



Towards better local regulation

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May 2013

The New Zealand Productivity Commission

Date: May 2013

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ISBN: 978-0-478-39525-9 (print)

ISBN: 978-0-478-39526-6 (online)

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Foreword

The scope and breadth of the regulatory functions of local government are far-reaching. They cover land and resource use, building construction, food and hygiene, health hazards, liquor and gambling activity, the storage of hazardous substances, waste management and more. Without local government success in carrying out these regulatory activities, central government cannot achieve its broader economic, social and environmental policy objectives. Central and local government are inextricably intertwined in their pursuit of efficient and effective regulatory performance.

Regulatory decisions that are well-conceived, properly monitored and enforced can change behaviour in positive ways, safeguarding future wellbeing without imposing unnecessary costs. This underlines the importance of this inquiry.

On the other hand, poor regulatory design and implementation is unnecessarily costly to society and undermines the achievement of important public policy objectives that promote community wellbeing.

The analysis supporting a regulatory initiative not only needs to ensure that design and implementation will provide benefits to society, it should also assess which level of government is best placed to carry out the regulatory function. This question is at the heart of our Terms of Reference. Our report sets out a framework for thinking about this important issue.

Taking a 'whole-of-system' view, the Commission examined how each component of the regulatory system was performing. Weaknesses have been identified that impact on the performance and success of local regulation. Some of these weaknesses are at the central government level, some are local and some are system-wide.

The report identifies many opportunities for regulatory performance improvements. But this is not enough. The ambitious reform programme set out in this report will only lead to enduring improvements if there are supportive institutional arrangements. We have made suggestions on what these could look like.

In forming our views, the Commission has been informed by a comprehensive engagement process. This has been invaluable. Across our issues paper and draft report, we received a large number of submissions helping us to understand key issues and concerns and ways to potentially address them. We are very grateful for the high level of interest and involvement. In addition, we have undertaken extensive research and analysis, including a survey of both business and local government.

Preparation of the report was overseen by all of our Commissioners, Professor Sally Davenport, Dr Graham Scott and myself. We would particularly like to acknowledge the work and commitment of the inquiry team—Steven Bailey (Inquiry Director), Judy Kavanagh, James Soligo, Paul Miller, Dennis MacManus, Rosara Joseph, Richard Clarke—and a number of other Commission staff and external providers that made important contributions to this work.



MURRAY SHERWIN

Chair

May 2013

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

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Overview

The Commission has been asked to identify opportunities for both central and local government to improve the regulatory performance of local government. This includes regulation-making processes, appropriate principles for the allocation of regulatory roles between central and local government, and better ways to assess the regulatory performance of local government.

The Commission has carried out an extensive assessment of local government regulatory performance, including substantial engagement with local authorities and other interested parties. This report sets out a reform programme to improve local government regulatory performance. This overview provides a summary of the report.

Why is this inquiry important?

Regulation affects many aspects of our lives – from the environment and buildings we live in, to the food we eat and the water we drink. Regulation is part of doing business and can have a major impact on a firm's profitability and growth. Local government regulatory activities therefore have a clear impact on regional economic growth and, ultimately, national economic growth and community wellbeing. Importantly, local government regulation is a means by which communities can take responsibility for their own wellbeing.

Making the right regulatory decisions and implementing regulation efficiently is therefore important to New Zealand's social, environmental and economic performance. Regulatory decisions that are soundly conceived, properly monitored and enforced can change behaviour in positive ways, safeguarding future wellbeing without imposing unnecessary costs. In contrast, poorly conceived and implemented regulatory arrangements not only fail to achieve the objectives sought, but also impose unintended costs that can undermine the very purpose of regulatory intervention and the cohesiveness of communities.

The process of amending existing regulation, or designing new regulation, has an added dimension when local government is involved. The analysis supporting a regulatory initiative not only needs to ensure that design and implementation will provide net benefits to society, but should also assess whether central or local government is best placed to carry out the regulatory function.

Getting these things right is critically important, considering the breadth of regulatory activity and workload of local authorities. Local government plays an important role in implementing central government policies. Around 30 pieces of primary legislation have been identified that confer regulatory responsibilities on local government, and many more regulations are found in secondary instruments (Chapter 2). These range from land and resource use under the Resource Management Act 1991 (RMA), to standards for constructing buildings, food and hygiene regulations, the control of liquor and gambling activity, waste management and beyond.

These regulatory responsibilities are critical to central government achieving its broader policy objectives. As partners in production and implementation of regulation, central government has a strong interest in the regulatory performance of local government. Achieving good regulatory outcomes must be underpinned by a strong working relationship between both levels of government.

The Commission's approach

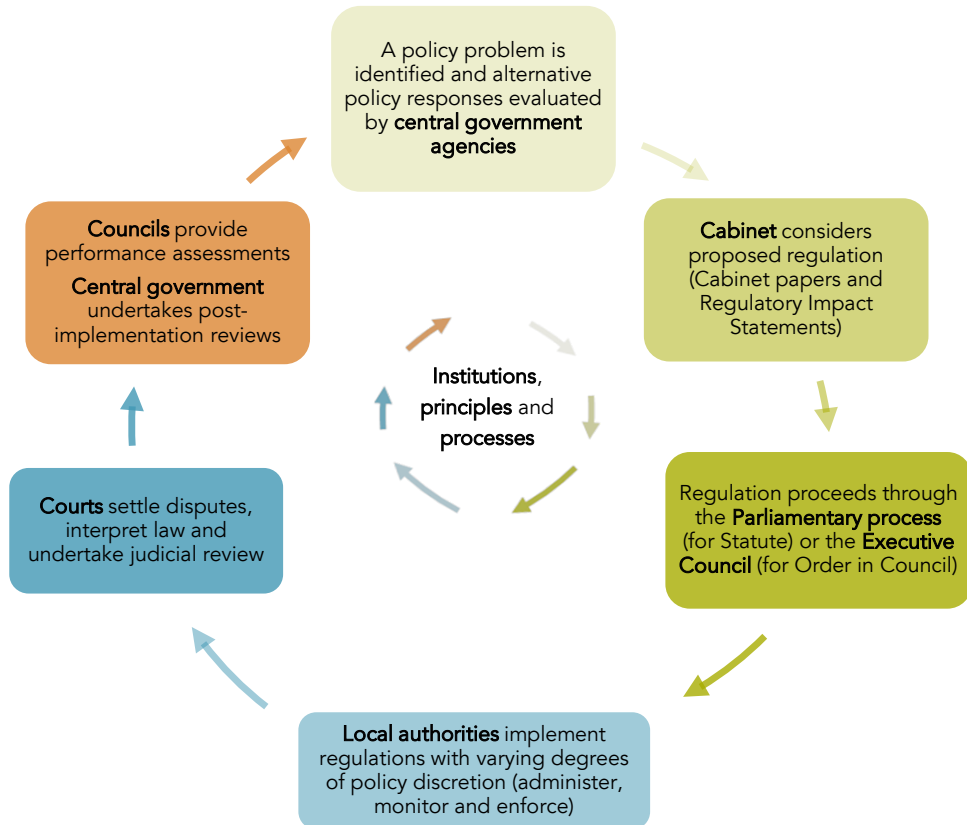
Local government regulatory activity sits within a wider regulatory system that is complex, multi-level and mutually dependent. The fact that more than one level of government plays a role in designing, monitoring, enforcing and reviewing regulations raises inherent risks to regulatory efficiency and performance. It is therefore unhelpful to think about individual component parts in isolation from the wider regulatory system. The regulatory system as a whole determines the quality of regulatory outcomes. The elements of this system are interconnected and all of the elements need to be operating effectively. For example, initiating and shaping regulatory proposals—often done by central government—happens before implementation—often done by local government. Regulations need to be designed with a view to how they can be implemented most effectively, and the lessons from implementation need to feed back into regulatory re-

