



Local government regulatory performance

Local Government Regulatory Performance

Issues paper - July 2012

The New Zealand Productivity Commission

The Commission – an independent Crown Entity – completes in-depth inquiry reports on topics selected by the Government, carries out productivity-related research and promotes understanding of productivity issues. The Commission’s work is guided by the New Zealand Productivity Commission Act 2010.

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The Issues Paper

This issues paper is intended to assist individuals and organisations to prepare submissions to the inquiry into local government regulatory performance. It outlines the background to the inquiry and the matters about which the Commission is seeking comment and information.

This paper is not intended to limit comment. The Commission wishes to receive information and comment on issues which participants consider relevant to the inquiry's terms of reference.

Key inquiry dates

Receipt of terms of reference:	16 May 2012
Due date for initial submissions:	31 August 2012
Release of draft report:	December 2012
Draft report submissions due:	February 2013
Final Report to Government:	1 April 2013

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Why you should make a submission

The Commission aims to provide insightful, well-informed and accessible advice that leads to the best possible improvement in the wellbeing of New Zealanders. The Commission strives to be 'in touch' so that its advice is relevant, credible and workable. The submission process helps the Commission to gather ideas, opinions and information to ensure that inquiries are well-informed and relevant.

How to make a submission

Anyone can make a submission. It may be in written, electronic or audio format. A submission can range from a short letter on a single issue to a more substantial document covering a range of issues. Where possible, please provide relevant facts, figures, data, examples and documentation to support your views. While every submission is welcome, multiple, identical submissions do not carry any more weight than the merits of an argument in a single submission. Submissions may incorporate material made available to other reviews or inquiries that are relevant to this inquiry.

The Commission seeks to have as much information as possible on the public record. Submissions will be placed on the Commission's website shortly after receipt unless marked 'in confidence' or accompanied by a request to delay release for a short period of time. The Commission can accept material 'in confidence' only under special circumstances. Please contact the Commission before submitting such material, to discuss its nature and how the material should be handled or presented.

Submissions may be sent through the Commission's website www.productivity.govt.nz, or by email or post. Where possible, an electronic copy of submissions should be sent to info@productivity.govt.nz in Word or PDF. Submissions should include your name and contact details and the details of any organisation you represent. If the content of a submission is deemed inappropriate or defamatory, the Commission may choose not to accept it.

What the Commission will do with submissions

Submissions will play an important role in shaping the nature and focus of this inquiry. They will be used to gauge the position and preferences of stakeholders. Where relevant, information from submissions may be cited or used directly in inquiry reports. As noted above, the Commission will publish submissions, unless arrangements have been made with the Commission regarding any confidential content.

1 What has the Commission been asked to do?

The Government has asked the Commission to undertake an inquiry into the regulatory functions undertaken by local government and opportunities to improve its regulatory performance.

There is a concern that regulatory functions are not allocated consistently and effectively between different levels of government. If functions best performed by central government are delegated to local government, or conversely, if functions best performed by local government are performed instead by central government, wellbeing is likely to be reduced relative to what could be achieved. There will also be higher regulatory costs on government, businesses and households.

The Commission has been asked to develop principles to guide the allocation of regulatory functions between levels of government, and to identify functions that should be reallocated to a different level of government.

Responsibilities for relevant regulations are fragmented across and within local and central government. This can reduce the coherence and coordination of regulatory activity, particularly where different levels of government are responsible for similar regulations. As well, this fragmentation and complexity may undermine the capacity of central and local government to administer regulations. Both of these issues can lead to gaps, inefficiencies and poor outcomes (OECD, 2012).

The Commission has also been asked to identify opportunities for both central and local government to improve the regulatory performance of local government, and to recommend options for regularly assessing its regulatory performance.

The risks of regulations failing to achieve their purpose or imposing excessive costs as a result of being allocated to the wrong level of government, or as a result of poor design or execution on the part of local government, underpin this inquiry.

This inquiry into regulation has been called for as part of the Government's wider review of the local government sector. *Better Local Government*, published in March 2012, laid out eight steps for improving local government in New Zealand. This inquiry is tasked with fulfilling one of those steps by reviewing "the balance of functions allocated to local government and ways to improve regulatory performance in the sector" (Better Local Government, 2012, p.12).

The full terms of reference for this inquiry are attached.

Box 1 Key inquiry questions

The inquiry terms of reference can be synthesised into three questions:

- How could 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?

What this inquiry is *not* about

This inquiry is about the regulatory functions undertaken by local government. It is not about:

- how local government should be funded eg, rates or development contributions – the terms of reference specifically focuses on regulatory functions.
- local government boundaries or amalgamation – this is specifically *excluded* by the terms of reference.
- how local government itself is regulated by central government eg, statutory requirements for Long Term Plans – this is covered in Point 8 of *Better Local Government* by the Local Government Efficiency Taskforce; and
- the services local government provides eg, swimming pools and rubbish collection – the terms of reference specifically focuses on regulatory functions.

Defining terms

Box 2 Defining regulation

For the purposes of this inquiry, regulation is defined widely to encompass the full range of legal and informal instruments through which central government, local government and the community seeks to manage the behaviour of citizens and business, and government itself, in order to achieve particular economic, social and environmental outcomes. Regulation includes primary legislation, subordinated legislation (delegated law making, including the bylaws and Planning instruments for which local government has responsibility), licences, codes and consents, rules, informal instruments and agreements, and self-regulation.

Box 3 What are regulatory functions?

Any regulatory regime has three working components – *standard setting* (identifying the regulatory goal or target), *monitoring* compliance with the regulatory standard and *enforcement* when there is noncompliance (Hood, Rothstein, and Baldwin, 1999). Together, these three elements form the basis for controlling the behaviour of individuals and businesses. These regulatory functions can be carried out by central government, local government, a mix of both, or by appointed non-governmental agencies. They can also be undertaken by the community or industry through self-regulation.

One important function within any regulatory regime is the provision for regulatory review to ensure that regulation is delivering on the intended policy objectives at least cost to society.

Policy context for the inquiry

This inquiry sits within the broader context of the Government's *Better Local Government* reform programme, announced in March 2012. The Commission intends to take this work programme, and other current and previous relevant reviews of local government, into account in selecting areas for detailed investigation (Table 1).

Table 1 Relevant reviews

Review	Comment
Previous reviews and audits	
Local Government Rates Inquiry 2007	Commented on 'unfunded mandates' passed from central to local government, and to what extent this drove local costs.
Royal Commission into Auckland Governance 2010	Commented on which level of local government should undertake certain functions (notably resource management planning) in the context of Auckland.
Report of the Prostitution Law Review Committee on the Operation of the Prostitution Reform Act 2003	Reviewed the performance of the Prostitution Reform Act 2003, and commented on the bylaws and regulatory performance of local government.
Wai 262 – the Flora and Fauna claim	Included implications for local authorities on the management of natural resources.

Various Auditor-General reports	Including: Managing freshwater quality – Challenges for regional councils (2011); Local government: Improving the usefulness of annual reports (2011); Local government: Examples of better practice in setting local authorities' performance measures (2010); Matters arising from the 2009-19 long-term community council plans (2010) and Liquor licensing by territorial authorities (2007).
Review of the Resource Management Act 1991 (RMA)	Phase one has been completed and led to streamlining of RMA processes. Phase two is currently underway. As part of phase two, Technical Advisory Groups (TAGs) have reported their findings to the Minister for the Environment (covering urban planning and infrastructure respectively). The findings from these TAGs informed a discussion document called 'Building Competitive Cities'. A third TAG has reviewed the principles (sections 6 and 7) of the RMA. This report was due for Cabinet consideration at the end of February 2012.
Current or planned reviews and audits	
Local Government Efficiency Taskforce	Point 5 of the Government's eight point plan for better local government. The role of the taskforce is to advise on streamlining and reducing the costs of the planning, consultation and reporting requirements on local authorities.
Expert advisory group on the efficiency of local government infrastructure provision	Point 7 of the Government's eight point plan for better local government. Likely to include looking at "the disconnect between the setting of standards for infrastructure and the cost implications of these standards (eg, drinking water)".
Review of the use of development contributions	Point 8 of the Government's eight point plan for better local government. Pending further work by the Auditor-General on development contributions.
Auditor-General's performance audit of local government's biodiversity work	In progress.

2 The Commission's approach

“Regulation is of critical importance in shaping the welfare of economies and society. The objective of regulatory policy is to ensure that regulation works effectively, and is in the public interest....there is no room for complacency for the work which lies ahead to transform regulatory policy into a truly effective support for meeting public policy goals.” – OECD, 2011, p.7

This inquiry will examine local government regulatory performance from the perspective of improving the wellbeing of the community as a whole, as required by the New Zealand Productivity Commission Act 2010.

Regulation and wellbeing

Regulations touch many aspects of our lives – from the environment and buildings we live in, to the food we eat and the water we drink. The outcomes of regulation are all around us.

When designed well and enforced efficiently and effectively, regulation can play an important role in correcting market failures and improving the efficiency with which resources are used. In doing so, regulation can help achieve broader economic, social and environmental goals that underpin wellbeing and that are unlikely to be achieved by market forces alone.

Regulation is typically used to control or modify the behaviour of individuals or businesses and is justified in the interests of the wider public benefit. However, if regulation is used when it is not needed, or is poorly designed and executed, it can fail to achieve policy objectives and have negative consequences that harm the wellbeing of New Zealanders.

Because regulation involves the exercise of the powers of the state, the outcomes of regulation should be justifiable on the grounds of the public benefit. Further, the system for making, administering and enforcing regulations must be *procedurally fair* (MED, 2009). There are important constitutional and legal principles relating to fairness and the preservation of individual liberty that need to be complied with if regulation is to be supported by society (eg, the New Zealand Bill of Rights Act 1990 and the Human Rights Act 1993).

A cost-benefit approach

The challenge for government is to deliver regulation that promotes wellbeing, while at the same time minimising the associated costs to individuals, businesses and the wider economy.

These costs are broad, diffuse and difficult to measure (Box 4). They are incurred by a multitude of individuals and businesses and ripple across society and the economy.

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. Similarly, in considering opportunities to improve the regulatory performance of the local government sector, the Commission will look at ways to improve regulatory outcomes as well as to reduce regulatory costs.

The Commission will adopt a broad interpretation of the costs and benefits of regulation even though not all areas lend themselves to monetary quantification. As such, the inquiry framework will utilise both quantitative and qualitative assessments of costs and benefits.

Evidence of such benefits and costs can be difficult to obtain. The Commission welcomes information and data from submitters on the regulatory issues raised in this paper. The Commission acknowledges the difficulties in determining the costs and benefits of policy decisions. Nevertheless, such analysis is important in understanding the overall impacts of regulation.

Box 4 **The costs of regulation**

There are three main types of costs associated with regulation.

- *Administration costs* – there are resource costs associated with administration of the regulatory system. These include the cost of formulating standards, monitoring and enforcing compliance, and adjudication. These costs are generally paid for through charges and fees, or through taxes or rates.
- *Compliance costs* – these are the costs borne by individuals, businesses and industries generally in meeting regulatory obligations. They may be direct, comprising the various costs incurred in interacting with government – the so-called ‘red tape’ or paperwork costs. They are also the indirect costs that arise when individuals and businesses need to change the way they do things, perhaps buying in specialist services to satisfy regulatory obligations (for example, legal advice, computer systems and software, laboratory and other research), holding costs associated with delays in regulatory processes, and changing production procedures generally. Most of these costs are borne by firms and can ultimately be passed (at least in part) onto their customers.
- *Wider economic costs* – these are the wider economic costs that distort the behaviour of individuals and businesses. These effects are less tangible and can arise when regulation impairs competition (eg, by creating barriers to market entry) or stifles innovation and entrepreneurship (eg, by placing constraints on the choice of production techniques) and generally restrains economic activity by, for example, increasing the risks and uncertainty associated with a particular development or course of action.

Scope of the inquiry

The Commission will need to prioritise its effort and use its judgement about the depth it goes into each part of the terms of reference. Some regulations, such as planning and resource regulation, have a large impact on productivity. Others are of particular concern to the community, such as noise and dog control. The Commission seeks submissions about the relative importance of the range of regulatory activities undertaken by local government, and where the Commission should focus its analysis. The Commission is also interested in views from submitters on future trends (eg, economic, social, demographic, technological and environmental) that are likely to affect local government regulatory functions.

Q1

What is the relative importance of the range of the regulatory activities local government undertakes? Where should the Commission's focus be?

