



Auckland Council's Submission in Response to the
New Zealand Productivity Commission's Issues Paper:

LOCAL GOVERNMENT REGULATORY PERFORMANCE

17 September 2012

INTRODUCTION

1. This is Auckland Council's submission in response to the New Zealand Productivity Commission's ("the Commission's") issues paper *Local Government Regulatory Performance*.
2. The address for service is Auckland Council, Private Bag 92300, Victoria Street West, Auckland 1142.
3. Please direct any enquiries to Dr Roger Blakeley, Chief Planning Officer. Phone 09 307 6063 or email roger.blakeley@aucklandcouncil.govt.nz
4. This submission has been approved by the Auckland Plan Committee of Auckland Council.
5. Auckland Council welcomes the opportunity to submit on the Commission's issues paper and thanks the Commission for extending the Council's submission deadline to 21 September to enable adequate engagement with political decision makers.
6. The Council notes that the Commission will also call for submissions on its draft report into regulatory performance which is due to be released to the Government in December. The recommendations and comments in this report are intended to assist and inform the Commission as it proceeds with its inquiry. The Council also extends an invitation to the Commission to meet with it to provide the opportunity to explore some of the points made in this submission in more detail.
7. The submission begins with some key messages and then makes general comments structured around the terms of reference of the inquiry and the six principal areas of the issues paper listed below:
 - (i) Commission's approach
 - (ii) Local government and regulation
 - (iii) Regulatory variation
 - (iv) Who should regulate?
 - (v) Getting regulation right
 - (vi) How should regulation be assessed?

The Council has primarily focused on key messages rather than providing a detailed answer to each of the 65 questions contained in the issues paper. This is to ensure that the unique circumstances of Auckland in terms of size, scale (ability to deliver), new governance arrangements and the statutory requirements of the Council are taken into account.

KEY MESSAGES

8. The key messages outlined in this section can be summarised as follows:
 - The issues paper is limited due to its focus on local government's regulatory role only
 - Regulation is not a "necessary evil" but serves to protect the public interest
 - By definition, local government regulation varies to respond to local preferences
 - Consideration needs to be given to the unintended liability local government sometimes assumes in order to execute required functions
 - Greater responsiveness to local advocacy on national policy settings is required
 - Auckland's unique circumstances should be taken into account
 - Auckland's spatial plan requirement creates opportunities for integrated and simplified planning processes and needs to be supported by other legislative change.
9. It is accepted that the New Zealand regulatory system requires both central government and local government involvement (allocation of functions), however the issues paper is limited because it focuses only on local government regulatory roles. The principles upon which the allocation of roles should be determined need to be explicit; noting that local authorities are often best placed to execute decisions such as those under the Resource Management Act 1991 (RMA) to reflect local conditions (including physical conditions), community values and preferences within a national policy setting.
10. There needs to be better recognition that regulation is not a "necessary evil" in itself but serves to protect the public interest and level of public investment made on behalf of communities. It is noted that the private sector also imposes its own regulation to protect its investments which councils have little control over (e.g. private covenants on titles). The issue is not whether to regulate or not, but to put in place regulation (and allocation of functions) that is fit for purpose. The recent systemic issues associated with "leaky buildings" is just one example of the devastating financial costs, loss of property value and human costs associated with a poor regulatory environment.
11. Where conditions and outcomes are not local specific, there is the opportunity for Central Government to set a more prescriptive framework

for policy and delivery of consistent outcomes. The Fencing of Swimming Pools Act 1987, for example, provides for swimming pools to be exempted from the requirements of the Act at the discretion of a committee of a territorial authority comprised of elected representatives. This places a considerable burden of responsibility on local representatives, and the volumes associated with this process make it an inefficient way to address what should be exceptions to well-understood requirements. The current legislation places great reliance on case law and determinations to provide guidance on what constitutes a compliant immediate pool area. This results in a high degree of variation between territorial authorities.