design, where necessary. Interdependencies such as this highlight that achieving good outcomes is an ongoing responsibility of both levels of government.

The Commission's approach to this inquiry was to take a 'whole-of-system' view that transcends levels of government. That is, to examine the underlying institutions, principles and processes that constitute the regulatory system, and identify possible performance improvements in the regulation-making process, implementation, monitoring and enforcement, allocation of regulatory roles and assessment of regulatory performance.

The regulatory system can be thought of as consisting of six elements (Figure 0.1). These elements are discussed in more detail in Chapter 4.

Figure 0.1 The regulatory system



Local government in New Zealand

New Zealand has had a system of local government since the 1840s. Established and empowered by statute, local government has been dramatically restructured and reshaped numerous times over the years by central government through legislative change.

Local government's structures and powers have reflected its dual roles as providers of local public services and enablers of local democracy. More recently, its dual roles have been explicitly recognised in legislation. The statutory purposes of local authorities are to enable democratic local decision making and action by, and on behalf of, communities; and to meet the current and future needs of communities for good-quality local infrastructure, local public services, and performance of regulatory functions in a way that is most cost-effective for households and businesses.

The powers invested in local authorities are extensive and diverse. They span a spectrum from devolved powers that confer substantial discretion and autonomy on local authorities, to delegated powers to implement regulation with little or no discretion. Most of the regulation made or administered by local authorities is either required by statute, or reasonably required for fulfilling a role delegated by statute. The Commission has found that local authorities have made only limited use of their power of 'general

competence’ under the Local Government Act 2002 (LGA) and that most bylaws are made under enabling statutes rather than under the more general provisions of the LGA.

The nature and extent of local government’s relationship with central government is context-specific, depending on the particular regulatory framework. Some regulatory frameworks explicitly provide that the relevant Minister or central government department has powers of review and intervention in local authorities’ exercise of specific regulatory functions. In the absence of such an explicit statutory power of review and intervention, a local authority is not accountable to the relevant Minister or government department for the exercise of its regulatory powers.

It is important to note that, while local authorities were created by statute, they are not, as sometimes characterised, ‘agents’ of central government that are required to implement national priorities, and be accountable to central government for operational performance. This agency characterisation seems to reflect a misunderstanding of the respective roles of, and relationship between, local and central government. Local authorities exercise a range of types of powers and have varying degrees of discretion and autonomy, depending upon the specific regulatory context (Chapter 2).

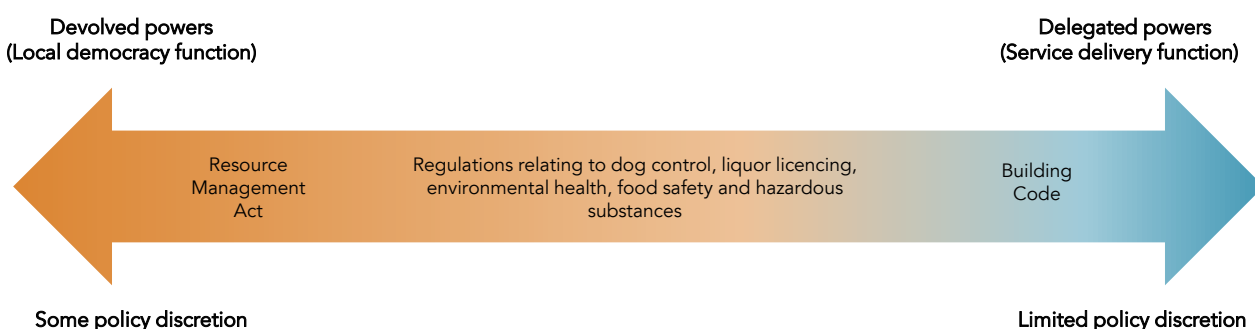
The important point here is that central government has purposefully made the decision to decentralise decision making to local government in many areas.

The regulatory task: Pressures and challenges

In providing regulatory services, the role of local government in facilitating local democracy and providing local services manifests itself in a number of ways. For example, the function of territorial authority building consent authorities to ensure that buildings meet the requirements of the Building Code is an example of a purely service delivery role. The performance of local authorities in these types of roles will be mainly judged on their capacity and ability to carry out regulatory functions to a national standard. At the other end of the spectrum, the requirement under the RMA to make district and regional plans is part of councils’ democratic role. The performance of local authorities will be judged on their ability to consult and reflect community interests and preferences and, importantly, their ability to reconcile different community interests and reach a decision.

In the middle of the spectrum is a raft of other regulations that have been conferred on local government, because it is believed that local government is best placed to tailor regulation to the specific characteristics, needs and preferences of diverse local communities (Figure 0.2).

Figure 0.2 The spectrum of local authorities’ powers



The challenge for local government in carrying out these regulatory roles is to implement and administer those regulatory functions conferred in a way that produces the outcomes that Parliament intended. However, local authorities undertake these complex regulatory roles in an increasingly challenging environment. Certainly, the task is getting harder, and will continue getting harder, for a number of reasons (Chapter 3).

Some councils experiencing population growth face difficult trade-offs between different priorities for the use of resources. Other councils experiencing population decline face challenges in undertaking regulatory roles due to shortfalls in capability. Increasing diversity and greater community expectations present difficulties for local authorities in reconciling different community interests and making decisions (Box 0.3).

Pressures on the physical environment generate a greater need for more technical information and technical skills in order to make decisions relating to environmental pressures. Local authorities in New Zealand are very diverse. Box 0.1 highlights some of the diverse characteristics of New Zealand's territorial authorities.

Local government must navigate through a legislative environment that poses its own challenges. There has been a steady stream of new statutes over the last decade affecting local government regulatory activities to different degrees. Councils also face risk of exposure to legal challenge for losses where a duty of care is owed in undertaking regulatory responsibilities.

