not possess. Perhaps an acceptable compromise to having all RIS is that Treasury focus on "significant RIS' (as currently defined), with discretion to review:

- other RIS based on some assessment of risk factors (e.g. the standard of previous RIS, previous history of policy failure and the like)
- a random sample of RIS conducted in conjunction with Departmental performance reviews (or CE performance reviews – providing a "tie-in" for the fourth of the options).

We also support the third option, the refusal to place papers on a Cabinet agenda without a properly completed RIS. Our only reservation about this option is that it places significant reliance on those officials in RIAT having the incentives and character to "stand their ground" when advising on RIS.

We agree the post implementation review is generally weak, if conducted at all. In our experience there has only ever been one such post-implementation review – the 2008 review that the Local Government Commission undertook of the Local Government Act and the Local Electoral Act[4]. In this instance, the review was a requirement of the Local Government Act 2002 (section 32) and was added in the last stages of the legislative process. Policy-makers should consider whether to conduct such a review, and if so when – we see this as little different from the requirement on local authorities to review their bylaws (section 159, LGA). We therefore see considerable value in the fifth of the options.

[4] The Commission's report can be found at http://www.lgc.govt.nz/lgcwebsite.nsf/wpg_URL/Resources-Legislative-Review-Index!OpenDocument

Improving Capability

We support each of the options presented in Table 7.2.

As a general point, SOLGM runs courses that are aimed at central government officials. We run an annual Local Government for Central Government Course that provides officials with an understanding of the sector's role, functions, funding and structure together with some case studies of successful planning, regulatory, joint up governance and service delivery. Our other courses and events are generally open to central government officials – though we have noted a marked decline in attendance over recent years.

Judicious use of secondments from local government into central government is an obvious way of filling capability gaps, especially if the gap is expected to be a temporary one. Such secondments will be most effective if they result in experienced local government staff providing expertise. The secondments we've seen into central government have been relatively junior, inexperienced officers. We agree with comments that secondees views may not be reflective of the sector as a whole. SOLGM could certainly be a useful place for departments to start their enquires when looking for secondment. Secondment should not be regarded as a substitute for engagement.

In a similar vein, option three – exposure to thought leaders also brings in expertise. Again SOLGM can help with this. Use of thought leaders must be tempered with the realization that not all will provide a disinterested view.

One of the sector's main sources of frustration with policy processes is the lack of support for implementation needs. We can cite examples where central government has worked with the sector on training needs (the work the Ministry of Justice is doing with ourselves and LGNZ to train members and staff on changes to liquor legislation is a good current example). But some other equally important legislation has been untouched – a good example is long-term planning where smaller local authorities operated for three years without clear guidance on what the expectations were.

In our previous submission we advocated for greater resourcing to enable DIA to have better oversight of other department's policy initiatives. We consider that the Commission has overstated the risk of DIA "acting as lobbyists for local government' – there is a difference between making sure people are appropriately advised of the practical consequences of decisions face and advocating for policies that are seen to favour the interests of a particular sector. To give an example, DIA might advise another department that a particular initiative cannot be implemented for another year because local authorities have adopted their annual or Long-Term Plans.

As a provider of capability to the local government sector we observe that while price is a factor in local authority's decisions to take up training, accessibility is an equally big consideration. This is especially true for elected members, where decisions take place in the public arena, and

where expenses are publicly disclosed. When a Department wishes to "roll out" a particular initiative it will generally need to conduct training in at least six venues around the country (possibly more). SOLGM also notes that it has acquired and uses web based training capability – something that none of the government departments or other agencies in the local government sector currently has.

Improving Engagement

We agree that improving engagement is an important part of improving regulatory governance. Improving engagement has two dimensions – improving the *quantity* of engagement and improving the *quality* of engagement. The options from Table 7.3 generally address the former as opposed to the latter.

Performance Assessment

The Commission asks how local government has used *Still Your Side of the Deal (YSD)*[5] *t*o assess its regulatory performance. The guide was developed to help local authorities develop performance culture (and meet the requirements of the Local Government Act).

Both SOLGM, and external reviewers have noted a general improvement in the overall "standard" of performance frameworks (of which information in LTPs is a subset). This has been good from the standpoint of helping the community get a better understanding of what they can expect from their council. We are, however, less confident that the sector as a whole is making the stride from what YSD calls "*developing*" performance management to *"understanding"* and *"utilizing*". The comments on page 214 of the report around using performance measures to target resources "ring true" in this context.

We generally agree that there is a focus on timeliness in many regulatory activities to the exclusion of other, equally helpful, measures. However, we observe that this is the result of a regulatory environment that requires reporting of timeliness (building consents and RMA consent). All the comments in Box 14.6 are rooted in this. Another key regulatory setting – the RMA discount regulations, also emphasises timeliness as a level of service.

SOLGM chose the appendices to Part Two of the guide to reflect groups of activity that have been traditionally regarded as among the "harder" to develop performance measures. One of the areas for improvement for the next guide will be to select one or two activities more closely associated with regulation, the closest the present guide comes is the RMA monitoring.

The Commission may have noted that *Your Side of the Deal* encourages local authorities to view outcomes measures as an assessment of the contribution that the activity makes to "making people's lives better i.e. community wellbeing. This reinforces that local authorities do not provide services for their own sake. The recent change to the purpose of local government to a service focused "meeting the community needs for good-quality local infrastructure, local public services and local regulation" discourages outcome based thinking.

[5] Disclosure Statement: The author of this submission was also the primary author of the current edition of YSD and a substantial contributor to the previous edition.

Good outcome measures need good quality sub-national data. Many national surveys (such as the Household Labour Force Survey, the Household Economic Survey) are based on sampling, with sample sizes that do not generate robust data, even at regional level. There is a national initiative to improve the collection of social statistics – including at regional level, but we have not seen any improvements in data availability and quality for some years. We also note that during 2012 Cabinet considered a proposal to move to a ten yearly national Census of Population and Dwellings. As the only non-sample survey currently in existence, this is an important data source for local authorities. While the proposal was deferred until after the 2018 Census, a recommendation from the Commission in support of a five yearly census would be welcomed.

The *"regulatory terms of reference"* offer greater clarity in roles and functions under the new legislation. This would be welcomed – and we see benefits that flow beyond the performance assessment. We are assuming that such a document would be developed at an early point in the policy process, as information such as costs and benefits of regulation; how governance and feedback systems link up is fundamental to a competent policy process.

We also recognise some benefits in the so-called regulatory *health checks,* at least in principle. The performance audits that the Office of the Auditor-General conducts serve as a useful starting point for development of a methodology – though we suspect that samples would have to be wider than is usually the case in a performance audit.. We'd also suggest that there would be enough commonality in regulatory functions (or capacity to undertake them) that once developed methodologies could be refined for each case.

Health checks would have most value if performed at arm's length from both central and local government. An appropriately resourced Office of the Auditor-General is one option for providing independence.

SOLGM has previously developed health checks around a local authority's capability in, and readiness for the long-term plan[6]. SOLGM's legal compliance modules, while not universal in their coverage of regulatory functions may also help in the development of a programme of health checks in many areas[7].

We make one final point in this area. The Commission's mandate empowers it to look only at the performance of regulatory functions. The Commission should be aware that these functions, while important, are but one of a large number of calls on local government). Any finding that local government needs to boost its capability in the regulatory area will come at the expense of other priorities, especially at a time when local government's rates may be regulated to increases in the CPI.

[6] See SOLGM(2010), *Living Through (Another) Long-Term Plan*, page 12-16.

[7] In the current financial year all 78 local authorities are members of SOLGM's legal compliance programme.