12. In certain circumstances, it can be appropriate to take account of different levels of risk that may vary from district to district. Setting a standard at the highest level to cover all geographic areas may not always be appropriate. For example, the risk of earthquakes occurring is not evenly spread across the country and it should be reasonable therefore to have lower standards in some districts.
13. In addition to the allocation of functions, due consideration needs to be given to the allocation of liability. There are examples where local authorities assume unnecessary liability as they execute required functions. Sometimes this is a result of Central Government establishing policy and making it operative without full consideration of the consequences for delivery of the policy. By way of example the Building Act 2012 defines a category of building work ("restricted building work") whereby only a person with the requisite licence may perform the design or construction. This requirement came into effect on 1 April but a large approval backlog at Department of Building and Housing meant that a large number of the Auckland design community had yet to receive their licence. The implications of strict compliance would have unnecessarily disrupted the Auckland development industry. Auckland Council assessed the situation prior to implementation, and decided to lodge such applications whilst only approving building consents with designers who had received their licence. This pragmatic approach allowed designers to get through the licensing process and averted what would have been a 'slow down' in an already depressed industry. Unfortunately the consequence of this is that liability gets transferred from Central Government to the local authority. It was apparent that large numbers of unlicensed designers were not a feature of many other communities, which highlights the need for regulatory implementation to be tailored to community needs.
14. As well, there are many examples where there are significant delays to changes in the national policy setting in response to advocacy from local authorities. Examples have included strong advocacy to reduce alcohol

harm. At one stage local authorities requested a change to the Sale of Liquor Act (to allow the location of alcohol outlets to be a factor for consideration by the District Licensing Agencies). In the absence of such reform local authorities look to other means (e.g. the RMA) to address community concerns about the proliferation of outlets at great cost and with no remedy. Such issues are now being considered through the Alcohol Reform Bill 2010 but it has taken several years for the national policy framework to change so that it is in keeping with community expectations. Greater responsiveness is required at a national level.

15. It is agreed that local authorities vary in their capacity to undertake the range of functions delegated to them. In this regard the unique circumstances of Auckland must be taken into account. With amalgamation, Auckland Council now operates at a scale that reduces duplication and enables greater efficiencies in contract procurement and standardisation of processes. The Council would like to discuss with the Commission the operational benefits that this presents to it and the initiatives already taken to achieve benefits.
16. At a policy setting level, Auckland Council is also the only local authority required to prepare a spatial plan that sets out a development strategy for the next 30 years taking account of all four well-beings. Now that this is complete, the Council is urging central government to change associated legislation in keeping with original aspirations for an integrated and simplified planning system as detailed in the October 2010 discussion document, *Building Competitive Cities: Reform of the Urban and Infrastructure Planning System*. Notably the Council seeks to make its Unitary Plan (which will combine district plans, the Air, Land and Water Plan, and the Regional Policy Statement into one unitary plan ready for notification by September 2013) effective immediately on notification. Also, following early community engagement and testing of options the Council has sought to have the hearings process changed so that appeals are on points of law only. It has been recommended that the hearings panel include independent commissioners. Similarly, the Council has also sought to have the Land Transport Management Act 2003 changed so that the Auckland Council does not need to duplicate its transport strategy which is contained in the Auckland Plan with a further regional transport strategy. In other words, the Council's approach to spatial planning provides the opportunity to establish a legislative and regulatory framework which supports local authorities to integrate and simplify strategies, policies and plans, including across the many statutes that govern local authorities. Ultimately the reduction of such strategies and plans will achieve efficient consent delivery.

RECOMMENDATIONS

17. Develop a comprehensive list of the regulatory functions of both central government and local government.
18. Refine the definition of regulation to include its role in achieving outcomes the community has identified to be important.
19. Ensure a more balanced discussion of regulation by articulating the benefits that regulation provides rather than just the costs, and by identifying the risks that arise from an absence of regulation or from an inadequate regulatory framework.
20. Rather than focusing on all regulatory areas in the inquiry, consider taking a risk-based approach, i.e. determine strategic priority areas based on the level of risk and the potential for significant improvements in regulatory performance.
21. Add the statutes noted in paragraph 51 to Table 2.
22. Recognise that local variation is inherent in the nature of local government and is in many circumstances highly appropriate.
23. Develop a set of principles to guide the allocation of regulatory functions.
24. Ensure more effective local implementation by early involvement of the local government sector in the development of new regulation or legislation.
25. Respond in a timely manner to local concerns and priorities in relation to existing regulatory frameworks.
26. Consider making the infringement offence system more generally available through the introduction of a mechanism whereby, with appropriate public input, bylaw breaches can be specified to be infringement offences.

TERMS OF REFERENCE

27. The Productivity Commission has been tasked with undertaking an inquiry into opportunities to improve regulatory performance in local government. The terms of reference for the inquiry have been synthesised into three overarching issues:
 - How can the allocation of regulatory functions between central and local government be improved?
 - How can central and local government improve regulatory performance in the local government sector?
 - 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?

28. The Commission defines regulation widely to encompass the full range of legal and informal instruments through which government seeks to manage the behaviour of individuals and businesses, in order to achieve particular economic, social and environmental outcomes.