Box 0.1 Diversity among New Zealand's territorial authorities

Local authorities vary markedly in the size of their population and the income levels of residents. While, overall, New Zealand's population is projected to grow, that growth is concentrated in key areas, and two-fifths of territorial authority areas are expected to experience population decline. These differences can drive very different regulatory demands at the local government level.

Physical endowments and industrial structures also vary widely across New Zealand's territorial authorities. Employment data indicate a pattern of larger 'hub' territorial authorities with a diverse range of economic drivers. Beyond them are smaller, often more rural territorial authorities characterised by a narrower range of activities. This drives different regulatory needs and the need for different types of regulatory capacity and capability across territorial authorities.

Alongside pressures on councils, there are important regulatory cost pressures on business that impact on productivity and profitability, and ultimately the economy. These include the compliance costs of meeting regulatory obligations; delays in obtaining responses from local authorities and holding costs associated with sequencing of multiple regulatory requirements and decisions by local authorities; and the wider economic costs incurred from regulation that distorts productive behaviour of individuals and businesses. These costs are often hidden, as projects are not undertaken, or are undertaken at a smaller scale than would have been the case in a better regulatory environment.

The Commission's survey of business indicates that regulatory cost pressures are a concern for businesses. Of those businesses that had contact with local government through the regulatory process, 39% reported that local government regulation places a significant financial burden on their business. Nearly half of respondents thought the time and effort involved in complying with local authority regulations is too large, and 70% of respondents were dissatisfied with the fees charged.

When there is pressure on the regulatory system, there is a greater risk of poorer regulatory outcomes, and costs could be higher than they need to be to achieve the regulatory outcomes sought. A robust regulatory system needs to provide regulatory institutions, principles and processes that can tackle the pressures and challenges of delivering quality regulation in a changing environment.

How well is the regulatory system performing?

The current regulatory system is not working as well as can reasonably be expected (Chapter 4). Some of the problems stem from the design of regulations at the central government level, some are problems with the way regulation is implemented and administered by local government and, lastly, there are generic weaknesses with the regulatory system as a whole.

Design of regulation

A number of weaknesses in the design processes for developing regulations that are devolved or delegated to local government have been identified.

- *Incentives faced by central government for rigorous analysis* – There is evidence that central government accountability is weakened when the implementation of regulatory functions is decentralised and, as a result, the political and fiscal costs of that regulation are (in part or full) transferred to local authorities. This 'accountability disconnect' weakens incentives on central

government to undertake rigorous analysis when designing regulation, and to think about the full range of costs, benefits and impacts when considering the case for regulatory intervention.

- *The level and quality of implementation analysis* – There is insufficient analysis of local government’s capability or capacity to implement regulation prior to devolving or delegating additional regulatory functions, or making changes to existing functions. Weaknesses in implementation analysis may be linked to the observation that few central government agencies have staff with an in-depth knowledge of the local government sector.
- *The level and quality of engagement with the local government sector* – Engagement with the local government sector in the design of new regulations is generally poor and, as such, is undermining the quality of local regulation. The inadequacy of engagement with local government by central government was a recurring theme emerging from this inquiry and, in part, has its origins in poor working relationships and a lack of common understanding between central and local government.
- *The performance of regulatory quality assurance processes* – The Regulatory Impact Statement (RIS) process has a valuable role to play in ensuring the quality of regulations delegated or devolved to local government. However, at present, this value is not being fully realised. Too often, the RIS requirements are seen as an ‘administrative hurdle’ rather than an integral part of the policy design process and a vital source of information for regulatory decision makers.

Implementation and administration

Local government’s ability to achieve regulatory outcomes is critically dependent on the quality of its internal decision-making processes, quality management practices, governance and its capability in regulatory administration. During the course of the inquiry, it has become clear that weaknesses exist in the way in which some regulations are being implemented, administered and enforced. These can often be traced back to gaps in regulatory capability.

- *Regulatory decision-making processes* – While decision-making processes used by local government are generally adequate, considerable room for improvement exists in several areas. Specifically, there is scope to better tailor regulatory objectives to local conditions, increase the breadth of the regulatory options considered and undertake better assessment of implementation issues. There are also concerns expressed by inquiry participants about the inflexibility and lack of discretion of the statutory requirements to consult under the LGA.
- *Consistency and quality management problems* – The single biggest issue businesses have in their dealings with councils is the perceived inconsistency in the application and administration of regulatory standards. Businesses perceive variation to be as common in regulatory areas with national standards as in areas where councils have a level of autonomy and discretion to tailor responses to local conditions. Of particular concern is inconsistency in the application of regulations within individual councils.
- *Governance issues* – There is evidence that, in some cases, councillors have become inappropriately involved in regulatory decisions.
- *Monitoring and enforcement* – Quality regulatory design can be significantly undermined if monitoring and enforcement are done poorly. The adoption of risk-based approaches to monitoring and enforcement activity could, in general, be improved to better achieve compliance and efficient resource use. There are gaps in the enforcement tools available to councils to achieve compliance and quality regulatory outcomes. There is also evidence that, in some instances, penalty levels are disproportionately low and are leading to weak deterrence and enforcement.

Generic system issues

More generally, a number of broader weaknesses in the regulatory system have been identified that are undermining the system’s efficiency and effectiveness in achieving regulatory outcomes.

Performance assessment

The current performance assessment framework for local government is not delivering to expectations. The following issues were identified.

- There is a weak 'whole-of-system' mindset when thinking about regulatory performance – that is, a lack of focus on how the regulatory regime is performing overall.
- Performance reporting and post-implementation reviews provide few feedback loops to assist councils to improve the way they deliver regulatory functions and to assist central government to improve policy.
- Local government performance measures are often dominated by externally-imposed formal obligations, such as timeliness and transactional measures, with little emphasis and transparency of regulatory impacts and outcomes. This situation is partly driven by statutory reporting requirements and partly by the inherent difficulty of measuring impacts and outcomes.
- Regulatory performance assessment is largely seen by councils as a compliance exercise for central government, rather than as an important means of improving the performance of regulation administered by local authorities.

Local regulation and Māori

Māori are a significant and distinct community of interest for local authorities. Indeed, the RMA and the LGA impose specific obligations on local authorities to include Māori in regulatory decision making. To appropriately involve Māori in decision making, councils must effectively mesh two different systems of governance – local representative democracy, and the tikanga of local iwi. There are questions around whether the current legislative framework adequately allows for Māori participation in decision making and whether it permits local government to adequately take account of the tikanga of local iwi. The current systems for including Māori in decision making rely heavily on the often constrained capacity of local iwi.

Poor central and local government interaction

A recurring theme during this inquiry was the poor state of the relationship and interface between central and local government, across all aspects of the regulatory system. Within local government, there is considerable dissatisfaction with central government agencies, with frequent claims that central government agencies lack respect for, and understanding of, local government's role and purpose. At the same time, central government agencies tend to downplay the role of local government in New Zealand's democratic system. On the other hand, central government points to problems with monitoring and enforcement, delays and inconsistency as symptomatic of broader deficiencies within the local government sector. Criticism is also levelled at local government for its reluctance to act as an agent of central government in regulatory implementation and administration.

