Submission To	**New Zealand Productivity Commission – July 2012**
Submission On	**Local Government Regulation Inquiry**
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Submission Date	**31 August 2012**
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Submitter Background	**Senior local government manager, elected local government member, farmer, businesswoman, environmentalist.**
Submitter Hearing Option	**Yes, I would like to be heard in support of this submission.**

Submission

The Commission has prepared a well written and easy to navigate document that should assist with some very good feedback. Thank you and congratulations.

In preparing this submission the writer has taken the same broad definition of regulation as defined in Box 2, Page 2, of the document.

The need for quality regulation has been evident for some times and is nicely summed up in Treasury's comment on the Regulation Standards Bill in 2011 **-**

> **"***Legislative quality is important; many people are concerned about legislative quality; the concerns are not confined to any particular type of legislation or dimension of quality; and existing arrangements for developing legislation are not particularly good at ensuring quality***".**

There is likely to be wide agreement with that view including from the present government. Its "Better Regulation, Less Regulation" initiative has a commitment that "We will introduce new regulation only when we are satisfied that it is required, reasonable and robust" and "We will review existing regulation in order to identify and remove requirements that are unnecessary, ineffective and excessively costly".

Clearly there is both a desire and a need for change and, unless we do, we will continue to get what we have always got – more and more indiscriminate regulation, poorly drafted, of indeterminate need, uncertain quality, and unknown effectiveness – not exactly a recipe for improving living standards or productivity.

This is not the first attempt to rectify the problem but previous efforts have been limited to process tinkering whereas it is the lack of a single strategic focus that is the problem. As the

adage says " If everyone is responsible then no-on is accountable" and it is being able to hold someone accountable for improving aspects of New Zealand's regulatory framework that is important here.

The essence of this submission is that I believe, in the absence of an upper house of Parliament or a national constitution, New Zealand would be well served by an Independent Regulatory Review Office (IRRO) to balance the power of the Executive when making regulations and to ensure that those regulations are necessary and of a consistent high quality.

The purpose of the IRRO then would be to manage all facets of our regulatory regime including receiving, and possibly hearing, applications for regulation, recommending regulation to government, and reviewing regulation as referred by government from time to time. I am suggesting that the IRRO would be an independent office, led by an Officer of Parliament, in much the same manner as the Ombudsman or Controller and Auditor-General's office is now. The present requirement for both Regulatory Impact Analysis and Regulatory Impact Statements and the work of the Legislative Advisory Committee (LAC) could remain and be incorporated into the work of the IRRO.

Local Government would have no ability to make by-laws but could make an application to the IRRO for a local law as a Schedule to a particular statute. The IRRO would handle all regulation not just that relating to local government.

Central government would be the only regulation making entity and all regulations would have to come via a recommendation from the IRRO. Government however, would not be bound by those recommendations but would be required to publicly notify reasons why it chose not to implement what had been recommended by the IRRO.

The IRRO should be supported by an Advisory Panel of subject experts comprising appointees from government departments, local government, business, academia, social services and Maori in order to provide a balanced perspective in terms of advice about the public good of any regulation. While the LAC no doubt does a very commendable job it is weighted in favour of more legislation because that's what legislators do – we recall Abraham Maslow's hammer analogy.

Discussion

It is one of the great perversities of the human condition that the "free society" is entirely dependent on regulation for its very existence.

Because people have quite different ideas on what is acceptable to them, and what they think is acceptable for others, regulation is necessary to ensure that one person's expression of freedom does not interfere with another person's exercise of freedom.

The Australian Independent Commission Against Corruption describes regulatory functions thus –

Regulation involves the enforcement of government controls and restrictions on a particular activity conducted by the public sector.

In NSW, state and local governments regulate many activities including the health and safety of workplaces, environmental management, construction and property development, motor vehicles, and food, as well as licensing of occupations and skills.

The integrity of regulatory functions is a matter of public interest. The power of regulators to grant significant benefits to, or impose restrictions or penalties on, members of the public can increase the risk that they will be exposed to corruption. Regulators also have a role in collecting and protecting government revenue.

With the exception of references to State governments, the situation in New Zealand is, not surprisingly, almost parallel. In addition, ours is an isolated country with a very small population and this has an impact on our regulatory environment. The market/competition/regulation regimes that could work in other countries may not be quite so applicable in New Zealand.