Q2

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

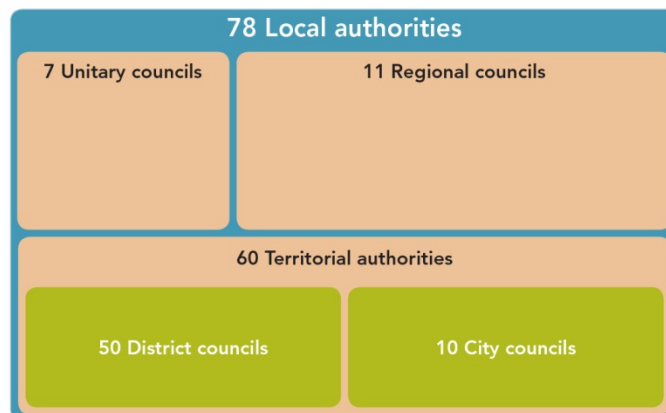
3 Local government and regulation

“...local authorities operate autonomously of central government and are empowered to choose which activities to undertake and how to pay for them. They make these decisions in consultation with the local communities that supply much of their funding.” – Briefing to the Incoming Minister of Local Government, 2011, p.3

Local government in New Zealand

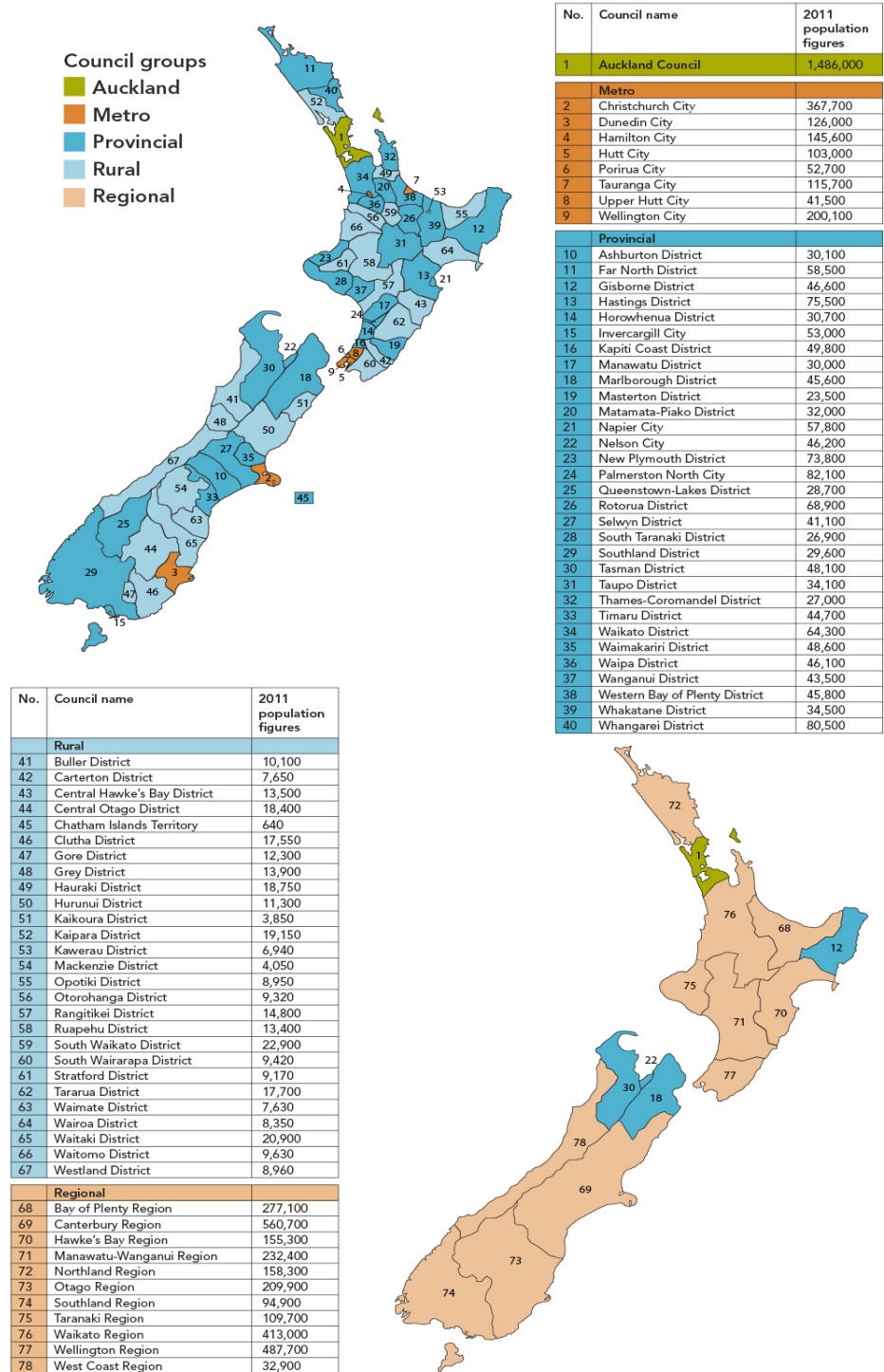
Local government and local authorities are terms used to describe New Zealand’s regional, district, city or unitary councils. Regional councils and territorial authorities have a range of functions. Regional councils have responsibility for the physical environment and cross-boundary functions that require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

Figure 1 Types of local authorities



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. A unitary authority is a territorial authority that also has all the responsibilities of a regional council.

Figure 2 New Zealand local authorities



Source: Data and map supplied by the Department of Internal Affairs

The purpose and role of local government is set out in the Local Government Act 2002.

Box 5 The purpose and role of local government

The purpose of local government is 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 for the future.

The role of a local authority is to:

- give effect, in relation to its district or region, to the purpose of local government; and perform the duties and exercise the rights conferred on it by or under the Local Government Act 2002 and any other enactment.

Source: Local Government Act 2002, sections 10 and 11

What local authorities are able to do is governed by legislation

The main laws that govern and empower local government in New Zealand are set out below. The first and the last are important for this inquiry as they determine what and how local authorities regulate.

Box 6 Laws that govern and empower the system of local government

- Local Government Act 2002 (LGA) provides local authorities with the power of general competence. It sets out the powers of councils, including the power to make local bylaws, and councils' planning and accountability requirements. It also broadly sets out the processes councils must use in exercising these powers.
- Local Government (Rating) Act 2002 sets out the methods by which councils raise revenue through rates.
- Local Electoral Act 2001 sets out the process for council elections.
- Local Government (Auckland Council) Act 2009 sets out the governance structure for the Auckland Council.
- Local Government Act 2002 Amendment Act 2010 prescribes rules for council performance standards for core services of the LGA.
- Local government activities (especially their regulatory functions) are also governed by a

number of statutes, such as the Resource Management Act 1991 and the Building Act 2004.

Source: [http://www.localcouncils.govt.nz/lqip.nsf/Files/PDF/\\$file/LG%20Info%20Sheet.pdf](http://www.localcouncils.govt.nz/lqip.nsf/Files/PDF/$file/LG%20Info%20Sheet.pdf)

[http://www.localcouncils.govt.nz/lqip.nsf/wpg_url/Policy-Local-Government-Legislation-Transparency-Accountability-and-Financial-Management-of-Local-Government-\(TAFM\)-Reforms?OpenDocument](http://www.localcouncils.govt.nz/lqip.nsf/wpg_url/Policy-Local-Government-Legislation-Transparency-Accountability-and-Financial-Management-of-Local-Government-(TAFM)-Reforms?OpenDocument)

The regulatory powers of local government

Local government derives its regulatory powers from three main sources.

- Statutes that delegate regulatory functions to local authorities (Table 2).
- The Resource Management Act 1991 (RMA), which requires the integrated management of resources through local authority District Plans. This usually results in rules about how resources are used.
- The Local Government Act 2002 (LGA), which gives local authorities general powers to make local bylaws.

Regulatory responsibilities conferred by Acts of Parliament

The Commission has been asked to take stock of those regulatory functions undertaken on the direction of central government and of those undertaken independently by local government. Table 2 represents a starting point for considering the former – functions performed by local government under a central government statute.

Table 2 Regulatory activities undertaken by local government

Legislation and agency	Regulatory responsibilities of local government
Biosecurity Act 1993 Ministry for Primary Industries	The Biosecurity Act 1993 allows regional councils to control pests by developing pest management strategies (sections 71 to 83). These set out the objectives of the strategy, the pests to be managed or eradicated and the methods of management.
Building Act 2004 Department of Building and Housing	Territorial authorities are Building Consent Authorities. They issue building consents and undertake building inspections under the Building Act 2004, but have no role in setting building standards and cannot set higher or lower building standards than the Building Code.
Dog Control Act 1996	The Dog Control Act 1996 makes councils responsible for the control of

Legislation and agency	Regulatory responsibilities of local government
<p>and Impounding Act 1955</p> <p>Department of Internal Affairs</p>	<p>dogs and makes the registration of dogs mandatory each year. Councils must adopt dog control policies, maintain the dog registration system and enforce this Act.</p> <p>The Impounding Act 1955 requires every local authority to provide and maintain a public pound (two or more local authorities may jointly provide and maintain a public pound).</p>
<p>Forest and Rural Fires Act 1977</p> <p>Department of Internal Affairs and Department of Conservation (DOC)</p>	<p>Territorial authorities are sometimes a 'Fire Authority' for part of their jurisdiction. As a Fire Authority, territorial authorities must promote and carry out fire control measures, can make bylaws to do so (which could include fire bans), give warnings about fire risks and must comply with the standards of the National Rural Fire Authority in doing so.</p>
<p>Freedom Camping Act 2011</p> <p>Department of Internal Affairs and DOC</p>	<p>Under this Act, freedom camping is considered to be a permitted activity everywhere in a local authority (or DOC) area (section 10), except at those sites where it is specifically prohibited or restricted (section 11). Bylaws must not absolutely prohibit freedom camping (section 12). Bylaws need to designate the places where freedom camping is not allowed, or where it is restricted in some way (for example for a limited duration, or only in self-contained vehicles).</p>
<p>Food and Hygiene Regulations 1974</p> <p>Ministry for Primary Industries</p>	<p>The Food Hygiene Regulations require registration of food-associated premises with their local authority. Every local authority is required to inspect all premises that should be registered in their area, and to enforce the specific hygiene regulations.</p>
<p>Food Act 1981</p> <p>Ministry for Primary Industries</p>	<p>The Responsible Minister can set standards other than the 1974 Regulations (largely to give effect to Food Standards Australia New Zealand (FSANZ) standards made under the Joint Food Standards Agreement). Territorial authorities may be asked by businesses to grant an exemption from the 1974 regulations where there is evidence that a food safety programme is in place, and the applicant will take all reasonable steps to comply with all other applicable food standards and regulations. Territorial authorities may inspect premises and vehicles for compliance.</p>
<p>Gambling Act 2003</p> <p>Department of Internal Affairs</p>	<p>Territorial authorities are required to develop class 4 (section 101) and TAB venue policies that must specify whether gambling machines are allowed and if so where they may be located. The policies may also specify any restrictions on the number of machines that can operate in a class 4 venue. Territorial authorities must decide consent applications on the basis of the policies they develop.</p>
<p>Hazardous Substances</p>	<p>Section 97 instructs territorial authorities to enforce the HSNO Act in or</p>

Legislation and agency	Regulatory responsibilities of local government
<p>and New Organisms Act 1996 (HSNO)</p> <p>Administered by the Environmental Protection Agency for Ministry for the Environment</p>	<p>on any premises situated in the district of the territorial authority. Regional councils do not play a direct enforcement role under the HSNO Act; however, under the RMA, they are responsible for controlling hazardous substances (under their functions relating to managing the discharge of contaminants into the environment). The HSNO Act does not prevent stricter standards from being introduced by a territorial authority or regional council under the RMA.</p>
<p>Health Act 1956</p> <p>Ministry of Health</p>	<p>This Act makes it the duty of every local authority to improve, promote and protect public health within its district. Local authorities are empowered and directed to appoint staff, inspect their districts, take steps to abate nuisances or health hazards, make bylaws and enforce regulations made under this Act (subject to the direction of the Director-General of Health).</p>
<p>Litter Act 1979</p> <p>Department of Internal Affairs</p>	<p>Territorial authorities are listed as 'Public Authorities' under the Litter Act 1979 and as such are responsible for the regulation of litter (defined as including "any refuse, rubbish, animal remains, glass, metal, garbage, debris, dirt, filth, rubble, ballast, stones, earth, or waste matter, or any other thing of a like nature" section 2(1)). Litter Control Officers can request the removal of litter and issue infringement notices and fines.</p>
<p>Maritime Transport Act 1994</p> <p>Maritime New Zealand</p>	<p>Local authorities are required to provide navigational aids inside the ports they operate. Regional councils are required to have and update regional oil spill plans and to notify the director of the Maritime Safety Authority regarding hazardous substances on ships, or substances being discharged from ships in their waters.</p>
<p>Prostitution Reform Act 2003</p> <p>Ministries of Justice and Health and Business, Innovation and Employment</p>	<p>Local authorities are empowered to regulate the location and advertising of brothels through bylaws.</p>
<p>Sale of Liquor Act 1989</p> <p>Ministry of Justice</p>	<p>This Act makes all territorial authorities District Licensing Agencies. Their role is to consider applications for the various kinds of liquor licences and for managers' certificates. Territorial authorities appoint inspectors to monitor compliance with liquor licences. The national Liquor Licensing Authority hears appeals of licence applications, and can make an order to suspend, revoke, or vary licences (including on the basis of requests from inspectors and constables for reasons including breach of conditions).</p>
<p>Transport Act 1962</p>	<p>This Act allows territorial authorities to make bylaws about road use,</p>

Legislation and agency	Regulatory responsibilities of local government
Ministry of Transport	and lists the offences enforceable by parking wardens.
Land Transport Act 1998 Ministry of Transport	Road Controlling Authorities (which include territorial authorities) have the power to make bylaws about almost any road-related matter.

Q3

Has the Commission accurately captured the roles and responsibilities of local government under the statutes in Table 2?

Q4

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?

The Resource Management Act 1991

The Resource Management Act 1991 (RMA) requires all district and city councils to prepare plans for their district. Each District Plan describes the council’s significant resource management issues and sets out the council’s objectives, policies and methods to address these issues.

The methods used to address resource management issues include rules that control what can and cannot be done. For example, most District Plans include land use planning rules, such as height restrictions on buildings and boundary set-backs. As such, these rules are regulations – as they are designed to control behaviour in the public interest and, in doing so, impose costs.

The Local Government Act 2002 – power to make bylaws

Sections 146-148 and 152 of the LGA indicate specific areas in which a territorial authority might make bylaws. Typical bylaws relate to animal control, fire prevention, liquor control, traffic and waste management. Other bylaws have enabling statutes (such as the Health Act 1956) associated with them.

A mix of regulatory functions

In some cases, local government administers regulation set by central government – for example, the Food Act 1981 requires local authorities to licence and inspect food premises to ensure they comply with food regulations set by central government. In other cases, central government sets standards but local authorities determine how the standards will be met, and are responsible for enforcement, while information collection and reporting is the responsibility

of central government. Air quality management under the RMA is an example of this particular mix.

Who has regulatory responsibilities?

Territorial, regional and unitary authorities all have regulatory roles but so do a range of other local organisations.