The uneasy interaction between central and local government is having a detrimental effect on New Zealand's regulatory system. Indeed, the weaknesses identified in this report often have their origins in, and are perpetuated by, the strained relationship between central and local government. This poor relationship is rooted in divergent views and understandings of the nature of the respective roles, obligations and accountabilities of the two spheres of government.

A more productive relationship and interface between central and local government is required if regulatory outcomes are to be improved. A circuit breaker is needed to 'reset' the relationship in order to improve the efficiency and effectiveness with which the regulatory system operates. This includes having a close look at the current institutional arrangements that act as an interface between the two spheres of government, the principles and processes that should govern this interaction, and the capacity and institutional substance required to underpin a properly functioning relationship (Chapter 12).

How can the situation be improved?

The Commission has identified the following critical areas where the regulatory system can be improved to boost the regulatory performance of local government:

- Regulatory design
- Allocating regulatory responsibilities
- Local government regulatory capability
- Local government regulatory processes
- Māori involvement in local regulation
- Monitoring and enforcement
- Regulatory performance assessment

The recommendations for improving local government regulation proposed in this report will only be successful, and lead to enduring improvements, if there are supportive institutional arrangements put in place to make changes. How this could happen is outlined in Chapter 12.

Improving regulatory design

As noted above, central government regulation making needs to improve in a number of areas. Improvements are needed in four related areas:

- the interface between central and local government needs to be improved with local authorities recognised as ‘co-producers’ of regulatory outcomes;
- incentives to undertake rigorous policy analysis need to be strengthened along with accountability for providing quality advice on regulatory issues;
- central government agencies need to enhance their knowledge of the local government sector and increase their capability to undertake robust implementation analysis; and
- meaningful engagement and effective dialogue with local government needs to occur early in the policy process.

To move forward will require both central and local government to demonstrate a commitment to fostering a more open and productive relationship and interface. To this end, there would be significant value in developing a ‘Partners in Regulation’ protocol, which articulated an agreed set of behaviours and expectations that would apply when developing and implementing local regulation.

The protocol would aim to promote a constructive interface between central and local government by:

- developing a common understanding of, and respect for, the roles, duties and accountabilities of both spheres of government; and
- articulating an agreed set of principles to govern the development of regulations with implications for the local government sector.

The protocol would be a jointly created document signed by the Government and representatives from the local government sector. To signal strong commitment, it could be signed by the Prime Minister and the Minister of Local Government. This would increase the protocol’s status as a ‘whole-of-government’ document. It is equally important that local government illustrates ownership and commitment to the protocol. For this to occur, signatories to the protocol must be seen by the sector as legitimate representatives with the authority to ‘speak for councils’.

The Commission does not envisage that the protocol would be a legally binding document. However, the requirements of the protocol should be added to the Cabinet Office Manual, along with a directive that the principles be complied with in formulating local regulation in all but exceptional circumstances. At the same time, progress towards implementing the protocol should be included in the performance assessments of relevant central government. Likewise, the protocol should include a provision that local authorities include a ‘statement of intent to comply’ in their annual reports.

Importantly, the protocol would be an avenue through which both spheres of government could acknowledge that the current relationship and interaction is not working to best effect, and take positive steps to improve the situation. More formal and legally binding options could be considered in the future if the protocol failed to have the desired impact. Other options incentivising compliance with the protocol are discussed in Chapter 5.

In addition to the protocol, other measures that would improve central government regulation making include specific guidance on the development of RISs covering local government regulatory issues, the development of strategies to lift the capability of officers to undertake analysis of the local government sector, and the development of joint regulatory change programs.

Allocating regulatory functions

The Terms of Reference for this inquiry require the Commission to develop principles to guide decisions about which regulatory functions are best undertaken by local or central government.

A careful and systematic application of relevant principles can result in an allocation of responsibilities between central and local government that better achieves the objectives sought for regulatory interventions. However, the allocation of functions is rarely simple in practice. Every case will have unique circumstances and implications that impact on the choices made for allocating responsibility.

The Commission has developed a framework to guide the allocation of regulatory roles (Chapter 6). The framework addresses the key allocation questions: Who should be responsible for setting the regulatory standard or policy, and who should implement and administer the regulation?

- **Should the regulatory standard or policy be determined centrally or locally?** Factors relevant to this choice include the communities of interest that will be affected by the regulation; where the costs and benefits are likely to fall; how those responsible for setting the regulatory standard or policy can be held to account for decisions; and consideration of the merits or otherwise of accepting variability in regulatory outcomes across regions.
- **Should the regulation be implemented and administered centrally or locally?** Considerations include whether or not implementation requirements are likely to vary from region to region; the potential for cost efficiencies in allocating responsibility centrally or locally; the existence of incentives on the regulator that might hamper the effective delivery of regulation; the location of the knowledge and capability to implement the regulation; and whether suitable arrangements for funding administration of the regulation exist centrally or locally.

The Regulatory Impact Analysis Handbook and the Cabinet Office Manual should be updated with a requirement to use the allocation framework where proposals for new or amended regulatory responsibilities are being considered. This would help ensure that Cabinet has the relevant information when considering proposals to allocate new or amended regulatory responsibilities to local government.

There are opportunities to use the framework to review existing regulation, such as the reviews undertaken as part of government agencies' regulatory review programmes. The framework should also be used where there is a change in the skills and capabilities required of the regulator, where there are changes in the institutional arrangements, where there is mounting evidence of poor regulatory outcomes that require remedial action, where there are changes in technology, or where the regulation is simply outdated.

More broadly, the allocation framework could be adapted and applied to consider:

- the allocation of regulatory responsibilities between territorial and regional authorities;
- the allocation or reallocation of functions between local authorities and other agencies such as district health boards; and
- when trans-national regulatory arrangements may have merit.

Improving local government capability

The capability of local government as a regulator is a key determinant of regulatory outcomes. Concerns have been raised about local government's regulatory capability in a number of areas. Data limitations make it difficult to assess the significance of these concerns, but the local government sector itself sees room for capability improvement.

It is important that the local government sector is the driving force behind improving its own capability. The policy challenge is to find an approach in which both levels of government perform roles that complement each other, without undermining the accountability of local government for building its own capability.

The Government should use existing mechanisms for central-local government consultation more effectively, or develop new ones, to:

- ensure that both levels of government understand the regulatory outcomes that central government is seeking and their relative importance; and
- identify resource and capability gaps that may prevent councils from achieving these outcomes, and determine how these gaps will be addressed.

