

Submission regarding

Local Government Regulatory Performance Issues Paper

Due date for initial submissions: 31 August 2012

<http://www.productivity.govt.nz/inquiry-content/1510?stage=2>

<http://www.productivity.govt.nz/sites/default/files/Summary%20local%20govt%20issues%20paper.pdf>

<http://www.productivity.govt.nz/sites/default/files/FINAL%20Local%20government%20issues%20paper.pdf>

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Application of the Governance Principle Separation of Powers

This submission raises a major issue as to the structure of Councils. It submits that the reviewing of regulatory functions is somewhat pointless unless functional efficiency is also addressed. It submits that the concept of a Council is inefficient by nature. It contends that Councils should be split into discrete functions. The regulatory review should then follow those splits. This submission may however be seen as going too far. Efficiency of regulatory performance suggests that Councils as they exist now may not be needed at all.

This submission focuses on these points mentioned early in the issues paper:

'In considering where regulatory functions should be located – at central or local government level – the Commission will look to principles that deliver the best outcomes for New Zealand while minimising regulatory costs.' Page 6 para 2

'Local government in New Zealand' Page 8

'Local government and local authorities are terms used to describe New Zealand's regional, district, city or unitary councils. Regional councils and territorial authorities have a range of functions. Regional councils have responsibility for the physical environment and cross-boundary functions that require an integrated approach, which includes regional land transport, bio-security, civil defence and some resource management.'

'The functions of territorial authorities (city and district councils) are broader, these encompass physical infrastructure such as roads, water

supply, waste water and storm water, recreation and cultural activities, land use planning, building standards and some public health and safety functions.'

Clearly these territorial and regional authorities were created for functional efficiency reasons. Regulatory effectiveness is partially or even mostly determined by functional efficiency. So functional effectiveness must be looked at before determining where and how regulatory functions should be managed. Therefore there is already an acceptance of splitting functions into discrete organizations. This submission recommends that the splitting process should go all the way in terms of functional efficiency.

An obvious example of poor functionality which is mentioned in the issues paper is that local bylaws are created by [about 74] autonomous local councils. It is obvious from a functional point of view that there should be a requirement to submit all by-law drafting to a central drafting body which mandates the bylaws across the country but accepts submissions from local authorities for local variances. The point is that the function should determine the efficiency of how regulations should be created and administered. Geography is a poor determinant of by-law drafting efficiency.

Later in the issues paper reference is made in chapter 4 to regulatory variation and its effect. The questions presuppose that councils take into account local preferences meaning community preferences. It is far more prevalent that councils take into account preferences of senior management of the councils and the preferences of councilors regardless of community preferences which are ignored. It is this trampling on citizens rights and abuse of regulatory power which a separation of powers is intended to prevent or remedy.

This example of by-laws is merely given to demonstrate a broader deeper and more pervasive issue. It is submitted that it is not feasible rationally to consider a 'central / local' split without considering the specific functions first in terms of efficiency. Each function needs to be considered separately.

This conundrum is a parallel to that of every large organization in the private sector. Should the organization be split along divisional lines of products or geographical lines e.g. branches. The overlay either way is the management structure financial controls, accounting, legal compliance, human resource management, etc.

A second example relates to the 'cross-boundary functions that require an integrated approach'. It is submitted that the boundaries are crossed

because of the initial application of the geographical split rather than a functional split.

So the first PRINCIPLE is determining the most efficient functional split for every function which is currently organised under a local or other **territorial** authority. That efficient functional split should initially be determined **without** regard to geography.

As an ongoing example, the function of managing libraries going forward into ever increasing use of electronic methods suggests that efficiency may best be achieved by a national lending libraries organization rather than a plethora of local government organizations. Libraries are discrete organizations within most local authorities and could easily be split away from local authorities.

The question has to be asked why we have the existing structure of local government. The answer is purely historical. We are still bound by centuries of perception that government should be organized this way. It is essentially still a regal / feudal concept. Modern citizens have become relatively far more educated over the last 500 years. The rules which structure the councils and mayoralty are meant to be democratic and participatory. However the power is mainly held by the Administration, very slightly by the Council, and not at all by the people. As a democratic model, it is inefficient, archaic and anachronistic. It is time to evolve.

So this proposal argues that local government should be totally split so functions are no longer under the umbrella of one organization – a Council whereby the main determinant is geography.