Recommendation

29. Develop a comprehensive list of the regulatory functions of both central government and local government.
30. Refine the definition of regulation to include its role in achieving outcomes the community has identified to be important.

Discussion

31. The terms of reference for the inquiry are limited in scope because, while the New Zealand regulatory regime naturally has central government and local government components, the Commission is only examining the local government side of the regime.
32. The principles and methods to consider the purpose and function of regulations, their efficacy, costs and benefits apply equally to central government and local government regulatory functions and cannot sensibly be applied in isolation from each other. In addition, both central and local government regulatory functions can occur within the same activity area.
33. The principles upon which the allocation of functions should be determined (a desired outcome of the inquiry) should be applied to a broad basket of regulatory functions and not just to those now performed by local government.
34. In defining regulation, the reference to “managing” the behaviour of individuals and society sends an unnecessarily negative message about its role. It should be acknowledged that regulation also provides a way to establish an acceptable path towards achieving particular outcomes. Regulation is, however, concerned with “rule making” and once the regulatory outcomes have been agreed, the ability to enforce or impose a sanction of some form if the regulatory standard is not adhered to, is a key component of it. The inclusion of “informal instruments” in the definition extends the inquiry into areas such as education campaigns which, while acting as important complements to regulatory tools or instruments, are not, strictly speaking, key components of the regulatory regime.

COMMISSION'S APPROACH

- Issues**
35. The issues paper outlines the need for regulation to balance the well being that it seeks to promote with the (often diffuse) costs that it imposes on individuals and society as a whole. Getting this balance right and delivering the best outcomes for New Zealand underlies the Commission's approach to its consideration of opportunities to improve the regulatory performance of local government.
 36. The Commission also seeks to identify the relative importance of the range of regulatory activities undertaken by local government in order to provide focus for its inquiry.
- Recommendations**
37. Ensure a more balanced discussion of regulation by articulating the benefits that regulation provides rather than just the costs, and by identifying the risks that arise from an absence of regulation or from an inadequate regulatory framework.
 38. Rather than focusing on all regulatory areas in the inquiry, consider taking a risk-based approach, i.e. determine strategic priority areas based on the level of risk and the potential for significant improvements in regulatory performance.
- Discussion**
39. There appears to be an underlying assumption in the issues paper that the costs of local government regulation are too high and often inappropriately allocated. The Commission states that evidence of benefits and costs can be difficult to obtain. It then sets out the three types of costs in a detailed manner with no corresponding detail on the range of benefits.
 40. The benefits of regulation need to be clearly articulated. Regulation is a fundamental tenet of a fair society where the rights of those less able to assess risk, to understand, or to stand up for themselves are protected. Governments regulate to protect and save lives, and to protect and enhance the quality of life of our communities, making them safe, healthy, and fair places to live. This is achieved through a variety of regulatory interventions such as preventing and minimising gambling-related harm, setting standards for quality housing, and taking steps to ensure safety in public and private places. The well-being of Auckland's communities is critical to creating a better future for Auckland and to attracting and retaining people to live and invest here.
 41. Regulation also has the power to facilitate and protect economic value in business and investment through the removal or reduction of risk and the provision of greater certainty and protection of rights. This must always be balanced with ensuring there are no unnecessary regulatory or non-regulatory barriers, costs and risks that act as a disincentive to businesses. In New Zealand it is considered to be easy to set up

business with relatively little red tape to contend with,¹ and New Zealand is consistently rated highly in international benchmarking surveys in relation to the ease of doing business. In the World Bank's 2012 *Doing Business Survey*², New Zealand is ranked third out of 183 countries and in the Heritage Foundation's 2012 Index of Economic Freedom, New Zealand is ranked fourth overall out of 179 countries.³

42. It is important that the Commission's inquiry considers the outcomes that arise from an absence of regulation. A lack of regulation, or the establishment of poor or inadequate regulation, provides the backdrop for many examples of significant market failures in recent years in New Zealand. For example, the recent collapse of the finance industry may in some way be attributed to lack of effective regulation. This and other examples have had substantial financial and social impacts on communities.
43. Regulation imposes a range of direct and indirect compliance costs on individuals and businesses and there is a need to ensure that these costs are appropriate. Considerations include whether:
 - it impinges unnecessarily on businesses
 - the cost reflects the importance to the community of the outcome sought
 - it is an appropriate area in which to influence behaviour
 - the costs to society imposed by the activities of businesses or individuals are covered.
44. To help define the scope of the inquiry, the Commission asks about the relative importance of regulatory activities. This question is problematic since all regulation undertaken by local government is intended to achieve specific outcomes that are considered desirable or necessary for social, economic, cultural and environmental well being. Assessing relative importance depends on perspective; while central government may focus on the barriers to economic activity or productivity posed by the RMA, for example, local communities may place greater importance on the fact that they are empowered under the RMA to make their own decisions, via the planning process, about the use, development and protection of resources in their district or region. Those decisions are able to reflect local values and preferences, provided they are consistent