Table 3 Other local organisations with regulatory responsibilities

Organisation types	Description
Council Controlled Organisations (CCOs)	CCOs are council subsidiaries often set up to deliver chargeable services (like water). They can be used for regulatory services as well. For example, Queenstown Lakes District Council contracts regulatory services to its CCO, Lakes Environmental.
Building Consent Authorities (BCAs)	Currently, all territorial authorities are accredited and registered BCAs. While private organisations can apply to be accredited and registered, there are no private BCAs.
Reserve trusts/societies/associations	These are community organisations established to manage reserves. It is not uncommon for territorial authorities to vest public land in these trusts (Queen Mary Reserve Trust is an example).
Heritage protection authorities	A heritage protection authority is the body that can give notice to a local authority of a requirement for a heritage order to protect the special heritage qualities of a place or structure. A body corporate having an interest in protecting a place may apply to the Minister for the Environment to become a heritage protection authority. Some, such as the Royal Forest and Bird Society already have. All Ministers of the Crown, local authorities, and the Historic Places Trust are automatically heritage protection authorities under the RMA. Under section 33 of the RMA, local authorities may transfer some of their regulatory functions to heritage protection authorities.
District Health Boards	District Health Boards are locally elected and play a role in public health regulation (sometimes interchangeably) with local government.
Iwi authorities	Under section 33 of the RMA, local authorities may transfer some of their regulatory functions to iwi or other statutory bodies. Thus, iwi may play a role in regulating land and water use along with local authorities. Increasingly, joint management agreements (often of rivers) between iwi authorities and local authorities are being made as part of the Treaty of Waitangi settlement process.

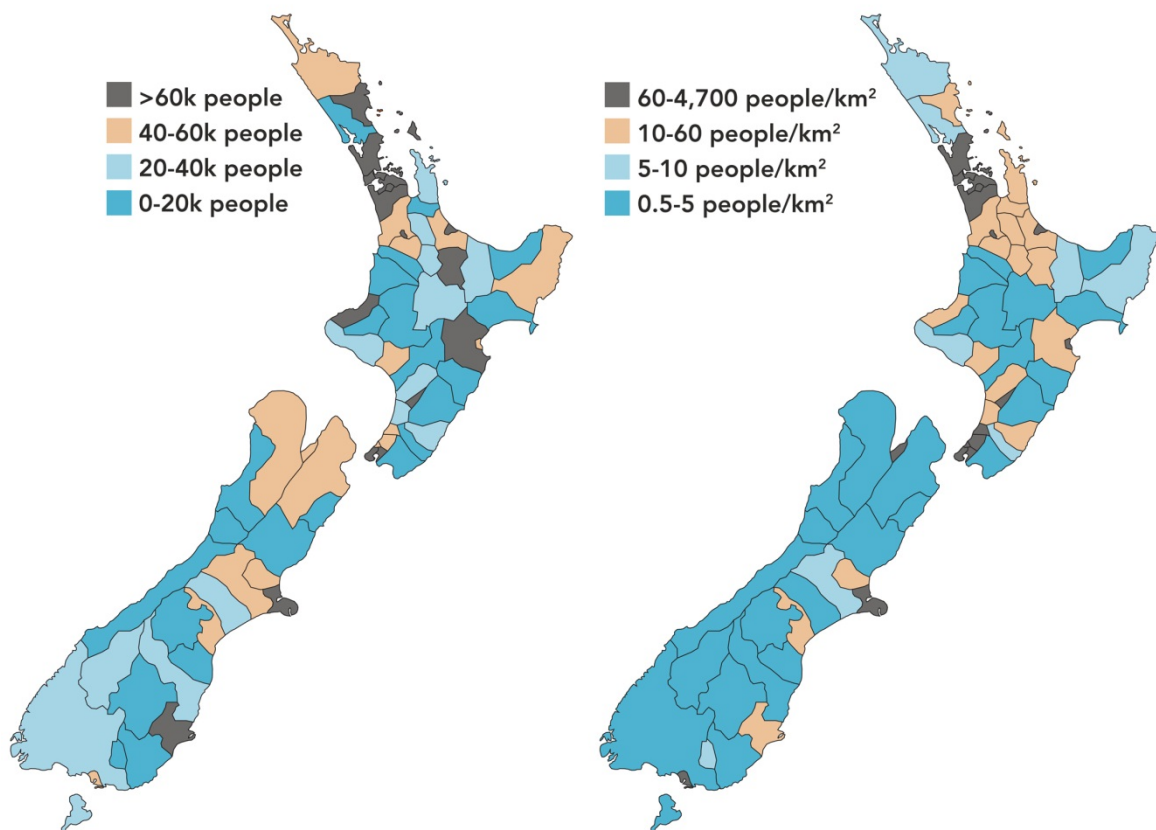
Q5

Are there any other local organisations with regulatory responsibilities that the Commission should consider?

Local authorities are diverse

The graphs below show the population and population density of New Zealand territorial authorities (TAs).

Figure 3 Estimated population and population density of TAs 2011



Source: Productivity Commission

Local authorities in New Zealand are diverse. They operate over variable areas and contrasting populations, from densely settled metropolitan areas, through to provincial cities and towns of modest scale, through to sparsely populated rural and wilderness areas. Consequently, local authorities face quite different issues and have access to different levels of resource for dealing with them. Auckland Council has a population of around 1.5 million in an area of around 4,900 sq km (although 90% of the population resides in only 30% of the area, the balance being

rural). At the other end of the scale, Mackenzie District has a population of just over 4,000 spread over 7,440 sq km.

Differences in the land area covered by territorial authorities, their population and population densities, and other characteristics, thus combine to present quite different challenges.

The most obvious difference is that between rural and urban councils:

...rural councils, because they are sparsely settled, spend very little on activities such as recycling, rubbish collection, potable water and cultural amenities. For the same reason they spend a considerable proportion of their budgets on roading. Urban councils, in contrast, spend most of their budgets on recreational and cultural amenities, as well as water and sewage services..... (Reid, 2009a, p.3)

The types of policy issues confronting these councils are equally diverse:

....not surprisingly rural councils find their meetings are dominated by the challenge of maintaining rural roads and bridges, funded through a property-based taxation system. In contrast, urban councils tend to be faced with issues of community safety, economic development and city promotion. (Reid, 2009a, p.3)

These challenges can lead to variation in the way in which local authorities exercise their regulatory responsibilities. This is discussed in the next chapter.

Box 7 **Did you know?**

- The number of council employees in New Zealand's most populous local authority exceeds the total number of people in its least populated local authority.
- Around 65% of councils have a population that could fit inside the permanent seating at Eden Park.

4 Regulatory variation

“New Zealand is a country of communities and they vary considerably. The local government framework currently gives councils substantial discretion which enables them to develop the appropriate mix of services to reflect the sorts of communities they govern.” – Reid, 2009b, p.49

The terms of reference require the Commission to assess whether there is significant variation in the way local government implements its regulatory functions, and the extent to which such variation is desirable. As a starting point, this chapter identifies some of the sources of local variation and asks a number of questions about their significance.

Differences between councils in regulatory standards, or in how they enforce the same standards, can increase the costs faced by firms that operate across council boundaries and require compliance with different approaches to regulation. Firms will seek to pass these additional costs on to their customers or in some cases may decide not to operate in some local authority areas. Community wellbeing will be reduced if there are situations in which the benefits of tailoring regulation to meet local circumstances are exceeded by the additional regulatory costs this might entail.

Sources of variation

The types of situations that could lead to differences in the administration of regulation between areas include where:

- councils face specific local problems they need to address;
- local communities have different expectations and preferences about the regulatory outcomes they want achieved;
- local authorities enter into agreements with Māori over the guardianship of tāonga, which may include a regulatory role; and
- legislation permits councils to use different regulatory instruments to achieve a particular outcome.

Different characteristics mean different problems and priorities

The wide diversity of local authorities, their characteristics and the policy issues they face could be expected to result in differences between local authorities in the way they exercise their regulatory powers.

In Auckland, the Mayor has established a taskforce aimed at reducing alcohol-related anti-social behavior.

Box 8 **Mayoral Taskforce on Alcohol and Central City Safety**

At its first meeting, the taskforce produced an action plan that includes using the regulatory powers available to the Council, including:

- establishing parking limits targeting five 'pre-loading' hot spots;
- instant fines for breaching liquor bans; and
- active enforcement to eliminate the sale of single drinks from off-licence outlets.

*Source: Auckland City Council Media release *Mayor takes action on central city alcohol issues* 13/06/2012*

Other local authorities will have different issues and priorities and, in respect of any issues they might have with alcohol and city safety, may use their regulatory powers differently.

As well, local communities may expect their local authority to set different regulatory standards or 'do more' because of concerns about specific local issues. Requests for further regulatory powers have often been around social issues not normally thought of as local authority responsibilities.

Box 9 **Recent local Bills**

One form of local regulation is an Act of Parliament that has local effect only. The following are examples of local Bills that have been passed (or are waiting to be fully considered).

- Wanganui District Council (Prohibition of Gang Insignia) Act 2009 enables the Wanganui District Council to make a bylaw specifying public places in its district as places where people may not display gang insignia at any time.
- Manukau City Council (Regulation of Prostitution in Specified Places) Bill 2010 – now amended to cover all of Auckland City Council, the Bill's purpose is "to authorise the Council to make bylaws specifying places in the district where the business of prostitution or commercial sexual services may not occur otherwise than in a brothel or a small owner-operated brothel".
- Hutt City Council (Graffiti Removal) Bill 2011 aims to empower the Hutt City Council to remove graffiti (tagging) on private property and that is visible from a public place.

Meeting local preferences

Local authorities have considerable discretion to reflect the preferences of the communities they govern. This can be reflected in their individual regulatory practices and become a source of variation in practice across the country. The Commission is interested in cases where variation in regulatory practice is a direct result of councils meeting local preferences. The issue has received attention in Australia with respect to its Building Code. In some states, local government could make bylaws that effectively varied or even added to requirements contained in the Building Code of Australia. The right to do so was vigorously defended by the Australian Local Government Association on the grounds that individual councils, being closest to the community, are best placed to balance local preferences and costs (Box 10). The Australian Productivity Commission, in its final report on the Reform of Building Regulation (2004) recommended that the Australian Building Codes Board reduce the scope for what it considered to be the “inappropriate erosion” of national consistency by local governments. This has been done through an Intergovernmental Agreement.¹

Box 10 Variations to the Building Code in Australia

“Should local variations to building requirements exceed the minimum requirements as established by the building code then, as the sphere of government closest to the community, it is appropriate that individual councils determine how best to balance community expectation, efficiency and cost effectiveness in that instance”.

Source: Australian Local Government Association submission to Australian Productivity Commission 2004 draft report. http://www.pc.gov.au/data/assets/pdf_file/0006/16926/subdr086.pdf, p.2

The roles of local authorities as a regulator and Māori as kaitiaki

The principles of the Treaty of Waitangi can (and are intended to) have significant influence on how local authorities carry out their regulatory functions. What influence should be had, and how this can be achieved in practical and meaningful ways, is a far from settled matter. In particular, the issues revolve around the respective roles of local authorities as a regulator and Māori as kaitiaki.²

Treaty obligations remain with the Crown but when central government delegates regulatory functions, it must also delegate any corresponding Treaty duties to local government (Waitangi

¹ The States and Territories signed an Intergovernmental Agreement (IGA) for the Australian Building Codes Board that is intended to safeguard against the introduction of building standards by local councils which are at variance with what is contained in the Building Code of Australia (soon to be a component of the National Construction Code). Jurisdictions agreed to introduce a ‘gateway’ model whereby relevant ministers would scrutinise proposed amendments to planning schemes which might seek the introduction of different building standards by councils.

² Kaitiakitanga is defined as “the exercise of guardianship by the tangata whenua of an area in accordance with tikanga Māori in relation to natural and physical resources; and includes the ethic of stewardship” (RMA, 1991, (2)1).

Tribunal). Central government has attempted to do so in several ways. There are a number of requirements on local government in the LGA and the RMA about involving Māori in decision-making, taking account of kaitiakitanga, and taking into consideration their relationship with features variously describable as tāonga.

Local authorities may transfer some of their regulatory functions to iwi or other statutory bodies. Sometimes there is an agreement to jointly manage a natural asset, perhaps as part of the Treaty Settlement process. Thus, iwi may play a role in regulating land and water use along with local authorities (Box 11).

Box 11 **Joint management of tāonga**

Joint management agreements create joint management authorities, with members from both local authorities and relevant iwi, to manage natural assets (such as rivers or other bodies of water). These authorities can carry out the equivalent of RMA planning (District Plans and regional policy statements) and some conduct the resource consenting process. In the case of the Waikato River Joint Management Authority, its plans 'trump' national policy statements.

Joint management authorities have typically arisen from deeds of settlement for Treaty of Waitangi claims, although the power exists within the RMA for councils and iwi to establish joint management agreements on their own initiative. To date, only one such agreement exists – between Ngāti Tūwharetoa and Taupo District Council for the resource consent process, where an application for resource consent is for Māori land.

There are earlier examples of co-management prior to the RMA being amended to enable joint management agreements. One such example is the arrangement between Ngāti Whātua o Ōrakei and the former Auckland City Council. The Orakei Act 1991 set aside almost 50 acres as a Māori reserve "for the common use and benefit of the members of the hapū and the citizens of the City of Auckland" (Orakei Act, 1991, (8)1). The reservation is administered through the Ōrakei Reserves Board, comprised of equal members of Ngāti Whātua and the Council (te Aho, 2011).

Such arrangements will mean that the regulatory authority will be different across the country. The variation in regulatory arrangements and how they are exercised will reflect the particular relationship Māori have with significant local natural features, such as mountains, bodies of water, or other wāhi tapu sites, and how the particular local authority gives effect to delegated Treaty of Waitangi obligations.

A local authority can use different mechanisms for regulating

Where a local authority wishes (or is required) to regulate an activity it has a range of options available to it and this can lead to variation in regulatory practice. For example, if a council

wished to regulate excessive noise, it can enact a bylaw under the Health Act 1956, or it could include constraints on noise in its District Plan rules.

Summing up

Variation can be expected because of the diverse characteristics of local authorities in New Zealand, the different policy issues they face and the mechanisms they have for regulating. Importantly, how local authorities exercise their regulatory responsibilities will reflect the priorities and needs of their communities. Further, Māori will have kaitiaki relationships over natural features in their local area, and the RMA provides for a number of ways in which Māori can exercise stewardship over tāonga. The Commission has explored some of the sources of variation in regulatory practice but is interested in hearing about other sources of variation.

Q6

Do the different characteristics and priorities of local authorities explain most of the difference in regulatory practice across local government?

Q7

Are community expectations to 'do more' about social issues leading to different approaches to regulation between local authorities?

Q8

To what extent are local preferences a source of regulatory variation in New Zealand? How far should councils, when implementing a national standard, have discretion to reflect local preferences in their bylaws?