Many of the capabilities embodied in people, processes, technology and assets are transferrable, so an important option available to councils to address capability gaps in delivering regulatory functions is to coordinate with other councils, or engage with third parties such as independent contractors. While there is room for improvement, there is already a significant amount of formal and informal cooperation, coordination, and sharing of resources amongst local authorities, which is generally seen as successful. Importantly, the Government needs to provide sufficient lead-in times for new regulation, in order to ensure that councils have time to consider opportunities for local cooperation and collaboration in administering and enforcing the regulation.

Improving local authority regulatory processes

There are improvements local authorities can make to their regulatory decision making. Some improvements rely on 'leadership from the top' in local authorities, but good processes can also reduce the variability in the quality of the analysis undertaken to make decisions.

It is well-established that transparency can improve regulatory decision making. To improve transparency, councils should make publicly available on council websites, using a standardised template format, the key components of the analysis underpinning regulatory decisions, and the information used in making decisions.

Statutory requirements can also sometimes impede efficient regulatory processes, such as mandatory requirements for the level of consultation to be undertaken. The LGA should be amended to enable local authorities to take an approach to consultation that is proportionate to the level of discretion they have to regulate, and the significance of the issue.

There is considerable debate about the participation process under the RMA, in particular whether it incentivises early and full participation by councils and participants, or whether it incentivises parties to 'keep their powder dry' for the Environment Court. The evidence suggests that councils and participants have incentives to resolve issues rather than go to court, and appeals to the Environment Court are mostly resolved through mediation. The success of mediation processes suggests that participants are prepared to compromise and participate constructively in the RMA decision-making process, if this process is run well. The Ministry for the Environment should consider the feasibility of making the Environment Court's mediation capability available to support local authority plan-making processes earlier in the planning process.

There is a general need to improve quality management systems to resolve inconsistency in administration and enforcement of regulation. This has been largely accepted by the local government sector during engagement meetings. The features of good quality management systems, and ways that good practice can be facilitated within councils are outlined in chapter 8.

Councillors have an important governance role in driving performance improvements in local authority regulatory processes. However, it is also possible for councillors to become inappropriately involved in regulatory matters. Where councillors are involved in regulatory decisions, it is important that an appropriate separation is maintained between the governance and advocacy roles of councillors.

Requirements to use independent hearings panels (IHPs) in resource management decisions can weaken the accountability and ownership that councillors have for regulatory decisions. The impact of further expanding the use of IHPs on councils' decision-making role, and councils' accountability to their communities, should be carefully considered.

Māori involvement in local regulation

Although tikanga Māori and the 'Rule of Law' are two distinct systems of governance, when it comes to regulation there are ways that they can mesh appropriately. This is important for effectively involving Māori in regulatory decision making. Meshing the two systems of governance can be achieved by focusing on:

- establishing appropriate 'secondary rules' about who decides on what is regulated, when, and how;
- supporting Māori involved in decision making through appropriate provisions for tikanga Māori in rules and plans; and
- providing appropriate legal backstops and safeguards.

Chapter 9 discusses several frameworks for thinking about how local authorities could better include Māori in decision making. The solutions these frameworks lead to may be more diverse than just extending the use of co-management agreements.

There is already plenty of experimentation occurring within local government with respect to involving Māori in decision making, although it is distributed unevenly across the sector. Some of these experiments are set out in chapter 9.

Improving monitoring and enforcement

An appropriate mix of compliance promotion and deterrence is likely to be the best enforcement strategy. The enforcement challenge is striking the right balance between persuasion, coercion and expense in securing regulatory compliance.

There are indications of a low level of prioritisation of monitoring and enforcement resources based on risks. This situation can be improved by pooling experience and databases among councils to identify trends and patterns in compliance, and encouraging councils to separate their monitoring and enforcement activities and budgets from consent processing activities and budgets. Improvements in monitoring will also come about through formal coordination between councils and other monitoring and enforcement agencies.

Constraints on the use of infringement notices, combined with the low level of fines where infringement notices can be used, may inhibit councils' capacity to encourage compliance with regulation. To improve this situation, the agencies responsible for regulation that local government enforces should work with LGNZ to identify regulations that should be supported by infringement notices, and to identify penalty levels that are disproportionately low, relative to the offence.

At the moment, regulations enabling councils to impose infringement notices (under s259 of the LGA) need to be made on a council-by-council basis. This is a cumbersome process, and the only infringement notices that have been made on this basis are those under navigation bylaws. S259 should be broadened, so that regulations can be drafted enabling infringement notices for similar kinds of bylaws across local authorities, rather than on a council-by-council basis.

Assessing regulatory performance

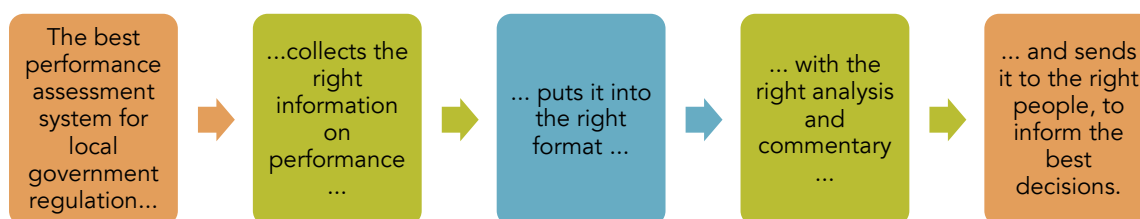
Regulatory staff and decision makers throughout New Zealand routinely gather and distribute information about the performance of a regulatory activity, process or system, and critically examine this information.

When done well, such activities can drive continuous improvement in the way regulation is designed, implemented and administered. It can also provide vital information for holding councils to account for the efficient and effective discharge of regulatory duties.

There are several leading performance assessment practices in local government. Some local authority annual reports already apply an outcome-based approach to performance assessment. The Society of Local Government Managers (SOLGM) provides practical guidance material on performance management, and there are strong relationships between local authorities and their auditors. Several local authority inquiry participants also commended some central government performance assessment approaches, such as audits of Building Control Authorities and the biennial RMA survey.

The Commission has developed a framework for examining potential improvements to regulatory performance assessment (Figure 0.3).

Figure 0.3 Framework for an effective performance assessment system



A package of initiatives will improve performance assessment.

- The Department of Internal Affairs (DIA) should work with local authorities to remove instances where authorities provide the same data to more than one department, and make central government administrative datasets available to local authorities to assist in the assessment of regulatory performance.
- The DIA should work with LGNZ and SOLGM to assess the costs and benefits of common measures of regulatory services, and prepare a framework for implementation.
- The Treasury, LGNZ and SOLGM should jointly trial the concept of a 'health check' of a regulatory regime, in which experts from local and central government would summarise the problems and opportunities in an area of local government regulation.

This package will help rebalance the performance assessment framework for local government, rather than creating additional performance assessment requirements.

Making it happen

This report has identified many opportunities to improve the performance of local regulation in New Zealand and has set out recommendations that, taken together, would make up an ambitious reform agenda. It has highlighted that local government regulation is mostly shaped by central government.