¹ Auckland's Economic Development Strategy, 2012, p. 14. <http://eds.aucklandcouncil.govt.nz/downloads/>

² *Doing Business*, International Bank for Reconstruction and Development / World Bank, 2012, <http://www.doingbusiness.org/~media/FPDKM/Doing%20Business/Documents/Annual-Reports/English/DB12-FullReport.pdf> The survey measures 11 areas of business regulation that are relevant to the life cycle of a domestic firm: starting a business; registering property; getting credit; protecting investors; enforcing contracts; dealing with construction permits; getting electricity; paying taxes; trading across borders; and resolving insolvency. The survey does not measure all aspects of the business environment e.g. security, corruption, market size, macroeconomic stability, state of the financial system, labour skills of the population or all aspects of the quality of infrastructure.

³ *2012 Index of Economic Freedom*, The Heritage Foundation, <http://www.heritage.org/index/>

with the overall purpose of the RMA.

45. While addressing relative importance is problematic, focus for the inquiry may be provided by taking a risk-based approach. This would seek to identify those areas where improvements in regulatory performance will make a significant positive impact. Elements that could be used to determine strategic priority based on risk include the scale and temporal reach of regulatory areas, and the potential spatial, population, economic, environmental, and cross-border impacts. The severity and permanence of the potential impacts would also be worthwhile considerations in determining regulatory priority areas.
46. The inquiry focuses on who should regulate but more important questions may be what should be regulated and why. This includes considering whether regulation is the best way to achieve the socially optimal outcome or whether it could be achieved through use of another tool or combination of tools. This would help to focus the inquiry on the societal values we are seeking to enhance and protect. It is also critical to ensuring that the regulation is fit for purpose and that it is possible to provide measures of the impact of regulation on the agreed policy objectives.

REGULATORY ACTIVITIES UNDERTAKEN BY LOCAL GOVERNMENT

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| Issues | 47. Chapter 3 of the issues paper sets out the results (Table 2, pp. 11-14) of the Commission's stock-take of the regulatory functions undertaken on the direction of Central Government and those undertaken independently by local government. The Commission asks for feedback on this stock-take. |
| Recommendation | 48. Add the statutes noted in paragraph 51 to Table 2. |
| Discussion | <p>49. Table 2 is a helpful but less than comprehensive inventory. It would be enhanced by a better description of the range of regulatory roles that local government performs under each identified Act. Adding the RMA, the Local Government Act 2002 (LGA), and the Land Transport Management Act 2002, which set out a wide range of regulatory responsibilities would enhance Table 2.</p> <p>50. Given the uniqueness of Auckland's governance structure, the Local Government (Auckland Council) Act 2009 should also be explicitly referenced.</p> <p>51. Additional statutes that should be included in Table 2 are:</p> <ul style="list-style-type: none">(i) Local Government Act 2002(ii) Resource Management Act 1991 |

- (iii) Land Transport Management Act 2003
- (iv) Local Government (Auckland Council) Act 2009
- (v) Fencing of Swimming Pools Act 1987 (obligations on local authorities to inspect and ensure compliance by pool owners in their district)
- (vi) Civil Defence and Emergency Management Act 2002
- (vii) Reserves Act 1977 (management and administration of reserves, including bylaw powers)
- (viii) Waste Minimisation Act 2008 (obligations for regulation of deposit of waste, collection and transport of waste, and extensive bylaw making powers)
- (ix) Burial and Cremation Act 1964 (mandatory duty on local authorities to establish and maintain cemeteries, and bylaw power regulating cemetery use).

52. The issues paper states that Building Consent Authorities “have no role in setting building standards and cannot set higher or lower building standards than the Building Code”⁴. The Council wishes to draw the Commission’s attention to the opportunities under other legislation such as the RMA to impose higher standards than would be required under the Building Act. One example of this is where councils have used their district plans to impose noise standards to control inter-tenancy noise in apartment buildings. There is an opportunity to either enhance the Building Code or to align it with new requirements for urban areas so that there is alignment with future expectations of quality.