Description of proposal

At present the hierarchy of every council in local government is structured like one large pyramid with impervious walls and a myriad of broken lined pyramids within, each such mini pyramid representing each of the many functions of local government.

The public get to vote in a council at the top of the great pyramid but that council as a representative organization is stymied by its own protocols from managing the detail of those smaller pyramids below. Even worse, the funding and self checking is all carried out from below and all within the great pyramid.

A second failure of the current system is that there is no parallel with normal commerce whereby there is a buyer and a seller. It is important in any transaction to have both parts represented separately. Central government does this with provider funder splits e.g. District Health Boards. The Pharmac control of drug purchasing is an excellent example of the most efficient function determining the nature of the organization.

This proposal is to explode the great pyramid but localized model like a 4th of November display. This is based on the governance principle Separation of Powers. It is also based on other organisational structures currently operating within society all of which function extremely well without criticism or difficulty.

The proposed structure may be referred to as the Sports Model.

It is based on the myriad of sports organizations from the local rugby team to the trampoline clubs, soccer clubs, tennis clubs, badminton clubs, archery clubs, and many other similar organizations within society which spring from the bottom up at a localized level. Each club carries out a different function [sport code]. Each club votes on a committee at the local level. In turn each local club votes up the best people to a small region then to a large region, then to a national region sports body. But the different codes do not amalgamate in one great pyramid. They remain in their separate functions. So it should be with local government. Soccer has nothing to do with badminton. Roads have nothing to do with libraries.

The addition to the Sports Model is to further split it by separating out the Administrative [spending - provider] functions from the Fundraising [rating??] and Purchasing and Veto [do not regulate / do not spend] function. This is perhaps the most important submission.

A trial explanation to a few citizens on several occasions drew very favourable responses. It is an easy sale although it is expected that there would be substantial opposition from entrenched participants in the local government scene although there may be some support.

Referring back to the regulatory drafting function which should obviously be centralized, the splitting of powers requires that provider of drafting services to be separate from the purchaser of those services being the individual functional units currently found in council units e.g. marina regulation. However it is possible that the administration of marinas may best be administered at a national level instead of a local level in which case, there may be only one 'purchaser' of the marina regulation drafting function. The functional decision regarding marinas should be based on best functionality and not historic geographic [council] location.

Chapter 5 asks how should the different regulatory functions be split. The question is then answered: To answer these design questions, the Commission needs to identify the levels of government that might undertake each function .

That is correct. No universal answer is available. Each regulatory function and then each administrative function affected by that regulation must be dealt with separately to establish the best functioning unit for that task. It is important to stop thinking of 'councils' in this consideration of the best

functioning unit. Instead think of the best functioning unit. It may well be that at the end, there are no 'councils'. Instead there are superbly operating functional units which are responsive to community needs based on the multi-sports model.

Decentralisation allows local and regional councils to differentiate themselves on the regulatory policies they implement

The differentiation is almost meaningless because citizens are denied a means of expressing their preferences. The term is learned helplessness. Citizens tolerate the existing council structures. This submission is designed to offer an alternative to that learned helplessness thus apathy.

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Local authorities are often in the position of both being service provider and regulator and may be in competition with other private providers at the same time. Where this occurs, it is important that there is a clear separation of functions to avoid internal inconsistencies and conflicts of interest.

This is exactly the problem that application of the Separation of Powers will remedy.

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Any decision made by local government, including a decision to regulate, must be made in accordance with the LGA (particularly sections 76-90). Section 77 sets out a process for local authorities to follow, including identifying all "reasonably practicable" options, considering present and future costs and benefits, and considering the effect on achieving community outcomes.

Again, the problem is that the council is attempting to determine both sides of the case when it – the council – is one of the parties. The separation of these powers would resolve this issue. The administrator [think council for now] should be a party not the determinator. The other party is the parallel citizens committee which is voted upon from bottom up.

Q29

How might central government regulation-making better take account of the costs and impact on local authorities from the delegation of regulatory functions?

The existing council / the new administrator is one party to submissions to the drafting of regulations. The other party is the citizens representatives in that parallel citizens committee which is voted upon from bottom up. Costs to the Administration would be a major factor for both the Administration and for the citizens representatives.