Q9

Are there areas of regulation where local and central government regulation appear to be in conflict? If so, how far should such conflicts be accepted as a consequence of the diversity of preferences?

Q10

Does the way in which a local authority chooses to exercise its regulatory powers – through bylaws or through its District Plan – lead to differences in effectiveness and outcomes for communities?

Q11

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

Q12

What does this variation mean in practice – for Māori, the local authority and for the regulation of the resource?

Q13

Are there other significant sources of variation in local authority regulatory practice than those described in this chapter?

Does variation matter?

A core question for this inquiry is whether variation matters. One way in which it might matter is where businesses operate over more than one local authority area and incur costs through having to comply with different council requirements, as in the case below (Box 12). The extent to which it does matter will be important for how regulations are made, administered and enforced.

Box 12 **The regulatory costs of displaying fish – Coles Supermarkets in Australia**

“In Brisbane for example, we can display fish fillets, but not in Cairns where only the whole fish is permitted. In Victoria, our Werribee store is required to put plastic cloches over fish on ice (impacting on sales) whereas our Donvale store does not require plastic cloches. In those supermarkets in NSW where we have removed the fish box displays from the front area of the fish slab display, certain councils have requested additions or modifications to the sneeze guards currently in place (eg, adjustments, height requirements etc).”

Source: Submission from Coles Supermarket, APC 2012

Q14

Can you provide examples of inconsistencies in the administration and enforcement of regulations between local authorities?

Q15

Do these inconsistencies impose extra costs on businesses? If so, are these extra costs significant?

Q16

To what extent does variation in regulatory practice matter?

Diversity can create opportunities for innovation

Diversity among local authorities can lead to the adoption of different and innovative regulatory practices. The Commission is interested in learning more about the process of regulatory innovation at the local government level – particularly the incentives on local authorities to seek out and adopt more efficient regulatory processes.

Q17

Can you provide examples of regulatory innovation by local government?

Q18

Is the innovation specific to a particular local authority and its unique circumstances, or could it be adopted more widely?

Q19

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

Q20

What factors encourage (or deter) local authority innovation? (eg, the (in)ability to capture the cost savings from innovation)

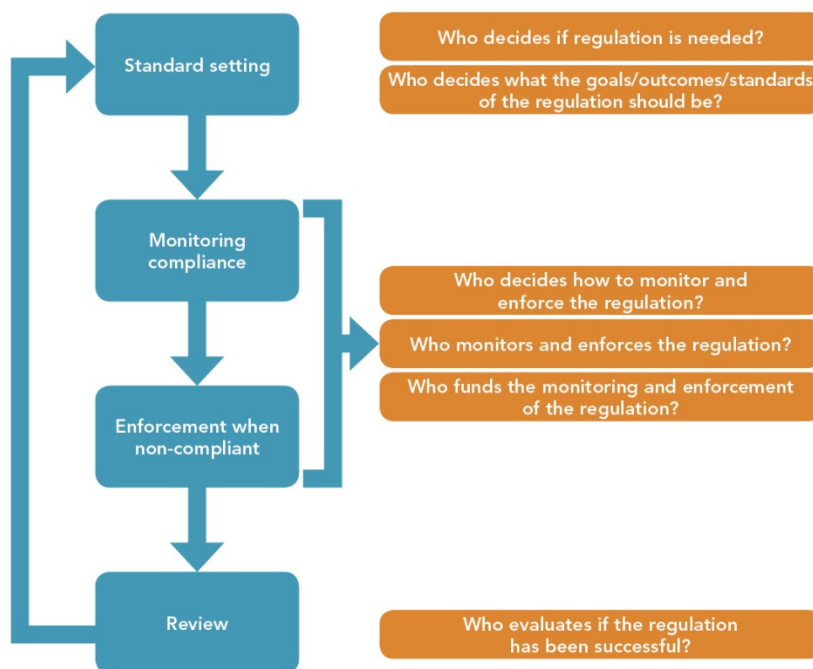
5 Who should regulate?

“It is helpful... to go back to some basic principles... first, the issue is not a simple one of centralisation versus decentralisation of environmental management.... the issue is one of aligning specific responsibilities and regulatory instruments with the different levels of government so as best to achieve our environmental objectives.” – Oates, 1998, p.14

The Commission has been asked to develop principles to guide decisions on which regulatory functions are best undertaken by local or central government. As a first step, this chapter sets out a simple schema for thinking about the types of regulatory functions, the range of institutions that might carry them out and some factors that might be important in deciding where regulatory functions might be located.

Regulatory functions and where they can be carried out

Figure 4 Core components of a regulatory regime



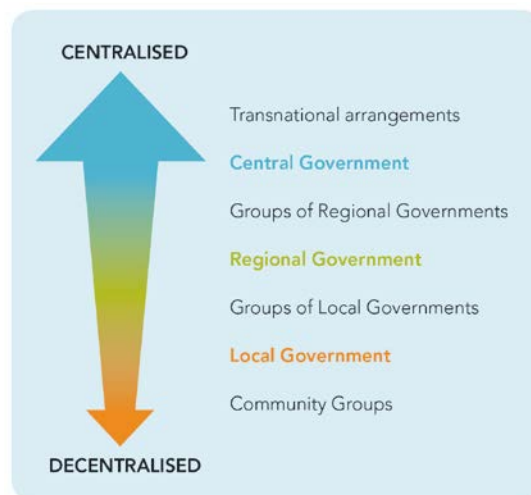
Regulatory regimes have a number of working components or functions – *standard setting* (regulatory goal or outcome), *monitoring compliance* with the regulatory standard, *enforcement* when there is noncompliance and *review* to evaluate if the regulation has been

successful. These different components raise a number of important questions when thinking about the appropriate allocation of regulatory functions (Figure 4).

To answer these design questions, the Commission needs to identify the levels of government that might undertake each function. Figure 5 presents a continuum of arrangements from regulatory authority being conferred on a transnational organisation, through to regulation being undertaken by community groups. This chapter uses the general terms centralisation and decentralisation. The Commission uses the term decentralisation to mean the devolution or delegation of regulatory roles.³ ‘More centralised’ means moving up the continuum, while ‘more decentralised’ means moving down the continuum.

In New Zealand, the role of local government is not defined in constitutional law. This means that decentralisation generally takes place by way of delegation by statute: central government passes laws which empower or enable local government to take on certain roles. While local authorities may act independently in delegated areas, their powers remain bounded by the processes stipulated in the LGA, and cannot be “repugnant to the laws of New Zealand” (Bylaws Act 1910).

Figure 5 The continuum from centralised to decentralised regulation



Transnational arrangements are where central government chooses to give regulatory authority to an external organisation – for example, Food Standards Australia New Zealand (FSANZ) or the proposed Australia New Zealand Therapeutic Products Authority (ANZTPA) for the joint regulation of medicines and medical devices. These sit most comfortably with central

³ Decentralisation can also mean the physical distribution of branch offices away from the head office. For example, a government department may have a local office. Branch offices may either have no decision making powers or limited operational discretion. This is not the way the Commission is using the term decentralisation in this inquiry.

governments to fashion regulatory policy according to international requirements. These types of arrangements will effect some local regulation.

In some cases, local and regional governments achieve their regulatory responsibilities by working together – for example, the shared services agreement between Otorohanga District Council and Waitomo and Waipa District Councils for environmental health services. Another possibility is mutual recognition of another jurisdiction’s regulatory policies or decisions.

Regulatory responsibilities can be devolved to or shared with community groups, such as the joint management agreements between local authorities and iwi, such as the Waikato River Joint Management Authority.

How regulatory functions can be arranged between different levels

Figure 6 presents a graphical illustration of some different ways regulatory functions can be arranged.

Figure 6 Some different ways to arrange regulatory functions



For example, the last column illustrates how air quality management is currently arranged, as described in Box 13 below.

Box 13 Air Quality Management

“Air quality management in New Zealand is governed by the Resource Management Act 1991 (RMA) and involves a number of agencies. The Minister for the Environment is responsible for recommending national environmental standards to guarantee a set level of protection for the health of all New Zealanders. Regional councils and unitary authorities are in turn responsible for ensuring that national standards are met in their regions. The Ministry

for the Environment liaises between and provides national guidance to councils, to assist them with improved air quality management and reports back to the Minister on progress in achieving the air quality standards.”

Source: Ministry for the Environment. 2011. Clean Healthy Air for All New Zealanders: National Air Quality Compliance Strategy to Meet the PM10 Standard. Wellington: Ministry for the Environment, p.1

What about the principle of subsidiarity?

The principle of subsidiarity – that matters ought to be handled by the smallest, lowest, or least centralised competent authority – is often cited as a guide for allocating functions between different levels of government. However the definition, and therefore the helpfulness, of the principle are far from uniformly accepted. There is a significant amount of academic literature devoted to unravelling the philosophical foundations of subsidiarity in order to develop a functional definition of the concept. For example, Follesdal (1998) highlights three different philosophical justifications commonly used to inform the definition of subsidiarity. These are:

- *liberty* – the notion that subsidiarity protects freedom by reducing the areas in which central government can overreach its power;
- *justice* – the notion that the political interaction possible at a decentralised level results in more representative, and therefore more legitimate, government decisions; and
- *efficiency* – the notion that decision making should reside with the lowest level of government that can most efficiently deal with a policy decision (ie, that can lead to the largest net social benefit).

In commenting on these various interpretations, Martin (2010) observes:

In each of these versions of subsidiarity, decentralising decision-making processes lightens the legislative burden on the centre and fosters a government that is ‘closer to the people’. Beyond these broad, and no doubt positive benefits, if put into practice, each of these interpretations would lead to a very different outcome... (p. 7)

While each justification is valid, the inquiry terms of reference steers the Commission towards an efficiency-focused approach to subsidiarity. In doing so, however, the Commission recognises that considerations of liberty and justice are underlying principles of the New Zealand constitutional framework with which all regulations must adhere.

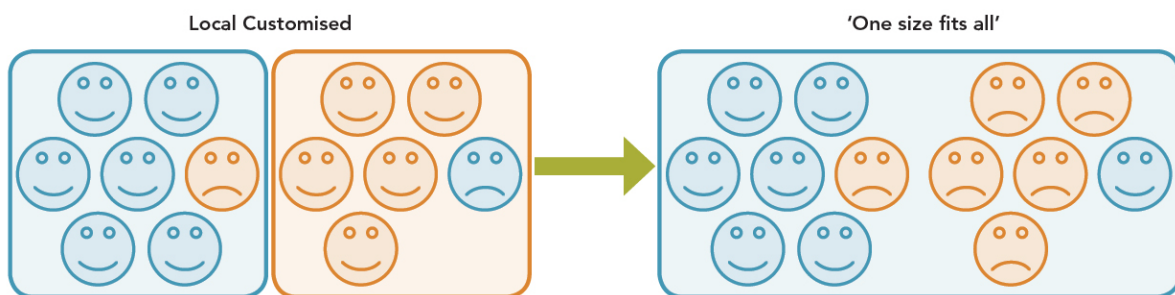
Factors that may be relevant in allocating regulatory roles

The following factors may be important considerations in deciding which level of government might carry out a particular regulatory function. Different factors may be more or less important depending on the regulatory issue.

Preferences

Decentralisation allows the flexibility of applying different standards (or approaches to meeting those standards) to best meet different regional or local preferences. Centralisation can result in a 'one size fits all' approach that may lead to a loss of wellbeing where there are wide differences in community preferences (Lin, 2010; Oates, 1999; Kerr, Claridge and Milicich, 1998; Alesina, Angeloni and Etro, 2005).

Figure 7 Preferences



Notes:

1. (Left) Regulations are aligned to regional preferences. Most people are happy.

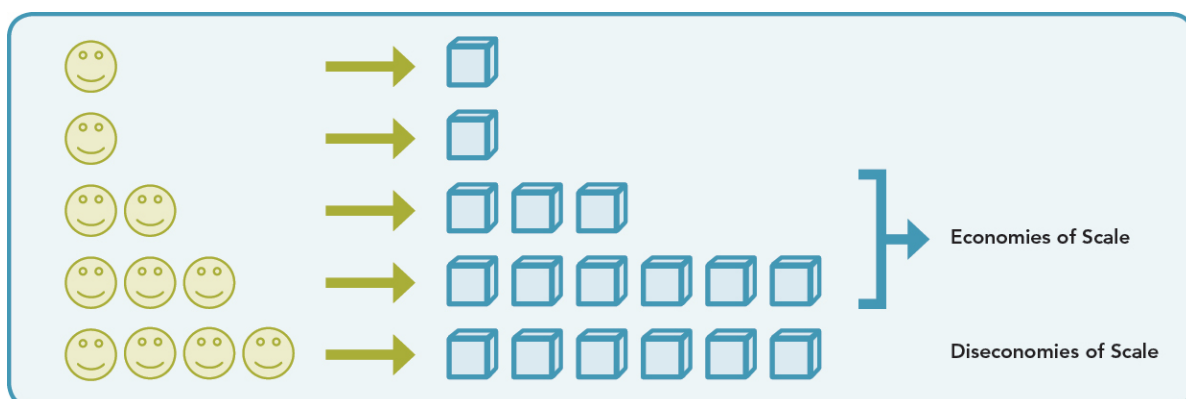
(Right) 'One size fits all' regulation is applied across the two regions. More people are unhappy.

However, 'communities of interest' (people with shared or similar preferences) may not follow geographic boundaries; greater decentralisation may not automatically lead to a closer matching of regulatory policies with preferences.

Economies of scale

Centralisation of regulation may lead to cost savings as it allows overheads to be spread over greater output, thus reducing duplication and increasing productivity through specialisation (Kerr, Claridge and Milicich, 1998; Alesina, Angeloni and Etro, 2005; Bailey, 1999).