Our parliamentary democracy, based on the Westminster system, is without the balancing power of an upper house (our Legislative Assembly was abolished in 1950) nor a national constitution that citizens of other jurisdictions enjoy. In many ways democracy in New Zealand is legislatively weak and relies heavily on existing protocols and precedents within the Westminster system for its functionality. It is therefore even more imperative that we have an open, transparent, independent and accountable regulation making regime.

With that in mind, and with many years experience as both an elected member and senior manager in local government, I have formed the view that New Zealand would be better served if we had an Independent Regulatory Review Office (IRRO) whose purpose would be to make recommendations to government on our regulatory regime and to co-ordinate the somewhat disparate efforts of various government departments.

Assuming then that we have an IRRO, or something similar, how would it work.
The following are some possibilities -
Government, including Members and Local Government would make application to the IRRO for a new regulation or review of an existing regulation.
Each application would need to specify why the regulation was needed, what other methods were considered to address the issue/s, what the goals or outcomes of the regulation were to be, what the monitoring, enforcement and performance reporting regimes should be, what the expected impact costs are and where they fall, who should fund which of these costs, what the service delivery regime was to be, and the review/evaluation criteria – here is where the existing requirements for Regulatory Impact Analysis/Statements would continue albeit with a few additions.
The IRRO would hear the application and deliberate taking into account existing regulation
The IRRO would release its decision to parliament with recommendations for change as necessary.
Government would publicly announce their decision and if in the affirmative the regulation would then be referred to the appropriate law drafters – if in the negative government would provide the reasons why it was not proceeding.

If government did not accept the recommendations of the IRRO they would publicly announce their reasons and then proceed to law drafting stages.
Once the law was drafted it would be referred back to the IRRO for confirmation or amendment.
The draft regulation would then become the Bill and go through the usual public consultation/select committee process and be referred back to the IRRO for final comment to Parliament prior to the final reading.
The Bill is then enacted.

This exercise should cover what, in the writers view, is the most critical aspect of regulation – the careful long term thinking and planning that should precede all regulation. Regulation, and especially new regulation, should only be used where every other avenue has been explored and found wanting.

In general I would prefer to see more democracy at the front end of regulation than I would at the implementation end – a far more inclusive, informative , accountable and transparent planning process followed by certainty. Regulatory failure tends to occur when we regulate quickly, and often as a knee jerk response to a certain situation or issue. In December 2011, New Zealand's pre-eminent constitutional expert Sir Geoffrey Palmer commented that -

> **"***It is incontestable in New Zealand that legislation needs more and better scrutiny than it receives. … The quality of legislation is getting worse in my view. Not enough time and effort is spent on getting it right".*

This writer could not agree more.

The leaky homes fiasco is probably the most obvious and costly recent example of this scenario. At a time of economic boom developers, councils, politicians, land owners, trades people, architects and the many other people with an interest in economic development were keen to see the removal of what were referred to as 'road blocks' in the building industry. The collision of new regulation, new products, development pressures, skill shortages and professional blindness conspired to create a national catastrophe that has ruined the lives of many thousands of New Zealanders and will cost taxpayers/ratepayers i.e. citizens, billions of dollars. The euphemistic 'road blocks' turned out to be vital citizen safe guards against poor regulation and building practice.

Regulatory failure is a costly business and impacts very negatively on our national productivity – the only winners from this disaster have been the legal profession and that, in itself, raises some interesting questions of provider capture – yet another reason to support the need for an IRRO. In retrospect, we would have been well advised to take a far more considered approach at the front end of the exercise but, as Eisenhower is reputed to have said "the search for scapegoats is the easiest of all hunting expeditions" – better that we just get it right first time.

Another example of huge national and local importance is the Resource Management Act (RMA) and particularly those sections relating to Regional and District Plans. These are some of the most voluminous, long winded, time consuming, complicated and expensive documents produced in New Zealand – and they have to be reviewed regularly so the

process is virtually continuous. Unfortunately the end result is often uncertainty, delays, frustration, legal fees, anger and disillusionment.

The process is made far more difficult than it need be partly because of the lack of National Policy Statements (NPS) to guide local authorities in the overall strategic policy direction for these plans. Section 45 of the RMA outlines the purpose of NPS's as *"to state objectives and policies for matters of national significance that are relevant to achieving the purpose of this Act.*

The RMA initially was predicated on these statements but, for whatever reason, only a few of these have eventuated. The resultant policy vacuum has left every local authority doing their own thing and trying to imagine what is, or might be, in the national interest – not a particularly useful position to be in really and an area where the Productivity Commission could usefully devote further research effort.