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Regulatory co-ordination

This should almost cease to be a problem because each function is at its most efficient and does not overlap with other functions. Marinas have nothing to do with roads. Where there is a practical need for cooperation, e.g. a marina road needs access to local roads, that should be an easy cooperation because nothing else is to be considered but the efficiency of that joint exercise. The coordination issues disappear.

Compliance costs

These would be minimized because the citizens representative committee would have veto power over unnecessarily expensive processes such as building consent costs at present. The citizens committee effectively polices the 'council' or what will be left of it so there should be no consumer dissatisfaction. The parallel citizens committees effectively become appeal bodies from administrative decisions.

Q41

In what ways are these regulatory areas unnecessarily costly (eg, are they too complex, prescriptive or unclear)?

Almost by definition, all regulatory functions are over-priced because there is no 'purchaser' with veto power. We cannot answer this question until we see what reductions in costs can be achieved by the parallel purchaser citizens committee.

The remainder of the questions in the issues paper will all be answered by the application of the principle of Separation of Powers.

Returning to the sports model of governance, as with the sports clubs, elections are held at the lowest pyramid level. In turn each local government function elects / sends a delegate [the best person] to a regional body which in turn elects their best person to go up the pyramid ladder of that local government function. The result is the best most knowledgeable elected people get to the top.

Is this expensive? No. It is done now in the Sports Model. Much of the local government structure especially the fund raising paying and veto function can be managed with unpaid elected representatives especially at the lower levels as in the Sports Model.

Perhaps the most important aspect of the application of Separation of Powers is to be found in the regulatory powers as applied to the wide range of functions. At present those powers are resident within the great pyramid of local councils. The problem is the lack of consultation and then the human bias to make the rules suit the bureaucracy instead of suiting the best for the citizens. This natural bias must be balanced by creating a separation of the by-law powers. There must be a separate veto power in a separate hierarchy best residing in the funding, purchasing, veto power body.

What are the functions which are not connected and should be split?

Local government functions include

building / resource consents / domestic swimming pools

cemetaries
sex industry
hostels and boarding houses
dog control
domestic fires
food premises
health – skin piercing
offensive trades
noise control
grafitti
public places / street trading
rural fire safety
signs including electoral signs
solid waste disposal
stormwater
waste water
pollution
transport parking footpaths cycle-ways roads buses trains ports wharves
and marinas
recreational parks
libraries
hazardous substances
heritage and community
and more

There may be some logic in grouping similar functions e.g. licencing for health and safety purposes but that should be contained in a Local Licencing Authority. Once that step is made, it appears obvious that body should be a national body with local representation.

The setting of waste water standards should be national but the administration should be regional being functionally more efficient. But the waste water body should be a separate body from all other functions. There is no need for it to be massed into one too large organization. To some extent the Auckland CCOs - Council Controlled Organisations have already partially taken that step. But they too need to be split where appropriate. For example, roads should be split from buses and trains walkways and parks. These are each discrete functions.

The Rule of Law is the fundamental basis upon which any society must rely for good order. But when that rule of law is abused or is capable of being abused by those who are entrusted to develop and apply that law, society itself is to some extent under threat if only by having a less wealthy community. Citizens avoid the threat by decamping to perceived better environments which may even include Australia. Alternatively

citizens complain privately and tolerate which is a failure of central government.

There is no adequate method of complaint satisfaction or cost effective appeal. The Ombudsman's Office process is totally inadequate to the task.

As noted in a property blog, why would you pay \$120,000 to a NZ local council when you can get the same subdivision in Australia for \$10,000 with supportive help from council.

The fundamental problem is the breach of the principle of Separation of Powers. It is naïve to think that an elected councilor acting as representative of the people can possibly scrutinize all minor regulations under their jurisdiction and even less all administrative decisions.

Consequently, virtually all regulatory functions have almost nil parallel scrutiny on behalf of citizens as distinct from interested parties who lobby local authority for preferential treatment [crony capitalism but it is not true capitalism]. Developers lobby council administrators but no-one represents home buyers. The citizens are dependent upon the goodwill of the incumbent administrators. Nothing has changed in 500 years in structural terms. It is argued by those incumbents that there are enough checks and balances within the hierarchy. However bureaucrats are left untrammelled to design regulation as they see fit as long as those regulations purport to address an issue such as building consents.

Councils determine local road structure, determine access to those roads, and then determine speed limits on those roads. Because senior Council staff may have agendas depending on their own political views, they are enabled to impose those views on society without restraint. It is this very situation which may have partly led to the Productivity Commission enquiry.