Figure 8 Economies of scale



Notes:

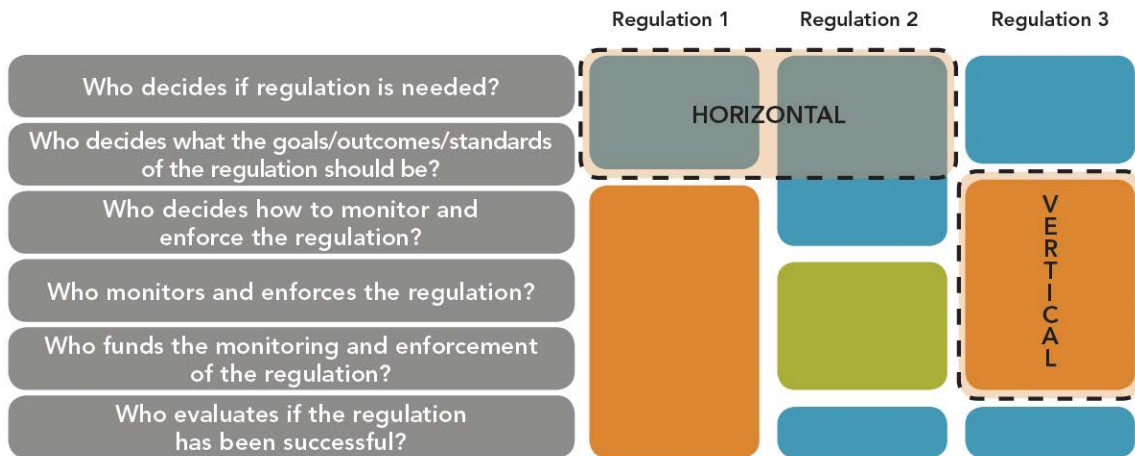
- Two people working together (row 3) produce more than when working separately (rows 1 & 2). This is economies of scale. Proportionally more output is produced when another person is added (row 4). Diseconomies of scale occur when a fourth person is added.

However, it may not be necessary to centralise in order to achieve economies of scale. Scale could be achieved by several units at one level working together. If an organisation gets too large, it may suffer from diseconomies through more bureaucracy.

Economies of scope

Economies of scope may occur when activities are done together rather than separately. ‘Vertical economies of scope’ may be achieved when the different steps in the regulatory process (design, implementation, enforcement, monitoring and review) could be more efficiently undertaken by a single unit of government. ‘Horizontal economies of scope’ may occur when there are synergies that make it more efficient for the same organisation to be responsible for similar areas of regulation. The myriad of regulations covering different areas of activity within local authorities suggests that there could be economies of scope to be gained at the local level.

Figure 9 Economies of scope



Notes:

- There may be efficiencies in placing different regulatory functions (vertical) or similar regulations (horizontal) within the same organisation.

Externalities

Regulation is often used to control the effects of one party’s behaviour on other parties. Noise control regulations, for example, are enforced to minimise the effect of noise on neighbours. Ideally, the communities in which regulatory decisions are being made will bear both the costs and the benefits of regulations.

When harm or benefit crosses from one jurisdiction into another, it can lead to a loss of wellbeing (Lin, 2010; Kerr, Claridge and Milicich, 1998; Bailey, 1999). For example, one

jurisdiction may benefit economically from having low environmental standards (lower compliance costs, more businesses, more jobs etc.) However, if the pollutant flows beyond the jurisdiction, it will enjoy the economic benefit but pass on some of the environmental costs to others.

The same can apply to positive externalities, for example protecting the Kiwi by preserving its natural habitat provides a benefit to all New Zealanders. However, if the local council incurs costs to protect Kiwi habitats (eg, by limiting the use of productive land) it may provide less regulation than is optimal from a national point of view. The council incurs costs but does not receive all of the benefits (Claridge and Kerr, 1998).

The advantage of more centralisation then is that some externalities which extend across local government boundaries can be internalised (ie, the political jurisdiction can incorporate the entire affected area). All the people incurring the costs and benefits will therefore be able to influence the outcome. The disadvantages of centralisation are that people and local communities have less opportunity to influence decisions that affect them.

Figure 10 Externalities



Notes:

1. (Left) Externalities (eg, smoke from a factory) flow from one region to another.
(Right) The larger political decision-making region means that the externality is internalised.

Information

Good information is needed to design and enforce regulation (Oates, 1999; Kerr, Claridge and Milicich, 1998). Because local governments are closer to local communities and businesses, they may have better information about their preferences and local conditions, and may be better able to design or implement regulations in a manner that reflects local needs and preferences. This in turn enables regulatory efforts to be better targeted – resulting in higher levels of compliance, lower implementation costs and less unnecessary regulation.

Moving the locus of decision-making authority down the hierarchy and closer to local sources of information can also allow regulators to respond more rapidly to certain types of change in the external environment, such as technological, environmental or social change (Fukuyama, 2004). However, widely dispersed information requires institutional mechanisms for aggregating, evaluating, codifying and diffusing knowledge (Mumford, 2011).

Collecting and analysing complex objective information may involve economies of scale and specialist personnel. On these grounds, more centralised units of government may be better at collecting and analysing complex information than smaller, decentralised units (unless the latter can gain sufficient expertise through collaboration or outsourcing).

Innovation

By adopting new ways of implementing regulations, local governments may be able to reduce their internal costs, reduce the regulatory burden on businesses or the wider community and generate better regulatory outcomes through more effective regulation (Kerr, Claridge and Milichich, 1998; Black, 2005). Flexibility in the manner in which regulatory objectives are achieved at the local level can encourage regulatory innovation. Local governments may be able to learn from each other's experiences and, through exchange of information, adopt best practice.

Central agencies may find it more difficult to experiment with different policies for different regions as policy uniformity may be required for equity reasons. The Government's *Better Public Service Advisory Group* has highlighted that the pace of innovation within central government agencies is often slow. A key reason for this is that agencies tend to work in an environment where the social and political costs of failure are high, and the rewards for introducing new ways of doing business are low. A centralised environment discourages process experimentation – a vital step in the process of innovation.

Competition

Just as competition between businesses can lead to better and cheaper products and services, competition between regions can also lead to better regulation (Oates, 1999; Tiebout, 1956; Siebert and Koop, 1993).

Decentralisation allows local and regional councils to differentiate themselves on the regulatory policies they implement. If citizens and businesses can and do move to regions that best match their regulatory preferences, it may create incentives for councils to innovate and contain costs. This way, councils can attract more residents and businesses and encourage those they already have to remain. Mobility also allows residents and businesses with similar needs to group together in the same region. Competition and comparison with other local authorities also places political pressure on councillors to improve policy and regulatory performance.

One criticism about regulatory competition between regions is it may create a 'race to the bottom'; for example, where governments compete with one another to attract business by having low environmental or safety standards (Morantz, 2009). This argument is strongest where regulatory competition creates negative externalities for other jurisdictions so that the home jurisdiction does not bear all the costs of the lower standards (MED, 2009).

It will be important to consider whether regulatory differences between local authorities influence where businesses locate. The extent to which the community is able to compare the

regulatory performance of councils and place pressure on councils to meet leading-practice regulation will also be relevant.

Regulatory consistency

A potential downside of allowing local or regional government the flexibility of choosing different standards or regulatory policies is that it can result in extra compliance costs when a business operates over more than one local authority. Implementing different standards can be costly for a firm (eg, requiring different systems and training). It may also reduce:

- *competition* - if firms are discouraged from operating in multiple authorities;
- *innovation* - if compliance distracts firms from their core business or if firms are discouraged from introducing innovation; and
- *compliance* - if businesses find it difficult to comply.

National priorities

There may be reasons why national consistency is important and should outweigh local preferences. One example is in setting and ensuring compliance with standards required to maintain a national reputation, or conform to international standards. For example, the phytosanitary standards administered by the Ministry for Primary Industries, and the quality assurance systems the Ministry applies in conformity with international expectations, are necessary to maintain the entry of many of New Zealand's processed and unprocessed primary products to international markets.

Capacity and capability

It could be that local governments do not have the capacity to implement a particular regulation; for example, where specialised technical skills and expertise are required (or cannot be cost effectively sourced) at the local level (Kerr, Claridge and Milicich, 1998).

Central government may find it easier to recruit staff because it can pay higher wages, provide better access to support and training and promotion opportunities and is located in larger cities with more potential employees. On the other hand, local government may attract staff with specialist expertise because they are attracted to the amenities available in provincial areas.

Governance

Decentralisation allows more local accountability as local citizens are able to monitor local decision-making and delivery more easily than a distant central authority (Seabright, 1995; Bailey, 1999; Bardhan and Mookherjee, 2011). Where government is closer and more visible to the people it serves, this should in theory increase accountability and therefore both the legitimacy and quality of democracy (Fukuyama, 2004). Central government agencies, however, may have better internal monitoring and guidelines for conflicts of interest than local governments.

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. Difficulty in achieving this may be a reason for changing the level at which one or other regulatory function is carried out. For example, the design of regulations and the setting of standards to be regulated might be set at one level and implementation conducted at another level. Equally, an outside agency might be established or appointed for implementation purposes.

Constitutional considerations

Some parts of New Zealand’s constitutional arrangements – such as the New Zealand Bill of Rights Act 1990 and the Treaty of Waitangi – will either limit some of the options available for conferring regulatory powers, or create an obligation that might lead to regulation being delivered a particular way. Joint Management Agreements over some sites or features would be an example of the latter.

Table 4 Summing up

Factor	Why each factor might be important in deciding where a regulatory function is located
Preferences	Taking people’s preferences into account might be an important consideration.
Economies of scale	Cost savings from spreading overheads over greater output might be desirable.
Economies of scope	Cost savings from doing activities together rather than separately might be desirable.
Externalities	It might be important that externalities that extend across local government boundaries can be internalised.
Information	Good information is needed to design and administer regulation and might be an important consideration in deciding where to locate a regulatory function.
Innovation	Encouraging innovation might be an important factor in deciding where a regulatory function should be carried out.
Competition	Competition between regions can lead to better regulation and this might be an important consideration.
Regulatory consistency	Reducing compliance costs by ensuring consistency of approach across jurisdictions might be an important consideration.
National priorities	There may be circumstances where national priorities take precedence.
Capability and	The level of government where regulatory functions are best placed may

capacity	depend on the capacities or capabilities at each level.
Governance	Ensuring the proper conduct of, and accountability for, regulatory activity is important. Governance issues might determine where a regulatory function is best placed.
Constitutional considerations	Constitutional considerations might determine where a regulatory function should be undertaken.

Which factors are the most important?

These factors do not always sit easily with one another. For example, there may be economies of scale for licensing food standards, liquor distribution, gambling, prostitution, etc. at a regional or national level, but significant and differing public sensitivities at the local level.

In some cases, local preferences might be traded-off in the national interest; for example, if a nationally consistent high standard needs to be rigorously enforced to maintain New Zealand's 'clean green' image or meet international obligations.

Any decision about the level at which a regulatory function should be located will need a principled approach to making trade-offs between these factors.

Q21

Has the Commission captured the advantages and disadvantages of centralisation and decentralisation for each of the factors?

Q22

Which of the factors discussed in this chapter are the most important for allocating regulatory functions locally or centrally?

Q23

Which other factors might be important for considering whether a regulatory function should be undertaken locally or centrally?

The Commission has been asked to identify regulatory functions that are likely to benefit from a reconsideration of the balance of delivery between central and local government. The Commission is interested in receiving submitters' views on this matter.

Q24

Are the factors discussed above helpful in thinking about whether a regulatory function should be relocated?

Q25

In the New Zealand context, are there regulatory functions that need reconsideration of who (central, local, community) carries them out?

6 Getting regulation right

“Regulations are indispensable to the proper functioning of economies and societies. They underpin markets, protect the rights and safety of citizens and ensure the delivery of public goods and services. At the same time, regulations are rarely costless. Businesses complain that red tape holds back competitiveness while citizens complain about the time that it takes to fill out government paperwork. More worrying still, regulations can be inconsistent with the achievement of policy objectives. They can have unintended consequences and they can become less effective or even redundant over time.” – OECD, 2011, p.7

What does good regulation look like?

There have been many attempts to define or benchmark good regulation (Box 14). Academic and governmental efforts to identify appropriate benchmarks for good quality regulation cluster around a relatively small number of themes (Baldwin, 2010):

- the adoption of lowest cost, least intrusive methods of achieving mandated aims;
- the application of informed (evidence-based) expertise to regulatory issues;
- the operation of processes that are transparent, accessible, fair and consistent;
- the application of appropriate accountability systems; and
- the use of regulatory regimes that encourage responsive and healthy markets where possible.

Box 14 **Good regulation**

Good regulation should:

- be proportionate; accountable; consistent; transparent; and targeted (UK’s Better Regulation Taskforce, 2003);
- confer net benefits; achieve objectives without unduly restricting business; be transparent and fair; accessible to business; create a predictable regulatory environment; and ensure responsive consultation (Australia’s Department of Industry, Tourism and Resources, 1999);

- be the minimum action necessary to achieve the objectives; not unduly prescriptive; accessible, transparent, and accountable; integrated and consistent with other laws; communicated effectively; mindful of compliance burdens; and enforceable (Australia's Office of Regulatory Review, Argy and Johnson, 2003);
- serve clearly identified policy goals and be effective in achieving those goals; have a sound legal and empirical basis; produce benefits that justify the costs, considering the distribution of effects across society and taking economic, environmental, and social effects into account; minimise costs and market distortions; promote innovation through market incentives and goal-based approaches; be clear, simple, and practical for users; be consistent with other regulations and policies; and be compatible, as far as possible with competition, trade, and investment-facilitating principles at domestic and international levels (OECD, 2005).

Source: Baldwin, 2010

The design challenge is to ensure that the institutions, principles and processes that constitute the regulatory system create the appropriate incentives and disciplines to produce good regulation, and ensure that regulation is necessary, cost-efficient, adheres to legal and constitutional principles and is in the public interest.

The process for developing regulations made by local government

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. Local authorities are also required to consider community views on the options.

The extent to which a local authority does this is to be decided at the discretion of the local authority in proportion to the significance of the decision (section 79). To decide the significance of the decision, local authorities are required to have a policy on 'significance'.

Box 15 The significance of 'significance'

Section 90 of the LGA requires particular information (such as the thresholds that need to be met before a decision is deemed significant) to be included in a local authority's significance policy. As such, it provides some transparency about the basis for a local authority's decision on how much analysis and consultation it will do.

Because local authorities can set quite high thresholds for significance the section 90 requirements might not provide an adequate safeguard for sound analysis and consultation on proposed regulation.