I have absolutely no doubt that all staff and politicians who have to work with the legislation are doing their absolute best to produce good outcomes but, as stated earlier, not enough work (make that democracy) is undertaken at the beginning of the exercise. What tends to happen is that citizens try to understand the process but their efforts are circumvented by the sheer amount of data, information and knowledge needed to navigate their way through the process. Many simply give up only to discover one day that the house next door to theirs is being demolished, along with the one or two on either side, and someone is about to build a four level apartment complex that overlooks them and generally interferes with the amenity that they previously enjoyed.

To make matters worse, it usually comes as a surprise that the four level apartment complex is a permitted activity in the zone and that Council is generally keen to promote this type of intensification which may well be far more environmentally friendly and affordable than the existing housing stock.

In relation to this regulatory review the question as to what should be a central or local government regulatory function becomes quite interesting because the answer depends on which questions are being asked.

If we look at the scenario above then -

Is there a national interest at stake?
Indirectly in terms of protecting productive land, transport/public transport, economic development, employment and housing portfolios.

Are there any Treaty of Waitangi issues?
Most probably not.

Are there national environmental issues involved?
Not likely – assuming appropriate conditions are in place to manage the development.

Are there national education issues involved?
No

Are there national health issues involved?
No

Are there national security issues involved?
No

In the absence of any relevant National Policy Statements, or evidence that there are matters of national significance involved, the response to this scenario is that local government is the appropriate level for the preparation, monitoring, and enforcement functions.

However, if we look at another scenario we may well come up with a completely different answer.

An overseas business consortium wants to build a processing plant in an industrial zone close to Auckland airport utilizing bio-solids from the Watercare treatment plant at Mangere to develop portable sheets of pre- planted lawn, playing fields, gardens and stock food. The sheets are light, easily transported, readily stored and will grow either horizontally or vertically depending on space and need. They can also be replaced within minutes if necessary hence the enthusiasm for the project.

Is there a national interest at stake?
Yes. Export markets will want to be assured that meat from any animals who have consumed this food source is safe for human consumption.

Are there Treaty of Waitangi issues?
Most likely. There may well be cultural issues to be addressed.

Are there national environmental issues involved?
Yes. The location on the edge of the Manukau Harbour is environmentally very sensitive

Are there national education issues involved?
Could be. How safe is the product for playing fields and is there a need for a public education programme to improve understanding of the product and its use?

Are there national health issues involved?
Definitely. Bio solids from wastewater require careful handling so the safety of staff working in this environment needs to be protected.

Are there national security issues involved?
Possibly. The proximity of Auckland airport would be a factor to consider for the processing plant.

Are there business/financial issues involved?
Possibly. The Overseas Investment Commission may want to look at the proposal.

From this scenario, it is clear that central government probably needs to be involved. As it happens the existing regulations provide for such eventualities under the Ministers call-in procedures in the RMA.

These two examples demonstrate that the division of regulatory responsibilities between central and local government is not always clear cut. It is probably sufficient to say that the present process of escalation to central government under agreed circumstances is likely to be a good option. It may also be that these provisions in the RMA could be copied to other regulation under pre determined criteria and especially is they were accompanied by good NPS's.

The main issue though, does need to be re-stated – New Zealand must devote more time, energy, focus and resources to the front end of the regulation making process so that we get it right first time. Responsibilities, delegations, costs, funds, performance, monitoring and review regimes should be made during the development stages of regulation and this is where the critical role of an IRRO becomes more evident.

In suggesting this office the writer is not proposing a major transformational change. These are usually time hungry, very expensive and often not especially successful. Rather what is preferred is an incremental process that does not dismantle what we have but builds an addition onto the present structure. The idea is to create a new facility within the existing Parliamentary system to act as a 'clearing house' for regulation – an independent office much like the present Ombudsman's or Auditor-General's facility that has served us well for many years.

There is plenty of evidence to support the view that an independent and more deliberative regulation making process would be of great benefit to all New Zealanders and especially our business community. In addition, an office focused on continuous review of existing legislation is likely to produce, in the medium to long term, a far cleaner, clearer and coherent regulatory regime in New Zealand.

That would probably be a very good outcome for everyone.

Response to Key Inquiry Questions.

1. **How could the allocation of regulatory functions between central and local government be improved?**

This needs to be one of the responsibilities of the suggested IRRO outlined earlier and should apply to both new regulation and when reviewing existing regulation. The main criteria though will still likely be the definition between what is in the national interest and what is local, rather than who does what.