A key theme is that central government should have a continuing role in contributing to good regulatory outcomes, even when regulation is delegated or devolved to local government. To operate effectively, New Zealand's regulatory system needs effective engagement and collaboration between the two levels of government. At present, there are diverse understandings and attitudes towards the respective roles, responsibilities, accountabilities and constitutional settings of both levels of government. While the quality of engagement will be influenced in the short term by personal relationships, enduring inter-governmental cooperation depends on the effectiveness of supporting institutional arrangements.

The Commission has made 29 recommendations for improving local government regulation. However, these recommendations, if accepted by the Government, will not lead to enduring improvements unless there are supportive institutional arrangements, which may involve some organisational change and more clarity about roles and responsibilities for driving reform. The fact that the Government has seen the need

to implement a wide-ranging review of local government regulation, together with the deficiencies in performance of the regulatory system and poor interface between the two levels of government that have been found by this inquiry, suggest that the current institutional arrangements are not adequate.

This has prompted the Commission to consider alternative arrangements for managing the relationship between the two levels of government. The reform programme proposed in this report culminates in nine functions that need to be carried out in order to secure effective implementation (Box 0.2). Currently, responsibility does not appear to be clear-cut for some of these functions.

Box 0.2 **Functional requirements**

The Commission has identified the following functions that are necessary to implement and progress the recommendations made in this report. Both levels of government are potentially involved in each of these functions, although in several cases the lead needs to be taken by central government.

- Ensuring that there is a clear statement of desired regulatory outcomes
- Promoting effective engagement between the two levels of government
- Developing and implementing the central government - local government 'Partners in Regulation' protocol
- Implementing the new framework for allocating regulatory functions between central and local government
- Promoting a 'whole-of-government' approach to local government
- Promoting and developing regulatory capability
- Undertaking research into new regulatory techniques and encouraging their diffusion
- Fostering evaluation and improvement of the enforcement of regulation
- Reviewing whether regulation enforced by local government remains fit for purpose

A more precise definition of these functions, combined with clear allocation of responsibilities for performing them, is likely to improve local government regulatory performance. However, if the Government wishes to implement the recommendations in this report, it would need to explore options that go further than allocating some extra functions within the current organisational arrangements. It is also worth considering whether more far-reaching organisational changes—including strengthening the organisations within each level of government, and creating a new organisation dedicated to improving the relationship and interface between the two levels of government—would encourage better outcomes.

An inter-governmental forum

A model that builds on the existing inter-governmental forums, while creating a step-change from the current situation, would create more effective engagement between both levels of government.

New arrangements could involve:

- a forum at the political level, with ministers and mayors as members. The existing Central Government-Local Government Forum (jointly chaired by the Prime Minister and Chair of LGNZ) could provide the starting point. However, the proposed revamped forum would need to be quite different in terms of its profile and agenda, in order to be recognised as a key place where nationally significant issues are considered on an ongoing basis through a structured and continuing work programme;
- a forum of chief executives – from both levels of government. The recently-established Central-Government-Local Government Chief Executives Forum is a useful model, but its work programme and profile would need to be enhanced as it would provide support to, and give effect to the decisions of,

the forum of ministers and mayors. The Chief Executives Forum would have the capacity to make some decisions on its own account, but would perform an advisory role in relation to significant issues that need to be determined by the forum of ministers and mayors;

- the Chief Executives Forum could be supplemented by a set of topic-specific forums, similar to the Chief Executives Environment Forum. Alternatively, there could be one or more steering groups made of middle level managers, whose role is to ensure that tasks that are determined by either of forum of leaders are completed; and
- adequate support from both levels of government, probably through a small secretariat, with experienced staff drawn from both sectors and funded through existing budgets.

The two levels of government should therefore consider establishing new joint institutional arrangements, which might grow out of the existing ones but would be a step change from them in terms of status, resourcing and priority. To be effective, these new arrangements would need:

- a clearly defined role, which might be to initiate, develop and monitor the implementation of significant initiatives to improve the achievement of regulatory outcomes requiring cooperative action by both levels of government. Performing this role is likely to involve the new organisations in the nine functions listed in Box 0.2;
- high-level representation from both levels of government, at senior ministerial level from central government and a small representative group of mayors and chief executives from local government. A key role of the local government representatives would be to provide feedback to the sector as a whole; and
- the capacity to set up working groups or task forces to examine particular issues, under direction from one of the forums or from a steering group that the forums choose to set up.

1 About this inquiry

Key points

- Regulations affect many aspects of our lives—from the environment and buildings we live in, to the food we eat. Regulation is part of doing business and can have a major impact on a firm’s profitability and growth. Local government regulatory activities have a clear impact on regional economic growth, and ultimately national economic growth. The impacts and outcomes of regulation are all around us.
- When designed well, and enforced efficiently and effectively, regulation can help achieve broader economic, social and environmental goals that underpin wellbeing. Equally, poor regulation damages achievement of these goals.
- The Government has asked the Commission to undertake an inquiry into opportunities to improve regulatory performance in local government. Specifically to:
 - develop principles to guide decisions on which regulatory functions are best undertaken by local or central government;
 - identify opportunities for both central and local government to improve the regulatory performance of local government; and
 - recommend options for regularly assessing the regulatory performance of the local government sector.
- The scope and breadth of the regulatory functions of local government is extensive. The Commission has identified more than 30 pieces of primary legislation that confer regulatory responsibilities on local government, and many regulations in secondary instruments.
- Local government regulatory activity sits within a wider regulatory system that can be characterised as complex, multi-level and mutually interdependent. This raises inherent risks to regulatory efficiency and performance.
- The Commission’s approach to this inquiry is to take a ‘whole-of-system’ view. That is, to examine the underlying institutions, principles and processes of the regulatory system and identify possible performance improvements in the regulation-making process, implementation, monitoring and enforcement, allocation of regulatory roles and responsibilities and assessment of regulatory performance.

1.1 Context for this inquiry

The Government has asked the Commission to undertake an inquiry into opportunities to improve regulatory performance in local government.

The Government has called for this inquiry into regulation as part of its 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 (Box 1.1). This inquiry is tasked with fulfilling step 6, by reviewing “the balance of functions allocated to local government and ways to improve regulatory performance in the sector” (New Zealand Government, 2012, p.12).

Box 1.1 Better Local Government

'Better Local Government' is an eight-point reform programme to improve the legislative framework for New Zealand's 78 councils. The Commission's inquiry is point 6 on the programme:

1. Refocus the purpose of local government
2. Introduce fiscal responsibility requirements
3. Strengthen council governance provisions
4. Streamline council reorganisation procedures
5. Establish a local government efficiency taskforce
- 6. Develop a framework for central/local government regulatory roles**
7. Investigate the efficiency of local government infrastructure provision
8. Review the use of development contributions

Source: New Zealand Government, 2012.