For bylaws, the LGA requires a three stage process:

- *Stage one* – the local authority must determine whether a bylaw is the most appropriate way to address the perceived problem (section 155 of the LGA). This decision would be subject to how significant the decision is (section 77).
- *Stage two* – the local authority must determine what kind of bylaw is most appropriate, and ensure that the proposed bylaw is consistent with the New Zealand Bill of Rights Act 1990.
- *Stage three* – once the bylaw has been drafted, there must be consultation using the Special Consultative Procedure (SCP) set out in the LGA. The local authority must, after considering the views expressed during consultation, decide whether to pass the bylaw.

Q26

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

Q27

Does the local government regulation-making process lead to good regulation? If there is evidence to show that it does not, how could the process be improved?

The process for regulations made by central government

The principles, processes and formalities that guide and determine central government regulation-making are set out in the Cabinet Office Manual, Legislative Advisory Council (LAC) Guidelines, the Regulatory Impact Analysis Handbook and Regulatory Impact Statement (RIS) requirements. Together, they provide obligations and expectations for the analytical quality of regulation, legal principles that must be adhered to and consultation and process requirements in developing regulation. Oversight of the quality of regulation sits with the Regulatory Impact Analysis team within the Treasury, which administers and enforces the RIS formalities.

Regulation imposes restraints on individuals, businesses and groups within society and the way they exercise various freedoms. Accordingly, the LAC guidelines provide important legal benchmarks that need to be considered when making regulation, including:

- common law principles – that is, incorporating much of New Zealand’s substantive law (eg, the law tort, law of contract, and much of the law by which Parliament’s statutes are interpreted by judges);
- the New Zealand Bill of Rights Act 1990, which affirms a range of civil and political rights;

- international law, standards and treaties that New Zealand is a party to;
- principles of the Treaty of Waitangi; and
- relationship with existing law.

The Regulatory Impact Analysis (RIA) framework for making regulation requires that:

- the regulatory problem is clearly defined;
- there is a clear description of the outcomes sought;
- the full range of practical options is identified and analysed; and
- the benefits of proposed regulation exceed the costs and deliver the greatest practical net-benefit.

Importantly, the full range of impacts must be identified (economic, fiscal, compliance, social, environmental and cultural), including the incidence of such impacts (that is, who bears the costs and benefits), and an implementation and enforcement strategy (including how compliance will be enforced and the body that will enforce it).

The Cabinet Office and the RIA framework also impose specific consultation requirements, and require that any significant issues are made explicit. For example, the RISs provided to Cabinet must outline who has been consulted, the feedback received and the steps taken to address any significant concerns (or why no steps were taken).

Concerns about the impact of central government regulation-making on local government

An important question is whether the current regulation-making framework adequately captures the impact of central government decisions on local authorities. This is particularly important when these decisions involve local government implementing or enforcing regulations made centrally. In this regard, specific concerns have been raised about central government regulation-making processes (eg, Local Government Rates Inquiry 2007).

These include concerns that:

- central government agencies do not take full account of the impact of new regulations on local government;
- central agencies do not adequately consult with local government prior to introducing new regulations;
- central government agencies too quickly devolve enforcement responsibilities to local authorities, without understanding the financial and capability constraints that may limit their ability to undertake enforcement;

- councils face undue costs from the transfer of regulatory duties from central government without a commensurate transfer of funding; and
- there needs to be a greater level of consistency and coherence in the development of the central government policies that impact on local authority operations.

Q28

Do you have examples of regulatory responsibilities being conferred on local authorities with significant funding implications?

Q29

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

Q30

How might central government better work with local authorities on the design, implementation and funding of delegated regulatory functions?

Q31

How could the RIA framework be improved to promote a fuller understanding of the impact of devolving new regulatory functions to local authorities?

In 2006, *Policy development guidelines for regulatory functions involving local government* was released by the Department of Internal Affairs. This was an attempt to improve the consistency and coherence of central government policies that involve local government. These guidelines aimed to improve the quality of policy-making decisions by:

- highlighting specific features of local governments in New Zealand that should be taken into account when central agencies are considering whether (and how) local governments should (or should not) be involved in the implementation of a new regulatory regime; and
- emphasising the benefits for involving local governments early in the policy development process and providing guidance on how meaningful engagement can be achieved.

Such guidance is unlikely to have much impact without the supporting institutions, formalities and processes to ensure that the guidelines are followed by central government agencies.

Q32

How successful has the guidance document *Policy development guidelines for regulatory functions involving local government* been in improving the consistency and coherence of central government policies that involve local government?

Getting the implementation right

A key feature of good regulatory design is that regulation can be implemented successfully by the authorities it has been delegated to. The Commission is interested in receiving submissions on issues in the administration, monitoring and enforcement of regulation in the local government sector. This is important, because poorly implemented regulation can lead to poor regulatory outcomes and the costs of regulation on local government, businesses and individuals may be higher than need be.

Regulation is more likely to be poorly implemented and lead to poorer outcomes where:

- local authorities face capability issues;
- there are unnecessary compliance costs;
- costs are misallocated among the parties; and
- there is political interference in the enforcement of regulation.

Capability issues

Capacity or capability constraints can mean that insufficient resource or the wrong level of resource is devoted to a regulatory activity. It can result in poor regulatory outcomes and potentially lead to a lack of public confidence in the regulator.

The Commission's Housing Affordability Inquiry, for example, noted that small Building Consent Authorities (BCAs) face challenges in acquiring, retaining and supporting the necessary skills, experiences and technology to perform their regulatory tasks to a high standard (Productivity Commission, 2012). This is because BCAs typically draw building inspectors from skilled builders in the area, and low rates of building activity make it difficult for building skills and building inspection skills to be retained locally.

A number of councils face difficulty in attracting and retaining staff with the appropriate level of skill and experience... (Department of Building and Housing submission to the Productivity Commission Housing Affordability Inquiry, Draft Report, Sub 55, p.9)

The Commission wants to understand more about the capacity or capability constraints faced by councils in their role as regulators.

Q33

To what extent is the effective implementation of regulations delegated to local government hampered by capability issues in local authorities? Do capability issues vary between areas of regulation?

In some cases local authorities are able to work together to overcome funding, capability or other constraints to achieve common regulatory goals. The Commission is interested in the extent that local authorities work together, or with central government, to implement regulation.

There is a broad spectrum of regulatory coordination with different levels of integration and formality, both between local authorities and between central and local government. These include informal cooperation on administrative and enforcement matters (such as information exchange), the mutual recognition of one another's regulation (permitting economic activity under one another's regulation), the harmonisation of regulation between local authorities and adherence to national policy statements or frameworks (Table 5).

Table 5 Regulatory co-ordination

Coordination types	Examples
Between local councils	<ul style="list-style-type: none"> – Shared inspection and licensing. – Harmonising District Plans through reviews (including a single District Plan for a region).
Between local and regional councils	<ul style="list-style-type: none"> – Formal requirements such as the filtering down of regional policy statements to District Plans. – Council initiated reconsideration of the balance of functions to reduce duplication.
Between local and central government	<ul style="list-style-type: none"> – Single Occupational Safety and Health (OSH) and public health inspection appointments. – Joint working groups on particular issues (eg, liquor harm, road safety and youth gangs in South Auckland).
Within and between central government agencies	<ul style="list-style-type: none"> – Consideration of potential economies from one organisation undertaking similar regulatory functions. – Plans to reduce the cumulative effect of regulation. – Learning from previous devolutions of regulatory functions.

Local Government New Zealand (LGNZ) raised the issue of coordination in its study *Shared Services for Local Government* (2011). The study identified factors, including strong leadership, shared vision and organisational culture that contribute to successful coordination between local authorities. The study also highlighted barriers to coordination such as uncertain benefits, political differences and conflicting objectives. The Commission is interested in further understanding the factors that both facilitate and limit regulatory coordination.

Box 16 Local governments working together: Otorohanga, Waitomo and Waipa environmental health

“Otorohanga Council belongs to a shared services agreement with Waitomo and Waipa District Councils for environmental health services. Under this agreement a qualified Environmental Health Officer (EHO) provides two days service per week. This is sufficient to maintain an adequate level of service to existing licence holders and to investigate and report on communicable diseases. Council also has the ability to call upon the additional capacity of the Waipa District to provide backup, relieving staff and assistance on large projects such as food fairs.”

Source: Otorohanga District Council draft Long Term Plan 2012/13 to 2021/22, p. 128

Q34

Can you provide examples of regulatory cooperation and coordination between local authorities or between central and local government, and describe successes and failures?

Q35

What types of regulatory functions more readily lend themselves to coordination to improve regulatory performance?

Q36

What are the most important factors for successful regulatory coordination?

Q37

Are opportunities for regulatory coordination being missed?

Q38

What are the main barriers to regulatory coordination?

Q39

Are there examples in New Zealand where local authorities mutually recognise each other's regulations?

Compliance costs

Regulation imposes a range of compliance costs on individuals and businesses, both direct and indirect. They include (APC, 2011):

- fees charged for particular processes or services, such as obtaining or renewing licences and permits;
- time delays involved in obtaining responses and decisions from regulators such as for applications to conduct or continue a business activity that result in holding costs for the applicant;
- sequencing costs and uncertainties associated when multiple consents are required;
- ease of interacting with regulators, such as through the availability and scope of electronic application, payment and tracking systems;
- the clarity and scope of regulatory information and guidelines available to businesses and the associated cost of education and training or consulting services required to understand and comply with regulatory requirements and changes to those regulations;
- requirements placed on businesses with respect to reporting, documentation and publication and the cost of record keeping in order to have statutory documents up-to-date;
- the frequency of audits, inspections or other enforcement activities as well as the associated fees and penalties imposed for regulatory breaches;
- transparency and consistency of processes within and across councils, including differences in interpretation of similar requirements;
- availability of appeals processes and the ease with which these can be accessed; and
- costs of review or appeals processes that may be passed on as an administrative cost of regulation, or recovered directly from the appellant.

Compliance costs can be necessary in achieving agreed regulatory objectives; however, unnecessary and excessive compliance costs that do not generate benefits can create inefficiencies that have wider impacts on productivity and wellbeing.

Box 17 Compliance costs example – Calendar Girls Wellington venue

During April and May 2012, media coverage was given to the *Calendar Girls* Wellington venue and the delays and difficulties faced in gaining several necessary council consents. The case illustrates several ways regulation can impose business costs:

- *Uncertainty and sequencing of regulations* – the club was required to gain building consent before it could be granted a liquor licence. This meant that fit-out cost had to be

incurred before there was any certainty that the business could operate.

- *Holding costs* – because the liquor licence was eventually opposed, it could not be addressed locally but had to be referred to the national Liquor Licensing Authority. This incurred costs to the business from a 4 to 6 week delay.
- *National consistency* – the licence appears to have been contested on the basis that the proprietor is unfit to hold a liquor licence. However, the proprietor already held two licences in Auckland.

Q40

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

Q41

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

Q42

Are there particular examples where local government approaches to regulatory responsibilities are especially effective at minimising unnecessary compliance costs for individuals and businesses?

Q43

For which aspects of the regulatory process (eg, approval, monitoring, enforcement and appeals) could compliance costs to business be reduced without compromising the intent of the regulation? How could this be done?

Misallocation of regulatory costs

How a local authority funds its regulatory activities matters for good regulatory outcomes. Section 101(3) of the LGA sets out what a local authority needs to consider in meeting its needs for funding each of its activities. This includes “the distribution of benefits between the community as a whole, any identifiable part of the community and individuals” and “the extent to which the actions or inaction of particular individuals or a group contribute to the need to undertake the activity” (the ‘exacerbator principle’). To do this, local authorities need to assess the distribution of benefits from regulation. The Commission’s initial review of some local authority draft 2012-22 Long Term Plans shows that what local authorities consider to be the split between public and private benefit for selected regulatory activities varies considerably.

Table 6 The public/private split of the benefits of regulation - selected territorial authorities

		WBOP	Westland	Otorohanga	Auckland	Dunedin	Taupō
Animal Control Services (dogs)	Private	80%	95-100%	90%	80%	75%	50%
	Public	20%	0-5%	10%	20%	25%	50% ¹
Resource Consent processing (all kinds)	Private	²	40-45%	100%	60%	47% ³	50%
	Public		55-60%	-	40%	53%	50% ⁴
Licensing and inspections ⁵	Private	70%	65-70%	40%	60%	40% ⁶	60%
	Public	30%	30-35%	60%	40%	60%	40%

Source: Productivity Commission from draft 2012-2022 LTPs.

Notes:

1. Includes livestock.
2. Reported separately for different kinds of process therefore not included here for simplicity.
3. The council wants to make this 100% cost recovery, but currently cannot for practical reasons
4. Includes compliance activities.
5. Includes liquor licensing, food premises registration and inspection and dangerous goods licensing.
6. Liquor licencing itself is a 50/50 split.

Balancing between the different considerations for funding will not always be easy. Public and private benefits will be hard to define and quantify in many circumstances. Determining when those that benefit should pay, and when those that cause the need to regulate should (the exacerbator principle), will not always be clear. However, the consequences of getting it wrong are clear – where a local authority overcharges for a regulatory service, it will push the level of the regulated activity below the efficient level. It may also result in non-compliance, undermining the intent of the regulation.

Q44

How well are the principles on which local authorities are required to base the funding of regulatory activities applied?

Q45

Are there examples of where cost recovery is reducing compliance with regulations and reducing their effectiveness?

Political interference

The regulatory efficiency advantages of keeping regulatory administration and enforcement separate and removed from political interference is a well-established leading practice (eg, OECD, 2002; Moe, 1990; Majone, 2001). New Zealand also has the independence of the prosecutor as a central tenet of good regulation.

The Crown Law Office's *Prosecution Guidelines* are clear that prosecution decisions should be free from political interference. The independence of the prosecutor is described as "the universally central tenet of a prosecution system under the rule of law in a democratic society" (OAG, 2011b, p.68).

In her 2011 report *Managing freshwater quality: Challenges for regional councils*, the Auditor-General raised concerns that elected officials were involved in deciding which cases would or would not be enforced or prosecuted (Box 18).

Box 18 Example: Involvement in prosecutions decisions

"At Waikato Regional Council and Taranaki Regional Council, councillors decide whether to prosecute those who breach the RMA. At Horizons Regional Council and Environment Southland, decisions to prosecute have been delegated to senior managers. However, we note that councillors at Environment Southland are part of a sub-committee that decides whether to proceed with prosecution and, at Horizons Regional Council, councillors can become involved when a decision to prosecute has been made. At Horizons Regional Council, councillors have become involved to the extent that they carry out their own investigations without the knowledge of the council staff involved."