REGULATORY VARIATION

Issues

53. The issues paper identifies four specific sources of regulatory variation, and poses questions around the extent to which regulatory practices vary from one local authority to another, the reasons for that variation and the extent to which it matters (in terms of costs imposed on businesses and residents).
54. The Commission acknowledges that there will be some variation given the diversity of local authorities and that although this diversity can lead to innovation in regulatory practices, it can also incur costs for businesses which operate in more than one local authority area. The Commission seeks feedback on whether the way in which a local authority chooses to exercise its regulatory powers leads to differences in outcomes for communities. It also asks how much discretion councils should have to reflect local preferences in their bylaws when implementing a national

⁴ Table 2, p. 11.

standard.

55. The issues paper discusses the delegation of the Crown's Treaty of Waitangi obligations to local government and notes that this may result in variation dependent on the relationship Maori have with significant local natural features. The Commission asks what influence this has on how local authorities have undertaken regulatory functions delegated to them by the Crown.

Recommendation

56. Recognise that local variation is inherent in the nature of local government and is in many circumstances highly appropriate.

Discussion

57. The issues paper appears to start from the assumption that regulatory variation is not desirable, focussing primarily on its cost implications for business rather than the extent to which it appropriately reflects the diverse needs of local communities.
58. Local government regulation is by definition likely to vary between districts and regions; the LGA itself defines the purpose of local government to be to **enable democratic local decision making and action by and on behalf of communities** and promote the social, economic, environmental and cultural well being of communities, in the present and the future (LGA s 10).⁵
59. A local authority must have regard to and provide for a complex matrix of local concerns, values and objectives when developing and implementing regulatory responses. The RMA plan making process is a good illustration of this point. Regulation under the RMA starts with a process that develops an inventory of the district's or region's natural and physical resources and then inquires into the values and aspirations held by the community in respect of those resources. Different sections of the community will have different perspectives on these matters, and different requirements or desired outcomes in relation to resource use, development or protection. The local authority must develop objectives and policies that accurately represent the community's aspirations for the resources of the district/region, and then draft rules to give effect to those objectives and policies.
60. Plan-making is a highly public process, enabling plan provisions to be tested rigorously through the submission, hearings and appeals processes. Bylaw making under the LGA is also subject to an evaluation and consultation process for similar reasons; to ensure that a bylaw promulgated by a local authority is the most appropriate regulatory mechanism to deal with a problem and, if so, whether the proposed bylaw is substantively appropriate. What is "appropriate" requires analysis of local conditions and concerns in addition to the objectives of regulation

⁵ Note that the Local Government Act 2002 Amendment Bill proposes to amend section 10 to change the purpose of local government.

which, under the relevant empowering legislation, are likely to apply nationally. Since bylaws are specifically designed to enable councils to develop regulations to deal with local issues, it is expected that there will be variation from district to district. Mechanisms such as model bylaws can be used to achieve a measure of uniformity and to reduce regulation development costs.

61. A core question of this inquiry is whether variation matters. Reference is made in particular to the costs to business of variation between local authorities. Notwithstanding the role bylaws are designed to play in addressing local issues, it is possible that the “problem” of local variation and the challenges it poses is overstated. Auckland Council is currently reviewing the 158 bylaws it inherited as part of the requirement to standardise regulation across the region by 2015. While operational interpretation and enforcement practices (which are typically driven by council staff on a day to day basis rather than political decision making bodies) may have varied, the review has identified common problems the legacy councils sought to address by way of bylaw.
62. The issues paper considers the opportunities for innovation that diversity in regulatory practice can provide. Auckland Council has a number of examples of innovative practices that have the potential for wider adoption. This includes the Auckland Council Bylaw Standard which ensures consistent process and form of bylaws and allows for local board decision making. More detail on this and other innovative practices is provided in Appendix A.
63. There is a growing body of established case law that facilitates the way in which all local authorities work with Maori. For example, Auckland Council understands it has a higher duty to consult with Tangata Whenua under the RMA than with a consent applicant. Additionally the Council is aware of consultation principles that apply to all work that are well-established through the Courts and which include sufficient information, sufficient time, and open-mindedness. These principles are applied when working with Maori and other communities. At the same time, councils need the opportunity to work with local iwi to come to agreed principles, such as those under Treaty of Waitangi, within which both parties operate. Auckland Council has used the Auckland Plan as a means of articulating such principles and responsibilities to Auckland Maori.

WHO SHOULD REGULATE?

Issues

64. The Commission has been asked to develop a set of principles to guide decisions on which regulatory functions are best undertaken by local government or central government. The issues paper proposes a range of factors that may be important considerations in deciding which level of government might carry out a particular function. The factors are:

preferences; economies of scale; economies of scope; externalities; information; innovation; competition; regulatory consistency; national priorities; capability and capacity; governance; and constitutional considerations.