The aim of this inquiry is therefore to identify opportunities to improve New Zealand's productivity through a more efficient regulatory framework as it applies to the local government sector.

In short, the Commission has been asked to:

- develop principles to guide decisions on which regulatory functions are best undertaken by local or central government, and identify functions that would benefit from a reconsideration of the balance of delivery between central and local government;
- identify opportunities for both central and local government to improve the regulatory performance of local government; and
- recommend options for regularly assessing the regulatory performance of the local government sector.

The full Terms of Reference for this inquiry are reproduced at the front of this report.

What this inquiry is not about

This inquiry is about local government regulatory performance. It is not about:

- the level of local government rates or development contributions—the Terms of Reference specifically focuses on regulatory functions. Although, to the extent regulatory effectiveness and performance are impacted, broader issues of funding, the allocation of regulatory functions, and regulatory design are examined;
- local government boundaries or amalgamation—this is specifically excluded by the Terms of Reference. However, the Commission does examine and make recommendations on regulatory performance improvements that relate to the alignment of policies and practices, coordination and collaboration across administrative borders; or
- the nature or quantity of services local government provides (for example, swimming pools and rubbish collection).

1.2 Regulation and wellbeing

Regulations affect many aspects of our lives—from the environment and buildings we live in, to the food we eat. Regulation is a fact of life for industry. It is part of doing business, and can have a major impact on a firm's profitability and growth. The outcomes of regulation are all around us.

Box 1.2 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 seek to influence or control the behaviour of individuals and business, and government itself, in order to achieve desired 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.

Regulations are an important tool for preserving and advancing public interests. 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. The OECD expresses the importance of regulation as follows.

Regulations are indispensable to 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. (OECD, 2011, p.7)

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

Box 1.3 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, & Baldwin, 2001). Together, these three elements form the basis for influencing 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 the intended policy objectives at the least cost to society.

At the heart of improving regulatory performance of central and local government is good design and implementation. So, what does good regulation look like? There have been many attempts to define or benchmark good regulation. Academic and governmental efforts to identify appropriate benchmarks for good quality regulation cluster around a relatively small number of themes (Baldwin & Black, 2008):

- 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.

Because regulation involves the exercise of coercive legal powers, the outcomes of regulation should be justifiable on the grounds of the public benefit. This also means that the system for making, administering and enforcing regulations must be procedurally fair. Importantly, the New Zealand regulation-making framework sets out well-established 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 (for example, the New Zealand Bill of Rights Act 1990 and the Human Rights Act 1993).

1.3 What is 'local government regulation'?

Around 30 pieces of primary legislation have been identified that confer regulatory responsibilities on local government, and many regulations exist in secondary instruments.

The scope and breadth of the regulatory functions of local government is far-reaching. They have a direct impact on the conduct of personal and business activity across New Zealand. They cover a myriad of activities including (but not limited to) building construction standards, food and hygiene regulations, health hazards, the control of liquor and gambling activity, the storage of hazardous substances and waste management.

Additionally, the various planning instruments of territorial and regional authorities under the Resource Management Act 1991 (RMA)—in particular, district and regional plans—set the regulatory environment for individual and business activity in localities across the country.

The district plan is the main document that sets the framework for managing land use and development within a territorial authority.

District plans explain how the Council will manage the environment. They contain objectives, policies and rules set out to address resource management issues within the district. One of the main methods used by Councils is the use of rules that set out what activities you can do as of right (permitted activities), what activities you need resource consent for, and how certain activities may be carried out. District plan rules cover things such as residential development, the use of land for agriculture, the subdivision of land parcels, noise and the location and height of buildings. (Waikato District Council, 2012)

Regional councils are responsible for managing the effects of using freshwater, land, air and coastal waters, through developing regional plans and issuing consents (Chapter 2). The importance of Regional Policy Statements for all activities using natural resources in a region is outlined by the Northland Regional Council:

The Proposed Regional Policy Statement doesn't set rules itself, but it does filter down into district and regional plans which contain the rules around how people, businesses and industry use Northland's resources. (Northland Regional Council, 2012)

Statutes that confer significant regulatory responsibilities on local government far outweigh the regulations (bylaws) made by local authorities under the powers of the Local Government Act 2002 (LGA). Indeed, the Commission has found that most bylaws are made under enabling statutes rather than under the more general provisions of the LGA. For example, bylaws regarding stock movements on roads are typically made under section 72 of the Transport Act 1962.

The Commission has undertaken a stocktake of statutes that confer regulatory responsibilities on local government (Chapter 2), but not bylaws. However, local authority decision-making processes for bylaws are examined in Chapter 8.

1.4 Partners in regulation

Local government's regulatory responsibilities are critical to central government achieving its broader policy objectives. Table 1.1 identifies broad policy areas and objectives that central government is typically concerned with, and provides examples of how regulation implemented and administered by local government contributes to these objectives.

Table 1.1 Examples of how local regulations contribute to national policy priorities