Source: OAG, 2011b, p.67

Q46

To what extent are councillors involved in the administration and enforcement of regulation? Has this raised issues in regard to the quality of regulatory decision-making and outcomes?

Q47

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

Reviewing existing regulations

Leading practice requires that the stock of regulation is systematically reviewed to ensure that regulations remain up-to-date, cost-justified, cost-effective and consistent, and that they deliver the intended policy objectives (OECD, 2012). Priority should be given to identifying inefficient and ineffective regulation. The systematic review of existing regulation helps to ensure that the regulatory objective is achieved and unnecessary regulatory costs for the community and businesses are avoided (Box 19).

Box 19 Regulatory review strategies

Five strategies for regulatory review are as follows.

- *Scrap and build* – this consists of a comprehensive review and rebuilding of an entire regulatory regime.
- *Ad hoc reviews* – are limited in scope. They may be targeted at particular sectors (eg, the Building Code), kinds of regulations (eg, permits and licences) or may cover the entire stock of rules with certain effects (eg, business impacts). They may also be targeted at identified problem areas.
- *Sunset clauses* – this technique consists of setting an automatic expiry date for new laws and regulations upon adoption. Regulations subject to sunset clauses can only be extended if they are remade through standard rule-making procedures.
- *Review clauses* – are requirements in regulations for reviews to be conducted within a certain period, and can be seen as a weaker form of sunset. However, in this case, regulations continue unless actions are taken to eliminate them.

Source: OECD, 2002; OECD, 1997

A number of mechanisms are used to review the regulations implemented by local government. For example, the Government receives two-yearly plans from all policy agencies identifying key areas that the agency will review. There are also permanent review mechanisms included in regulation, such as review clauses built into primary laws and sunset clauses built into subordinate legislation. For example, the LGA includes a sunset clause that requires bylaws to be reviewed after 10 years. If a bylaw has not been reviewed and confirmed within two years of the review date, then the bylaw expires.

An important factor in designing an effective regulatory review mechanism is deciding who actually undertakes the review: in-house or independent of the regulatory agency. There are trade-offs involved with both approaches. The OECD advocates that, for significant regulations, the conduct of reviews should be independent of the agencies administering the regulation (OECD, 2012).

Q48

Are the current processes for reviewing existing regulation adequate? Could they be improved?

Q49

In which regulatory areas are there good regulatory review mechanisms? In which regulatory areas are there poor or insufficient regulatory mechanisms?

Q50

Who should undertake regulatory review – the responsible agency or an independent body?

Reviewing regulatory decisions

It is a well-established regulatory principle that regulators must exercise their authority only within the scope permitted by their legal powers, treat like cases in a like manner and have justifiable reasons for decisions or for any departure from regular practice. Providing for effective review and appeals processes prevents abuse of discretionary authority, and preserves the integrity of the regulatory system (OECD, 2012).

Individuals and businesses that are subject to the decisions of regulatory authorities should have ready access to procedures and formalities for challenging the exercise of that authority. Effective decision review has a number of elements:

- review formalities and procedures should include the right to appeal regulatory decisions on legal grounds, including on the grounds of procedural fairness and due process;
- individuals and businesses should have access to review formalities and procedures at reasonable cost and receive decisions in a timely manner; and
- appeals should be heard by an authority other than the body responsible for making the original regulatory decision.

Table 7 Dispute resolution mechanisms - key attributes and trade offs

Option	Cost	Accessibility	Timeliness	Authority of decision
Mediation	Low	High	Fast	Not binding
Arbitration	Higher	Medium	Fast	Binding
District Court/Environment Court	Higher	Lower	Slower	Binding
High Court	Highest	Lowest	Slower	Binding

Source: Productivity Commission 2012.

A number of disputes resolution and decision review mechanisms are available in regard to decisions by local authorities (Table 7). These range from relatively informal procedures such as mediation and arbitration, to more formal review processes through the courts (the notable examples being the Liquor Licensing Authority for appeals about the granting or otherwise of liquor licences, the Environment Court for resource management matters, and the High Court).

There are trade-offs between different dispute resolution and review formalities. It is important to ensure that access to decision review procedures is swift and uncomplicated, without the excessive burden of legal costs. However, readily accessible dispute resolution and review mechanisms can create incentives for frivolous and vexatious appeals by those affected by regulatory decisions, which unnecessarily ties up the resources of regulators and reduces regulatory certainty. This was an issue under the RMA, and saw the recent Phase 1 review tighten up some provisions to make it clear the submission and appeals process could not be used for anti-competitive purposes.

Q51

Is there a sufficient range of mechanisms for resolving disputes and reviewing regulatory decisions of local authorities?

Q52

Are some appeal mechanisms used excessively, frivolously or for anti-competitive reasons?

7 How should regulatory performance be assessed?

“Providing relevant and understandable performance information will contribute towards building a relationship of trust and confidence between local authorities and their communities. Likewise, providing community members with meaningful information gives them a greater opportunity to understand and take an interest in their local authority and the city or district in which they live.” – Auditor General, 2010a, p.5

The Commission has been asked to look into options for the systematic assessment of local authorities' regulatory performance. The Commission is seeking input from submissions in a number of areas. These include whether or not improvements in the performance monitoring system are required and, if so, the areas where improvements would benefit local authorities, central government agencies and the community.

Why monitor regulatory performance?

Regulatory performance monitoring promotes good regulatory outcomes through:

- providing a feedback loop through which improvements in the regulatory regime can be identified or problems rectified;
- encouraging transparency and accountability within government;
- improving community understanding of the regulatory process thereby allowing them to have more informed opinions;
- assisting to better prioritise effort and resources – thereby enabling a more efficient use of available resources and a closer matching of regulatory effort to public priorities;
- assisting to identify problems within regulatory regimes and the causes of such problems (eg, whether regulatory outcomes are not being achieved due to shortcomings in design or in implementation); and
- assisting to identify best practice regulation and thereby improve the outcomes of regulation, and/or reduce the cost of compliance to those covered by regulations.

Current monitoring of regulatory performance

It is important that the Commission understands the existing arrangement used to monitor regulatory performance and the strengths and weaknesses of these arrangements.

A key component of the current performance assessment regime is the development of local authority Long Term Plans. These plans must include performance measures for major activities undertaken by the council, including its regulatory functions (Box 20).

Box 20 Performance measurement under the LGA

The LGA requires local authorities to develop a Long Term Plan (LTP) describing the activities they intend to undertake over the coming 10 years and how these activities contribute to achieving community outcomes (section 93). LTPs are used as the basis for Annual Plans which specify the activities the local authority will undertake over the coming 12 months (section 95). Both documents must include performance measures to enable the public to assess the level of service being provided by local authorities (Schedule 10, s.4b).

At the end of each financial year, local authorities are required to produce an Annual Report setting out the activities that were actually undertaken and the performance of these activities against those anticipated in the LTP and Annual Plan (section 98). Local authorities must report at least every three years on progress towards achieving community outcomes.

Performance measures are subject to audit by the Office of the Auditor-General. These audits focus on an assessment of the performance management framework used by local authorities rather than the extent to which anticipated performance goals were reached or the underlying policy/regulatory approach.

Local authorities also have specific monitoring and performance reporting requirements under the RMA. For example, local authorities have a duty to monitor the efficiency and effectiveness of policies, rules, or other methods in their regional policy statement or District Plans (section 35). Local authorities must compile and evaluate this information (and make it publicly available) at least every five years.

For many areas of regulation, performance assessment is largely through community scrutiny of local authority performance using information that the local authority reports. Other areas of regulation are subject to periodic monitoring by central government agencies. For example, the Department of Building and Housing undertakes Technical Reviews of local authority performance under the Building Act 2004. These reviews assess local authority compliance with statutory timeframes for issuing compliance schedules and how well local authorities monitored the timeliness of owners providing building warrants of fitness to the local authority. Similar reviews are undertaken every two years by the Ministry for the Environment to assess compliance with timeframe requirements in the RMA.

From time to time, local authorities' regulatory performance is also assessed as part of broader investigations by statutory authorities, such as the Parliamentary Commissioner for the Environment.

Q53

In what areas of local government regulation is performance being monitored effectively?

Q54

Are there areas of local government regulation where performance is not being monitored and assessed?

Q55

Is the current monitoring system effective in providing a feedback loop through which improvements in the regulatory regime can be identified and rectified? What examples are there of successful improvements to a regulatory regime?

Better performance information

A recurring theme of the Auditor-General's work has been the need for better performance information from all types of government organisation. In part because of her role in auditing LTPs, the Auditor-General makes some specific comments on local authority performance information:

Despite the significant improvements we have seen, there is still much that local authorities can do to ensure that their plans and reports effectively disclose how well they are performing on service delivery, the well-being of their communities, and outcomes – (OAG, 2010b, p. 78)

However, there has been progress:

We found improvements in the quality of local authorities' SSPs [Statements of Service Performance] during the period under review. Local authorities have made considerable progress in presenting their non-financial performance measurement in 2009/10 compared with reports from earlier years (2003/04 to 2008/09). The earlier reports often had information of very limited usefulness for assessing and evaluating performance. The progress reflects improvements in local authorities' performance frameworks, as included in their 2009-19 LTPs and first reported against in their 2009/10 annual reports. - (OAG 2011a, para 3.2, p.19)

The Commission is interested in how better performance information can be collected and used to improve local government regulatory performance.

Current challenges in meeting good practice

A number of institutions have developed good practice guidance on performance measures – an example is presented below (Box 21).

Box 21 Better practice design features for performance indicators

The following features are important when designing performance indicators for benchmarking regulatory costs.

- *Acceptability and ease of interpretation* — indicators should be sufficiently simple to be interpreted by intended users. They should be unambiguous in what they are measuring, and have broad support.
- *Data availability and cost* — the information required for an indicator should be obtainable at a reasonable cost in relation to its value. Data gaps or limitations can erode the value of the information provided by the indicator.
- *Comparability* — the data collected should allow for meaningful comparisons between jurisdictions. Where data is not comparable across jurisdictions benchmarking over time within jurisdictions would be particularly important.
- *Robustness* — benchmarking should produce consistent results over time.
- *Significance and relevance* — an indicator should be significant in the sense that it represents an important element of the regulatory burden placed on business.
- *Timeliness* — indicators should provide information within reasonable time periods.

Source: APC, 2007

Although the principles of good performance measurement have wide acceptance, their implementation can be more difficult. It is important that the Commission understands the constraints and challenges local authorities face in developing performance measures that conform to better practice.

Q56

What challenges or constraints do local authorities face in developing and sourcing data for better practice regulatory performance measures?

Q57

Are there examples where local authorities are using better practice performance measures? What, if any, obstacles exist for wider adoption of these measures?

Improving performance monitoring and assessment

Any performance measurement regime comes at a cost. The Commission is keen to ensure that its recommendations on performance measurement deliver maximum value. A spectrum of approaches – ranging from providing data and support for existing local authority measurement requirements, to development of indicators to measure performance, through to benchmarking across local authorities – could be considered.

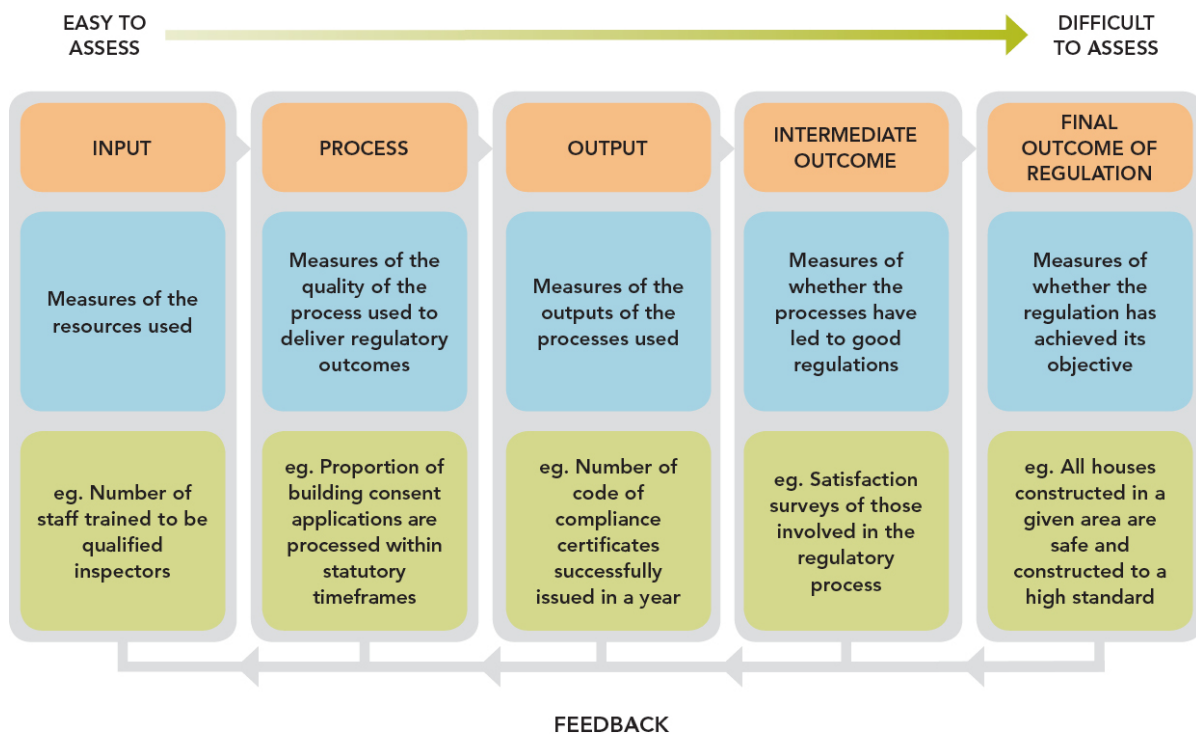
Q58

What kind of regulatory performance measurement would add maximum value to local authorities, their communities and New Zealand?

What makes a good measure of regulatory performance?

The ultimate objective of any regulatory regime is to alter behaviour in order to achieve some socially desirable outcome. However, measuring the outcomes of regulation can be difficult, due to problems with data availability and the difficulty in attributing outcomes to specific regulatory actions.