Recommendation 65. Develop a set of principles to guide the allocation of regulatory functions.

- Discussion**
66. The factors that are most important for determining whether a function is undertaken centrally or locally may differ for different regulatory areas (e.g. health, dog control) and may depend on who is regulated (e.g. business or community).
67. The factors identified by the Commission could be developed into a set of principles that also include: scale and impact of the regulatory area (temporal, spatial, sector); the degree of risk that is involved; the importance of consistent fairness of outcome and treatment.
68. Applying these principles in practice needs to be supported by a comprehensive understanding of central and local government regulatory functions. The Council has recommended earlier in this submission that the Commission compile an inventory of such functions and that it includes enough detail to determine whether the function is one of standard setting only, or whether it includes the development of more detailed policy and implementation.
69. In some areas, regulatory standard setting at a national level is appropriate, but in others communities want a greater say. For example, for matters of public health, national legislation may be best placed to address the risks and to ensure communities have the benefit of consistent hygiene standards nationwide.

GETTING REGULATION RIGHT

- Issues**
70. The issues paper outlines the existing mechanisms in the LGA for regulation making and seeks feedback as to whether they lead to good regulation and, in particular, allow for adequate consideration of present and future costs and benefits.
71. The issues paper also outlines the process for regulations made by central government and seeks feedback on the impacts of that process on local government, and in particular, any funding implications. The Commission questions how central government might better work with local authorities on the design, implementation and funding of delegated regulatory functions.
72. Under the heading “Getting Implementation Right”, the Commission seeks feedback on any issues in the administration, monitoring and enforcement of regulation in the local government sector. In this regard,

the issues paper explores capability issues, opportunities for greater coordination and cooperation between local councils or between a local authority and a central government agency, compliance costs, the principles on which the funding of regulatory activities are based, and the extent to which elected representatives are involved in the administration and enforcement of regulation.

73. Finally, the Commission seeks feedback on the process for reviewing existing regulations and for reviewing regulatory decisions.

Recommendations

74. Ensure more effective local implementation by early involvement of the local government sector in the development of new regulation or legislation.

75. Respond in a timely manner to local concerns and priorities in relation to existing regulatory frameworks.

76. Consider making the infringement offence system more generally available through the introduction of a mechanism whereby, with appropriate public input, bylaw breaches can be specified to be infringement offences.

Discussion

77. There is scope for improving the way in which local authorities and central government agencies work together to develop and implement the regulatory framework. The Council is aware of examples of regulation where Central Government demonstrates a limited understanding of the implications for local communities. This could be resolved by more thorough investigation and consultation with local government and the community on the best regulatory approach, including the most successful means of execution. Consultation should occur early on in the development of new regulation or legislation that may result in regulatory responsibilities.

78. An example of this limited understanding is the new licensing requirements introduced earlier this year for those undertaking restricted building work. The process did not take close enough account of the likely volumes of applicants from large jurisdictions and the potential disruption to the construction industry from delays in processing. Early engagement with Auckland Council or other large city councils could have alerted the Department of Building and Housing to the issue and provided the opportunity for the Department to put an alternative process in place or to devote more resource to the process. Growing urban areas, in particular, have needs that require new thinking and approaches. There is little indication that this is widely understood by Central Government.

79. A further example relates to freedom camping which, following legislation which came into force in 2011, is now considered to be a permitted

activity except at sites where it is specifically prohibited or restricted. Local land managers (local authorities and the Department of Conservation) have the flexibility to decide on those prohibitions or restrictions and to issue instant fines for bylaw breaches. While this legislative change arose from concerns about blanket bans that had been imposed by some councils, it has resulted in some perverse outcomes whereby tourists must seek information on camping restrictions and be subject to fines each time they move into a new territorial area. The Council encourages Central Government to consult and work closely with local government on issues such as these to identify the best regulatory response and to avoid unintended outcomes.