Even for matters that were of national interest there is no reason why, with appropriate guidelines (NPS's) and Service Level Agreements/Statements of Intent, local government

could not undertake a service delivery role – funded as necessary for any assumed financial obligations/commitment.

The point here though is to make sure we get it right i.e. be effective, rather than doing it quickly i.e. be efficient. It is very easy to be efficient doing the wrong thing so the focus must be on effectiveness.

2. **How can central and local government improve regulatory performance in the local government sector?**

This question requires some very careful consideration. We need to be absolutely aware of the statutory framework that local government works with in New Zealand. Without a national constitution, local government here is a creature of status and relies entirely on central government for its existence. Further, central government does not fund local government as occurs in other jurisdictions. New Zealand local government funds all of its activities save for a revenue sharing arrangement with central government over road taxes (of various kinds) and a range of one-off subsidies for projects like small community wastewater systems.

Local government is therefore accountable to their ratepayers/citizens for virtually all of the functions they perform. Central government should have a direct interest, and influence, on how well or otherwise local government performs functions that come via regulation but herein lies the rub – unless the regulation itself includes some nationally consistent performance measures it is going to be very difficult to know how well any particular party is performing – and that includes central government.

In a 2009 study titled "A Literature Review of Local Government Performance Reporting – Accountable To Whom" this writer found -

> ***"****The perversity of performance reporting in the public sector has many drivers but it appears that the two key elements within the local government sector can be identified as - failure to recognise multiple audiences coupled with a lack of formal agreements around partnerships which would allow stakeholders to identify who was responsible for achieving particular outcomes and thus whom they should hold accountable".*

Most regulation places onerous demands in terms of functional responsibility for service delivery i.e. the Sale of Liquor Act, the Building Act etc., and in many instances this role is taken up by the local government sector. If the goal is to improve performance – and that is a very commendable goal – then a suitable framework needs to be developed that identifies who is to be held accountable for which aspects of regulation and how they are to be held accountable. It is not enough to state that the polling booth is the best measure of government performance - at either a local or central level – citizens deserve better and, at 40% of GDP, government activity clearly has an impact on the nation's productivity so it is in everyone's interest to get it right.

3. **How can the regulatory performance of the local government sector be measured in a manner that leads to continuous improvement in the way it regulates?**

Local government in New Zealand actually makes very little regulation – in fact only local by-laws and there is nothing to suggest that these have any national significance. I will assume then that the question is how local government carries out its regulatory functions rather than how it regulates?

The Commission may be interested in this writers findings from her 2010 Masters thesis titled - "Mind The Gap" A Framework for Performance Reporting and Inter-Council Comparison In New Zealand Local Government –

> *"Despite a wide range of challenges the research indicates that a robust and transparent performance reporting regime is a worthwhile addition to the local government accountability landscape. The paper develops a performance reporting framework built around the purpose of local government - governance and democracy, economic well-being, environmental well-being, social and cultural well-being. Performance is determined by utilising existing processes/procedures and supported by a series of new evaluative questions, independent citizen surveys and national performance indicators (once developed). It is proposed that performance reports be short and succinct, published widely and with inter-council comparative material available on the internet. Rather than discarding previous performance management and reporting efforts, this paper builds on present industry knowledge and practice in a way that provides national consistency of format, focus and auditing processes".*

However, there is nothing in the above study, or any other material that this writer has seen, to indicate that the regulatory performance of local government is any better or worse than the regulatory performance of central government. This raises the question as to whether the Commission's brief should be extended to include the broader issues outlined earlier in this submission.

Accepting that this may not be the current mandate of the Commission, there is non-the-less an opportunity to take a 'whole of regulation' approach which is what this writer would like to see as an outcome of the Local Government Regulation Inquiry 2012.

As most of the further questions posed by the Commission have been responded to above my final comments will relate to those remaining questions.

Question 2: What are the main economic, social, demographics, technological and environmental trends that are likely to affect local government regulatory functions in the future?

With an ageing population New Zealand will face economic challenges around rates/tax affordability. The most dramatic changes will come within the technology area where citizens

will expect to access all the information and services they need through mobile devices. Managing these expectations within appropriate privacy settings will be difficult in constrained financial situations.

Question 4: Are there other statutes that confer significant regulatory responsibilities on local government? What, if any, regulatory roles of local government are missing from Table 2?

Useful additions would include the Reserves Act 1977, The Fencing of Swimming Pools Act 1988, the Cemeteries and Crematoria Act 2003.

Question 6: Do the different characteristics and priorities of local authorities explain most of the differences in regulatory practice across local government?