Figure 11 Types of performance measures



As a result, it is common for performance indicators to focus on input or process indicators as proxies for regulatory performance. These indicators can be very useful for some purposes but often provide little insight into whether a regulatory system is achieving its ultimate objective.

Q59

What regulatory performance indicators are most commonly used by local authorities? Can you provide examples of good input, output and outcome measures for regulations you have experience with? What makes them good indicators?

Could centrally-provided data enhance regulatory performance assessment?

Because of the number of functions they perform and their existing monitoring requirements, local authorities can hold a range of data relevant to monitoring their regulatory regimes. Typically, this data will be about inputs and outputs (eg, costs of an inspection regime, number of inspections). In some areas, such as environmental monitoring, there may also be outcome data (eg, data relating to freshwater quality).

Where local authorities do not collect data themselves, it may be available through central government systems – crime, employment or ‘state of the environment’ statistics for example. However, there may be an opportunity for a more targeted set of central government measures that could provide data which would complement existing local authority data. If targeted to delegated regulatory regimes, there may be economies of scale through data being collected and made available on a nationally consistent basis by central government. Before collecting further data though, it is important to know what data is being collected and used currently, and whether improvements to it might be sufficient, rather than further data gathering.

Q60

What kind of centrally provided data would enhance the local government regulatory monitoring regimes?

Q61

Are there quality issues in existing nationally available data sets that would need to be resolved before developing national performance measurement regimes?

Comparing local authorities – what is practical?

The terms of reference require the Commission to make recommendations about how the regulatory performance of local government can be regularly assessed. “Whether common performance indicators can be developed” is cited in the terms of reference as a specific example. The advantage of such indicators is comparability across local authorities; however, there are significant and longstanding concerns about the reasonableness of such comparisons,

given the diversity of the sector. The design of any system by which local government can be regularly assessed should incorporate design principles such as those outlined in Box 21.

The Commission notes that standardising performance management frameworks to allow for easier comparability between councils is currently being trialled for the 'core services' of local authorities (Box 22).

Box 22 **Transparency, Accountability, and Financial Management (TAFM)**

The Local Government Act 2002 Amendment Act 2010 (colloquially known as the TAFM Act) introduced the ability for the Secretary for Internal Affairs to prescribe rules for council performance standards, particularly the 'core services' of the LGA. To date, this power has only been used for prescribing the form that funding impact statements of core services take to make them comparable between councils. It may be indicative of a more general trend in government to standardising the performance management frameworks of councils for easier comparability.

Q62

What are the specific characteristics of individual local authorities that make local authorities comparable with regard to their regulatory performance?

Q63

Of the performance indicators commonly collected by local authorities, do any naturally lend themselves to systematic benchmarking of regulatory performance?

Q64

What new performance indicators could meaningfully measure the regulatory performance of local government?

Third party evaluation of local government performance

In thinking about ensuring quality service delivery, the Royal Commission on Auckland Governance recommended an independent auditor of service performance. Current audit work focuses on the management systems and the adequacy of the data used to produce those services, and measures the effectiveness and efficiency of that provision. It does not usually look explicitly at the effectiveness of services, regulatory or otherwise.

Q65

Is there a role for a third party evaluator to measure customer service standards in local authority regulatory functions?

The Commission's approach to performance measurement

In considering performance measurement, the Commission will be working through the following process:

- identifying the systems and processes currently used to assess the regulatory performance of local governments;
- assessing the effectiveness, cost and adequacy of these systems, including how performance information is used by central and local governments to improve regulatory outcomes;
- identifying options/models that could improve the efficiency and effectiveness of regulatory performance assessments (and their usefulness for councils, central government and the community); and
- reviewing the options identified against qualitative criteria in order to identify a preferred model(s) or approach(es).

Submissions on matters relating to this process are welcome.

Summary of questions

The Commission's approach

- Q1** What is the relative importance of the range of the regulatory activities local government undertakes? Where should the Commission's focus be?
- Q2** What are the main economic, social, demographic, technological and environmental trends that are likely to affect local government regulatory functions in the future?

Local government and regulation

- Q3** Has the Commission accurately captured the roles and responsibilities of local government under the statutes in Table 2?
- Q4** 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?
- Q5** Are there any other local organisations with regulatory responsibilities that the Commission should consider?

Regulatory variation

- Q6** Do the different characteristics and priorities of local authorities explain most of the difference in regulatory practice across local government?
- Q7** Are community expectations to 'do more' about social issues leading to

different approaches to regulation between local authorities?

- Q8** To what extent are local preferences a source of regulatory variation in New Zealand? How far should councils, when implementing a national standard, have discretion to reflect local preferences in their bylaws?
- Q9** Are there areas of regulation where local and central government regulation appear to be in conflict? If so, how far should such conflicts be accepted as a consequence of the diversity of preferences?
- Q10** Does the way in which a local authority chooses to exercise its regulatory powers – through bylaws or through its District Plan – lead to differences in effectiveness and outcomes for communities?
- Q11** In what ways has the Treaty of Waitangi influenced how local authorities have undertaken regulatory functions delegated to them by the Crown?
- Q12** What does this variation mean in practice – for Māori, the local authority and for the regulation of the resource?
- Q13** Are there other significant sources of variation in local authority regulatory

practice than those described in this chapter?

- Q14** Can you provide examples of inconsistencies in the administration and enforcement of regulations between local authorities?
- Q15** Do these inconsistencies impose extra costs on businesses? If so, are these extra costs significant?
- Q16** To what extent does variation in regulatory practice matter?
- Q17** Can you provide examples of regulatory innovation by local government?
- Q18** Is the innovation specific to a particular local authority and its unique circumstances, or could it be adopted more widely?
- Q19** What mechanisms or incentives are there for local authorities to share innovations (or experiences with 'failed' innovations) with others?
- Q20** What factors encourage (or deter) local authority innovation? (eg, the (in)ability to capture the cost savings from innovation)

Who should regulate?

- Q21** Has the Commission captured the advantages and disadvantages of centralisation and decentralisation for each of the factors?
- Q22** Which of the factors discussed in this chapter are the most important for allocating regulatory functions locally or centrally?

Q23 Which other factors might be important for considering whether a regulatory function should be undertaken locally or centrally?

Q24 Are the factors discussed above helpful in thinking about whether a regulatory function should be relocated?

Q25 In the New Zealand context, are there regulatory functions that need reconsideration of who (central, local, community) carries them out?

Getting regulation right

Q26 Do local authority significance policies allow for adequate consideration of the present and future costs and benefits of local government regulation-making?

Q27 Does the local government regulation-making process lead to good regulation? If there is evidence to show that it does not, how could the process be improved?

Q28 Do you have examples of regulatory responsibilities being conferred on local authorities with significant funding implications?

Q29 How might central government regulation-making better take account of the costs and impact on local authorities from the delegation of regulatory functions?

Q30 How might central government better work with local authorities on the design, implementation and funding of delegated regulatory functions?

- Q31** How could the RIA framework be improved to promote a fuller understanding of the impact of devolving new regulatory functions to local authorities?
- Q32** How successful has the guidance document Policy development guidelines for regulatory functions involving local government been in improving the consistency and coherence of central government policies that involve local government?
- Q33** To what extent is the effective implementation of regulations delegated to local government hampered by capability issues in local authorities? Do capability issues vary between areas of regulation?
- Q34** Can you provide examples of regulatory cooperation and coordination between local authorities or between central and local government, and describe successes and failures?
- Q35** What types of regulatory functions more readily lend themselves to coordination to improve regulatory performance?
- Q36** What are the most important factors for successful regulatory coordination?
- Q37** Are opportunities for regulatory coordination being missed?
- Q38** What are the main barriers to regulatory coordination?
- Q39** Are there examples in New Zealand where local authorities mutually recognise each other's regulations?
- Q40** Which local government regulatory areas (eg, planning and land use, building and construction, environmental regulation, public safety and food safety) impose the greatest unnecessary regulatory burden on individuals and businesses?
- Q41** In what ways are these regulatory areas unnecessarily costly (eg, are they too complex, prescriptive or unclear)?
- Q42** Are there particular examples where local government approaches to regulatory responsibilities are especially effective at minimising unnecessary compliance costs for individuals and businesses?
- Q43** For which aspects of the regulatory process (eg, approval, monitoring, enforcement and appeals) could compliance costs to business be reduced without compromising the intent of the regulation? How could this be done?
- Q44** How well are the principles on which local authorities are required to base the funding of regulatory activities applied?
- Q45** Are there examples of where cost recovery is reducing compliance with regulations and reducing their effectiveness?

- Q46** To what extent are councillors involved in the administration and enforcement of regulation? Has this raised issues in regard to the quality of regulatory decision-making and outcomes?
- Q47** Are there any other governance issues which impede the efficiency of local government regulation?
- Q48** Are the current processes for reviewing existing regulation adequate? Could they be improved?
- Q49** In which regulatory areas are there good regulatory review mechanisms? In which regulatory areas are there poor or insufficient regulatory mechanisms?
- Q50** Who should undertake regulatory review – the responsible agency or an independent body?
- Q51** Is there a sufficient range of mechanisms for resolving disputes and reviewing regulatory decisions of local authorities?
- Q52** Are some appeal mechanisms used excessively, frivolously or for anti-competitive reasons?
- How should regulatory performance be assessed?**
- Q53** In what areas of local government regulation is performance being monitored effectively?
- Q54** Are there areas of local government regulation where performance is not being monitored and assessed?
- Q55** Is the current monitoring system effective in providing a feedback loop through which improvements in the regulatory regime can be identified and rectified? What examples are there of successful improvements to a regulatory regime?
- Q56** What challenges or constraints do local authorities face in developing and sourcing data for better practice regulatory performance measures?
- Q57** Are there examples where local authorities are using better practice performance measures? What, if any, obstacles exist for wider adoption of these measures?
- Q58** What kind of regulatory performance measurement would add maximum value to local authorities, their communities and New Zealand?
- Q59** What regulatory performance indicators are most commonly used by local authorities? Can you provide examples of good input, output and outcome measures for regulations you have experience with? What makes them good indicators?
- Q60** What kind of centrally provided data would enhance the local government regulatory monitoring regimes?
- Q61** Are there quality issues in existing nationally available data sets that would need to be resolved before developing national performance measurement regimes?
- Q62** What are the specific characteristics of individual local authorities that

make local authorities comparable with regard to their regulatory performance?

- Q63** Of the performance indicators commonly collected by local authorities, do any naturally lend themselves to systematic benchmarking of regulatory performance?
- Q64** What new performance indicators could meaningfully measure the regulatory performance of local government?
- Q65** Is there a role for a third party evaluator to measure customer service standards in local authority regulatory functions?

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Terms of reference

Local Government Regulatory Performance

Context

1. The Government has launched '*Better Local Government*', an eight point reform programme to improve the legislative framework for New Zealand's councils. It will provide better clarity about councils' roles, stronger governance, improved efficiency and more responsible fiscal management. These local government reforms are part of the Government's broader agenda. We are rebalancing the New Zealand economy away from the increased public spending and debt of the previous decade. We are building a more competitive and productive economy. This requires that both central and local government improve the efficiency of delivering public services.
2. Local government, at both regional and territorial level, is involved in many regulatory roles covering, for example, building, resource management, food safety, and alcohol. There is no consistent approach regarding what regulatory functions are most effectively achieved nationally or locally. There is also a concern in local government that functions are allocated to councils without adequate mechanisms for funding. The issue of what is best regulated at the national and local level is also important to the private sector which, through rates, taxes and fees, funds both. There are opportunities to improve New Zealand's productivity through a more efficient regulatory framework.

Scope

3. Having regard to the context outlined above, the Commission is requested to undertake an inquiry into opportunities to improve regulatory performance in local government. For the purposes of this inquiry, the Commission should:

Regulatory Functions of Local Government

- a. identify the nature and extent of key regulatory functions exercised by local government;
- b. perform a stocktake to identify which local government regulatory functions are undertaken on the direction of central government and which are undertaken independently by local government;
- c. develop principles to guide decisions on which regulatory functions are best undertaken by local or central government;

- d. identify functions that are likely to benefit from a reconsideration of the balance of delivery between central and local government, or where central government could improve the way in which it allocates these functions to local government;

Improving Regulatory Performance in Local Government

4. Taking into account the principles developed in point (c) above:
 - e. assess whether there is significant variation in the way local government implements its regulatory responsibilities and functions, and the extent to which such variation is desirable. For example whether variation reflects differences in local resources or preferences or insufficient direction from central government;
 - f. identify opportunities for both central and local government to improve the regulatory performance in the local government sector. For example how to overcome any key capability, resourcing, or regulatory design constraints;
 - g. examine the adequacy of processes used to develop regulations implemented by local government and processes available to review regulations and regulatory decisions made by local government; and
 - h. recommend options to allow for the regular assessment of the regulatory performance of the local government sector, for example whether common performance indicators can be developed to assess performance.

Other matters

5. Where possible, the Commission should seek to quantify relevant costs and benefits of recommendations it makes in the inquiry. The Commission should prioritise its effort by using judgement as to the degree of depth and sophistication of analysis it applies to satisfy each part of the Terms of Reference.
6. The inquiry should not make recommendations that would directly affect representation or boundary arrangements for local government.

Consultation Requirements

7. The Commission should take into account existing and ongoing work in this area to avoid duplication, including the Government's eight point reform programme, resource management reviews, the Local Government Rates Inquiry, and the Auditor General's work on performance management.
8. In undertaking this inquiry the Commission should consult with key interest groups and affected parties. To ensure that the inquiry's findings provide practical and tangible ways to improve regulatory performance, the Commission should work closely with Local

Government New Zealand, the wider local government sector and government agencies with regulatory regimes that affect local government.

Timeframe

9. The Commission must publish a draft report and/or discussion paper(s) on the inquiry for public comment, followed by a final report, which must be submitted to each of the referring Ministers by 1 April 2013.

HON BILL ENGLISH, MINISTER OF FINANCE

HON DAVID CARTER, MINISTER OF LOCAL GOVERNMENT

HON JOHN BANKS, MINISTER FOR REGULATORY REFORM

NEW ZEALAND
PRODUCTIVITY COMMISSION
Te Kōmihana Whai Hua o Aotearoa