80. While a Regulatory Impact Assessment (RIA) framework is in place for central government regulation making, the framework needs to more explicitly require that local government is consulted in relation to the analysis of issues, options, benefits and costs, including cost recovery arrangements and skill and resourcing requirements. Good practice suggests that government policy/regulation makers undertaking an RIA should provide local government the opportunity to have input into the assessment of regulatory impacts. The Regulatory Impact Statement for the recent Local Government Act 2002 Amendment Bill noted that “the local government sector was not consulted about the policy proposals, principally due to a lack of time”.⁶ Time constraints are a poor reason for lack of consultation.
81. While a better understanding of the implications of new regulatory requirements is sought, mechanisms are also required to ensure Central Government is able to respond in a timely manner to growing local concerns and priorities in relation to existing regulatory frameworks.
82. Liquor licensing, for example, is an increasingly hotly-debated issue, yet Central Government has been very slow to respond to community views and expectations. One of the policy objectives of the Alcohol Reform Bill which was introduced in November 2010 was to improve community input into local alcohol licensing decisions. This was reflected principally in the provisions empowering territorial authorities to develop a local alcohol policy (LAP) related to the sale, supply or consumption of alcohol in their district.
83. Through the select committee process, Auckland Council has expressed concerns with the LAP promulgation process and the limited scope of matters that an LAP could address, and also with the process and threshold for implementing alcohol control bylaws. While a number of the procedural issues were addressed, the scope of matters to be included in

⁶ Department of Internal Affairs. “Regulatory Impact Statement – Better Local Government”, March 2012, p. 33.

a LAP remained confined.

84. While in terms of regulatory allocation, the Alcohol Reform Bill clearly signals Central Government's recognition that regulatory decisions on licensing matters are best dealt with by the local community (albeit within clearly defined parameters, and through the provision of the right tools), local authorities still wait for the Bill to be passed into law. In the interim, our communities continue to speak up on this and other issues and to work together to develop solutions within the current regulatory constraints (e.g. the Mayor's taskforce to reduce alcohol-related anti-social behaviour).
85. Enforcement is an area where there is room to improve coordination between local and central government. The RMA and the Building Act 2004, for example, both provide for relatively efficient enforcement mechanisms by way of the creation of infringement offences for failure to comply with notices that require the remediation of defects or the cessation of rule breaching activities. The trigger to impose the penalty is the failure to comply with the notice, rather than the original breach itself. This allows time for the breach to be remedied prior to the penalty being imposed and avoids the need for a local authority to explicitly define the circumstances in which the enforcement measures can be applied. The Summary Offences Act sets out a common process that infringement offences follow.
86. Other pieces of legislation do not allow for this enforcement mechanism, except where it is explicitly established by the Minister, and efforts by local authorities to have infringement offences created under the LGA and other pieces of legislation have largely failed. This means that the infringement offence system is not generally available. Significant improvements in the cost-effectiveness of enforcement could be made by allowing councils to specify failures / breaches that become infringement offences. Without such a provision, a local authority's main options may be limited to making contact, education and discussion (which is effective in many cases) or considering court action (which can be a costly and lengthy exercise). The cost and time involved mean that court prosecution is generally only appropriate for more serious or repeat offences.
87. One example where this approach would create efficiencies and an improved approach to delivering desired outcomes relates to bylaw breaches. Auckland Council must review all its bylaws over the next three years. It would be relatively straight-forward to provide a mechanism whereby bylaw breaches can be specified to be "infringement offences", making this enforcement option available. This could cover bylaw breaches that are similar to offences that are already explicitly identified in legislation (e.g. the Dog Control Act 1996) as

infringement offences.

88. The mechanism to classify these breaches as infringement offences would need to provide for appropriate public input (e.g. alongside public consultation on a draft bylaw), and could also provide some guidance on the appropriate types of offences and limitations on the penalties that could be imposed.
89. Proper process is an important aspect of enforcement. However in some cases legislative authority overlaps and may be inconsistent. As a result, councils often need to place an inefficient level of focus on process, potentially giving rise to increased costs, delay, and risk of regulatory enforcement failure.
90. The Commission's view of what constitutes good regulation appears to assume compliance costs should be minimised. However, regulations represent an expression of the community's expectations in relation to a myriad of areas. The process of assessing proposals against these expectations takes time and will give rise to compliance costs to applicants. The critical thing for good regulation is not to seek to remove all compliance costs but rather to set them at an appropriate level.
91. Common approaches to creating good regulation that creates a balance between articulating and protecting the interests of the community and imposing appropriate costs on individuals or organisations include:
 - Thorough evaluation of whether regulation is necessary (i.e. can the outcomes be achieved through other means such as voluntary efforts or self regulation)
 - Early consultation with industry, local government and the community
 - Appropriate advice and enforcement practices (e.g. clearly articulating the need for regulation; making the rules clear and readily available; issuing advice and education before warnings and enforcement)
 - Ongoing reference or stakeholder groups once regulation is in place
 - Publication of review information.
92. The Commission's review of some local authority draft Long Term Plans for 2012-2022 found that what local authorities consider to be an appropriate split between the public and private benefit arising from services provided by councils varies considerably. The revenue and financing policy that must be adopted by each local authority is required to set out policies in respect of the sources to be used to fund operating and capital expenditure. The issues to be determined are often not amenable to quantitative analysis and inevitably involve a value judgement to balance the range of considerations. This is a political

decision which is informed by consultation with the community and therefore the public/private benefit split will inevitably be different across different communities.