The principle of the Separation of Powers if properly applied means that every local government activity must be counter –balanced by a parallel body which can and must be 'at the same level'. There is a need for many such bodies of counter check at all levels of decision making. Those bodies would have the function of scrutinising the decisions of local government and be empowered to veto any such decision if they do not accord with specified principles. This enables the citizen to have power to appeal decisions at the right level.

Prof Tim Hazledine has recently proposed that transaction costs should be brought into the mix of criteria which must be considered. Does the cost outweigh the benefit? At present, Council staff use their costs to prevent citizens from exercising their rights to justice. If a job is only worth say

\$3,000, that is not worth taking to the Environment Court which is the only appeal from council administrative decisions under RMA.

To be fair, NZ does a good job in most local authority situations compared with other countries. However the risk is still there and still causes councils to tend to the wrong side. That injustice to citizens must be fixed.

Those principles of Separation of Powers could include for example in the case of local roads a requirement for efficiency. There is strong argument that local government is captured by political views that favour e.g. public transport versus private transport. Thus there is a tendency and even a specific intent to hinder private vehicle travel and encourage public transport.

There is independent evidence of such hi-jacking of functional efficiency by politicized officials. That evidence is obtainable from former council officers. Copies of reports are available.

Local government should therefore be split into separate functional bodies. But each function must be separate. This is dissimilar to the Auckland Council Owned Companies such as Auckland Transport:

The organisation is responsible for all of Auckland's transport requirements (excluding state highways) - from roads and footpaths, to parking and train, bus and ferry services.

It is this amalgamation of powers that enables bureaucrats to manipulate information with **deliberate inefficiency** as a result.

It is noteworthy that the citation states '[excludes state highways]'. This is an application of the principle of Separation of Powers.

The NZ Transport Agency has in its goals:

Safety, efficiency and delivering roads that meet both present and future needs are the key principles underlying our operation of the state highway network.

NZTA is focused.

Council's Auckland Transport is diffused.

There is therefore an urgent need to split the functions of all Councils into their component parts along functional lines. Parliament should specify the goals of those component parts and where and how co-ordination amongst various bodies should be handled.

An obvious example is found in council libraries. Firstly it needs to be noted that the technological environment for books and libraries is

changing quickly. There seems no reason to tie libraries to roads or sewage. Already the Auckland amalgamation has meant that Auckland citizens can freely obtain books from any one of many libraries under the expanded jurisdiction. It seems only sensible to arrange libraries on a national basis to better cope with forthcoming technological changes which may render visiting the library obsolete even for or especially for the elderly.

Urban roads would be better managed by a dedicated regional Roads Authority which would be separate from other 'council' functions. Roads should be separate from buses which should be separate from trains which should be separate from parks and walkways.

Each should be split into Provider and Funder /Purchaser / Veto.

Therefore every Function of Local Government should be split distinctly apart from existing Councils and relocated into new separate functional organizations.

More importantly, Parliament should enable that the all important appeal / veto function at all levels of such [former council] functions so citizens are not disempowered by bureaucrats who make rules to suit their own convenience rather than the best practice to achieve specified goals.

The bottom line is that we get bad decision making right through the bylaw, and administrative process because of wrong structures without parallel appeal and veto powers.

Some USA experience is helpful:

Bradbury, J., and F. Stephenson. 2003. Local Government Structure and Public Expenditures. Public Choice 115: 185–98.

State governments have adopted more than a dozen types of institutions to help control their spending. Unfortunately, most reforms have yielded disappointing results. However, according to [Matthew Mitchell](#) and [Nick Tuszynski](#), who examined state spending in the summer issue of *The Independent Review*, two measures have been clearly effective in helping states get their spending habits under control: the item-reduction veto and separate spending and taxing committees.

How—and how well—do they work? An item-reduction veto allows a governor to cut spending in particular program areas, enabling him or her to negotiate spending proposals more effectively. States with an item-reduction veto reduced spending per capita by \$451, compared to \$100 for those with a line-item veto.

Having separate spending and taxing committees is even more effective. The latest study that Mitchell and Tuszynski could find concluded that separate spending and taxing committees were associated with spending reductions amounting to \$1,241 per capita. "These institutions also happen to be among the least studied, so further analysis may be warranted," the two economists write. "Nevertheless, policymakers interested in arresting the unsustainable growth of government already have a number of tools at their disposal."