I would say generally, yes. The manner in which regulations are applied in Naseby will be very different from Napier – literally like comparing apples with apricots – and that is how it should be. Local government was designed for the benefit of locals and it should stay that way. In many ways this also has little, if any, impact on national productivity and even then the impact is likely to be a positive rather than negative. The main concern is to ensure that there is a nationally consistent way to measure performance and that does not presently exist.

Question 11: In what ways has the Treaty of Waitangi influenced how local authorities have undertaken regulatory functions delegated to them by the Crown?

The Treaty was here long before local government and for most of its history is was ignored by local government. In more recent times it has been finding of the Waitangi Tribunal, and their subsequent inclusion in various regulations relating to local government that has had an enormous impact on how local government works. Depending on one's point of view that impact has either been negative or positive.

There is no doubt that much more thought, time and effort is now devoted to compliance with the principles of the treaty and that this has resulted in a different approach to resource management and cultural sensitivity. The costs of compliance though are very considerable with much of these associated with time costs – the consultation process is quite a lengthy undertaking and the delays in decision making are not always appreciated or understood by the business community.

Question 19: What mechanisms or incentives are there for local authorities to share innovations (or experiences with 'failed' innovations) with others?

From my experience I would say, very little and mostly because of patch protection by both politicians and staff. If we were to take a pure business approach to local government then we would have two or maybe three processing centers in the country capable of handling all transactions relating to accounts, HR, property, rates, and licensing and for all units of local government.

In addition a central procurement facility would save millions on such items as paper, library books, office equipment/incidentals, travel, vehicles, etc., but to do that would result in a substantial loss of local employment and business opportunities. It is difficult to see how any local government politician would be motivated to behave in this way as their focus is on the local community, not the national interest.

This is another area that the Commission could usefully explore further as there are opportunities for substantial efficiencies in the administration/finance/corporate area given that the same process applies to every local authority in New Zealand.

Question 26: Do local authority significance policies allow for adequate consideration of the present and future costs and benefits of local government regulation-making?

The significance policies outlined in Section 77 belong to Part 6 of the Local Government Act 2002 dealing with Planning, decision-making, and accountability whereas Section 155 of the Act relates to the making of by-laws within Part 8, Regulatory, enforcement, and coercive powers of local authorities.

There appears to be no cross referencing between these two sections indicating that the significance policy under Section 77 should be taken into account when applying Section 155 as has been indicated in the Commissions Issues Paper. It is somewhat unclear therefore whether question 26 is appropriately framed within the document especially given the clear governance responsibility requirements outlined in Section 39 (c) of the Act

> *"A local authority should ensure that, so far as is practicable, responsibility and processes for decision-making in relation to regulatory responsibilities is separated from responsibility and processes for decision-making for non-regulatory responsibilities" .*

It is most likely that the purpose of this section has been specifically designed to separate the regulatory roles from all other roles that local authorities undertake hence the lack of cross referencing is deliberate.

Question 40: Which local government regulatory areas (e.g. planning and land use, building and construction, environmental regulation, public safety and food safety) impose the greatest unnecessary regulatory burden on individuals and businesses?

That depends entirely on who is asking the question. A business person may have a very different view on what is necessary to protect the environment than a scientist and a parent

will see public safety in a very different light than a single professional couple. Again, NPS's would be very useful here in focusing effort on matters of national importance and this would then be consistent across the whole country. That small initiative alone would be a most welcome addition to the regulatory environment for both central and local government. These major statements should drive most regulation with any local additions being added as and when necessary but getting the front end sorted is again the highest priority.

Question 47: Are there any other governance issues which impede the efficiency of local government regulation?

Yes - central government leadership. Local government is always on the receiving end of regulation and, while that is not necessarily the wrong thing, quality regulation would provide for them the clarity of purpose needed to muster resources around the things that really matter to New Zealand. Efficiency is also only one aspect of a regulatory regime – as mentioned earlier it is the effectiveness aspect that has more impact on productivity and this is where we need to make a far more focused effort.

Doing the right thing – effectiveness – is about leadership, direction and resource allocation and this role sits with central government. What are our national priorities, how should they be funded, who should do them and how should they be done.

Doing the thing right – efficiency – is about performance, enforcement, monitoring, measuring and reporting. This role sits with local government when they are the service providers and the focus is on how will they implement the role, how they will measure it and how they will report it.

For the purposes of this submission, local government by-laws have essentially been ignored as they have very little impact on national productivity.

An opportunity to discuss this submission with the Commission would be most welcome.

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