HOW SHOULD REGULATORY PERFORMANCE BE ASSESSED?

Issues

93. The Commission's terms of reference require it to make recommendations on how the effectiveness of local government regulation can be more systematically assessed. The issues paper therefore seeks feedback on what makes a good measure of regulatory performance, and on the constraints local authorities may face in developing and sourcing better measures.
94. The paper briefly discusses the potential for economies of scale if central government were to assume responsibility for collecting data to assess the effectiveness of council regulations. It also raises the possibility of shared benchmarks, noting longstanding concerns with this approach given the diversity of the sector.
95. The Commission says it is interested in hearing the views of submitters on existing performance measurement systems, identifying options for improving the efficiency and effectiveness of regulatory performance assessments and subsequently reviewing those options against a yet to be determined set of criteria to identify a preferred model.

Discussion

96. Historically, emphasis tends to have been on the process of performance information reporting which is assumed to provide an understanding of the relationship between a local authority's monitoring effort and the issue being managed through the monitoring system, i.e. a level of attribution can be established. Solely meeting reporting requirements is not sufficient in this regard. Effective performance assessment also requires evaluation and reflection and, importantly, the opportunity for any performance issues to be rectified. To ensure understanding becomes the objective of the monitoring system, numerous feedback loops are required which utilise information that is fit for purpose, i.e. adheres to SMART⁷ criteria and also other more intangible requirements such as motivational impact, compatibility with the environment etc.
97. The design of good monitoring frameworks, the collection of appropriate monitoring information and the robust analysis of monitoring data can require skilled resources, across a range of professions and technical areas. This is likely to produce more challenges for smaller local authorities than for Auckland Council which has a dedicated unit looking after the Council's research, investigations and monitoring requirements. The research centre leads the evidence gathering functions of the

⁷ SMART: specific, measurable, aligned, realistic, and timebound.

Council that assists policy development, implementation and evaluation, and drives the adoption of best practice monitoring and reporting across the entire organisation.

98. Many central government agencies collect data which may assist in monitoring and determining the effectiveness of local government regulation. For example, District Health Boards and the Police collect information which may assist in monitoring the impact of local regulation on public health and safety. There can be challenges to the establishment of data sharing practices which often involve local authorities making specific local arrangements with these agencies for data exchange. There may therefore be some merit in identifying and making freely available (or at a nominal cost) agreed core data sets which would assist local government in the monitoring of regulation.
99. Comparability between local authorities, and therefore the viability of benchmarks across the sector, depends to an extent on the regulatory area being assessed. In the case of public health regulation, the characteristics which determine comparability might include demographics of the area's population, similarity of urban settlement patterns, and availability of services. The meaningful comparison of this data across local authorities can be enabled by presenting it on a normalised basis, (e.g. per capita, per household, per cent of an identified population).

Appendix A – Examples of regulatory innovation

The “Auckland Council Bylaw Standard”.

This bylaw standard is understood to be a first for New Zealand, and is a necessary initiative as Auckland Council has 22 bylaw proposing authorities and two bylaw making authorities. The Bylaw Standard ensures consistent process and form of bylaws in Auckland, and promotes region-wide frameworks. This approach allows for local board decision-making (e.g. determining dog access rules); and for the use of a range of consultation methods other than the Special Consultative Procedure (e.g. skin piercing standards through targeted consultation with skin piercing operators and health and safety organisations), to maintain best practice standards.

Central Bylaws Project Teams

The Council has set up a central projects team who use bylaws not only as a regulatory tool but as an educational one to deal with a number of activities occurring in public places such as dumping of shopping trolleys, signage, busking, street trading and some of the social issues addressed in the 'Public Safety' bylaws (such as car window washing, glue sniffing and begging). This targeted, pro-active approach enables the Council to take enforcement action against offenders, whilst having regard to the circumstances of the individuals involved and the reason for their offending (which may be as a result of homelessness, drug/solvent/alcohol addiction or mental illness). It is an inter-agency approach including the Council, Police and social agencies such the City Mission.

Online tools

Website enhancements have been delivered allowing access to information in new forms. For example, planning or building rule “wizards” and maps showing where particular rules apply.