[Institutions and State Spending](#), by Matthew Mitchell and Nick Tuszynski (*The Independent Review*, Summer 2012)

[The Independent Review \(Summer 2012\)](#)

Some states allow one legislative committee to have jurisdiction over both spending and taxing legislation. Others divide the two powers between separate committees. States that keep these functions separate seem intuitively likely to spend less than those that combine them. The idea is essentially Madisonian: if one committee has jurisdiction over taxing but not spending, its members—unable to steer spending projects toward their constituents—will have an incentive to block the interests of other committees with spending authority.

It appears that the most recent study of separate spending and taxing committees is by Mark Crain and Timothy Muris (1995). According to their data (which is from the 1980s), five states combine spending and revenue authority in one committee, and the other states keep these two functions separate. They find that states with combined spending and revenue authority tend to spend \$1,241 more per capita than states with separate authorities. As indicated by figure 1, this amount is by far the largest effect per capita produced by the institutions we survey here. The study is also one of the oldest considered here, and the subject may well need a fresh look with updated data.

10. Centralized Spending Committees

Researchers have also examined the effect of centralizing spending authority in one committee rather than dividing it among several separate spending committees. In this case, the theoretical predictions differ: when a number of different committees have a hand in determining spending priorities, spending is subject to a "tragedy of the commons." As Crain and Muris explain, "[N]o one committee has the incentive to restrain its spending commitments because the total level of spending is no longer the responsibility of any one committee. To the contrary, the resulting competition among committees to spend results in more spending than would otherwise occur, increasing reliance on deficit financing" (1995, 314)

Bradbury, J., and F. Stephenson. 2003. Local Government Structure and Public Expenditures.

Public Choice 115: 185–98.

Governance of the new independent functional organizations.

At present, Councils are elected by citizens in triennial elections. The lack of real representation is a paramount criticism. Further the Councilors are renowned for their inability to govern the council hierarchy. The bureaucrats run rings round council. Those few councilors are totally inadequate to the task. The staff within council are people who have aspirations, ideals, and selfish motives like all human beings.

In the structuring of local government, there is no cognizance taken of human characteristics and the effect upon efficiency. There is a giant assumption that all civil servants are well intentioned and are not motivated by anything but the best for all citizens. Unfortunately that is naïve. The Separation of powers goes a long way to remedy this defect in organisational structure.

Practical Issues

A key issue is that Councils seem to have no idea of relativity or transactional costs. Refer Tim Hazledine for recommendation that an important additional criteria for council decision making would include transaction costs. A small job by a citizen should warrant only a small fee. That is just like a citizen will get an engineer to report on a structure but limit the fee to a specified low amount where the structure cost is low.

A small repair job worth a few hundred dollars should not incur council fees of thousands. Nor should it be delayed by many months or years.

Decisions regarding methods and amounts of funding should await considered submissions from those new citizens organizations relevant to each function although it may well be that they delegate collection to another functionally efficient administrative organisation. For example, 'Rates' may no longer be the predominant method of funding decentralized government functions.

Extent of Application of Sports Model and Separation of Powers

There is a limit to the application of the Sports Model. It applies to the concept of democratically elected organizations based on functionally efficient structures from the bottom up. It demonstrates the splitting of each function into its own discrete most efficient structure. However it does not go far towards determining the most efficient functional split in all circumstances.

The principle of Separation of Powers carries on and raises a significant regulatory question as to whether there is need for the purchasing function to be split from the [regulatory] funding function. Should those

that spend be those who determine the funding method and amount? Simple rationale based on human nature suggests that these two functions should be split.

One mini pyramid becomes funder [tax / rates / invoice], another mini pyramid structure becomes the purchaser [of by-laws and administration for a specific function], and another is the provider [which is likely to be the current council administration]. The regulatory goal of each would need to be clearly stated.

Conclusion

Geographically based council pyramids are an anachronism. A substantially more educated population deserves a better system. Based on efficiency, it is necessary to implement a separation of functions and powers across all existing council regulatory, administration, and related functions and powers. The Sports Model of democracy and governance demonstrates the way coupled with the rigorous application of the principle Separation of Powers. Central Government must establish the mechanism for transition from the old structure of local government to the new democratic form.