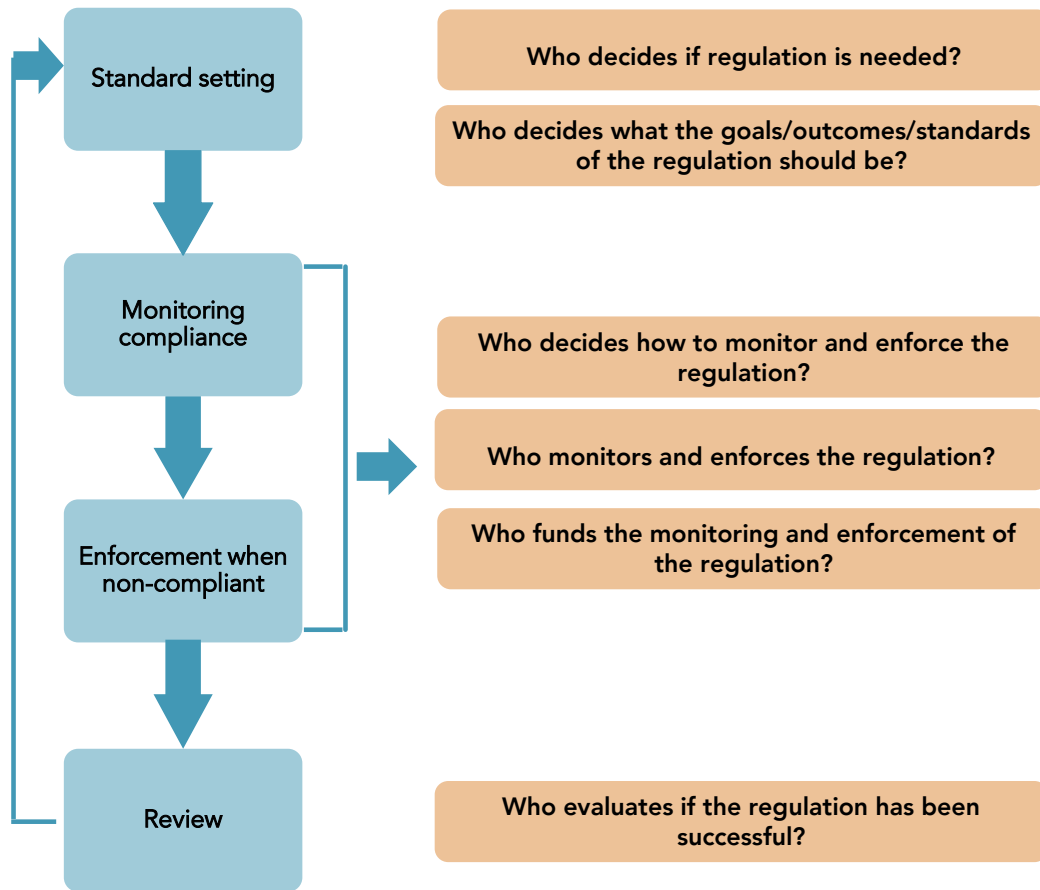
Central government policy area	Examples of how local regulation contributes to central policy objectives	Legislation
Export promotion and economic growth	Land use plans impact on the use of New Zealand agricultural land (a major source of international competitive advantage)	Local Government Act 2002
	Zoning regulations determine the supply of land for industrial, business and commercial purposes	Local Government Act 2002, Resource Management Act 1991
	Pest management strategies help to protect key export industries (and access to overseas markets)	Biosecurity Act 1993
Efficient national infrastructure	Resource consents impact on the development of network infrastructure such as telecommunication and electricity networks	Resource Management Act 1991
	Regional land transport programmes assist in the management and development of the land transport system	Land Management Amendment Act 2008
	Bylaws relating to the management and operation of airports assist the operation of the national and international air transport system	Airport Authorities Act 1966
Natural resource management and environmental protection	Regional policy statements and plans help to protect sensitive environment landscapes and habitats	Resource Management Act 1991
	Regulation of litter helps to prevent the unauthorised dumping of waste	Litter Act 1979
	Regulation of hazardous substances assists in preventing contaminants being discharged into the environment	Hazardous Substances and New Organisms Act 1996
Healthy and safe communities	Dog control regulations assist in preventing harm caused by dog attacks	Dog Control Act 1996
	Liquor licencing regulations assist in managing anti-social behaviour associated with excessive alcohol consumption	Sale of Liquor Act 1989 and Sale and Supply of Alcohol Act 2012
	Bylaws aimed at controlling health hazards help to improve, promote and protect public health	Health Act 1956
Protection of historical and cultural heritage	Bylaws and zoning regulations assist with the preservation of historic and culturally significant places or areas	Historic Places Act 1993

As partners in the production and implementation of regulation, central government has an ongoing interest in the regulatory performance of local government. Achieving good regulatory outcomes needs to be underpinned by a strong working relationship and interaction between both levels of government.

1.5 The regulatory system is complex

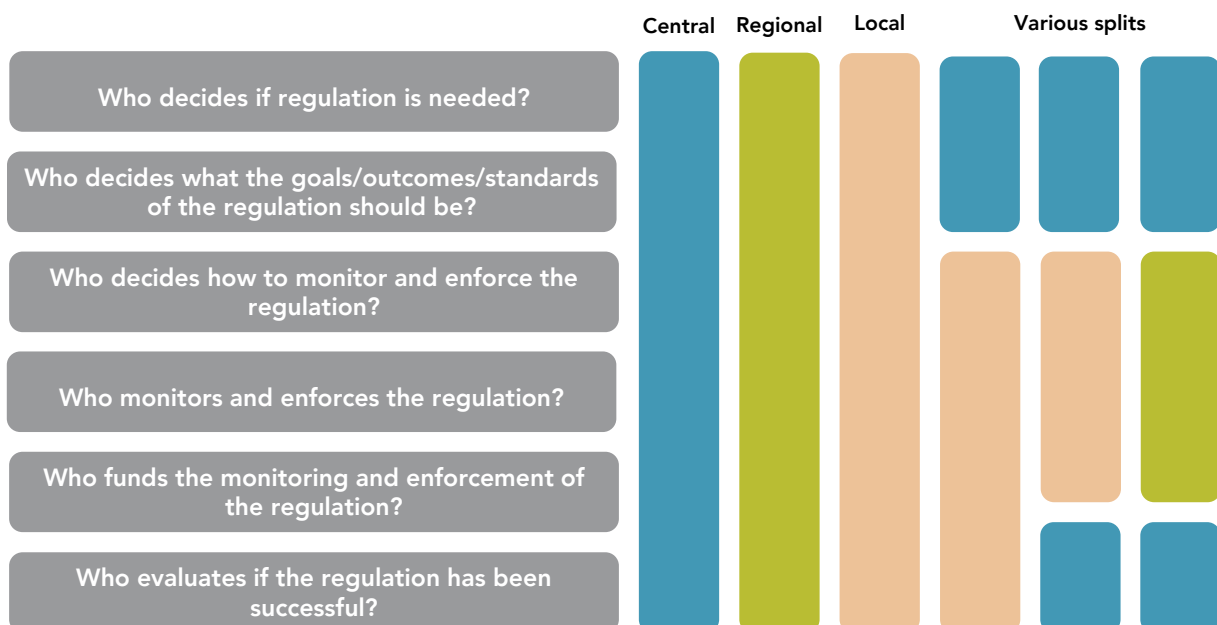
The regulatory system has many parts, levels and actors. Because all regulatory regimes have a number of working components or functions, a number of important design questions are raised when considering where regulatory functions are best carried out—either centrally, regionally or locally (Figure 1.1).

Figure 1.1 Core components of a regulatory regime



The various regulatory functions can be undertaken at different levels of government (Figure 1.2). Policy design, including determining if regulation is needed and what regulatory standard should be set and how it should be set, often originates in central government agencies. In many cases, central government agencies retain an oversight or monitoring role. At the local government level, regulatory roles may be undertaken by regional councils and territorial authorities (including unitary authorities), but also by special purpose agencies such as Building Consent Authorities, District Licensing Agencies, Trusts, Council Controlled Organisations and co-governance or joint management arrangements between councils and iwi.

Figure 1.2 Some different ways to arrange regulatory functions



For example, the last column in Figure 1.2 illustrates how air quality management is currently arranged (Box 1.4).

Box 1.4 Air Quality Management

Air quality management in New Zealand is governed by the 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 (MfE) 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: MfE, 2011a, p.1.

A set of common challenges arises when more than one level of government plays a role in designing, implementing and enforcing regulations (OECD, 2009). The relationship between levels of government can be characterised by mutual dependence, since a complete separation of policy responsibilities and outcomes among levels of government is not possible.

The complex roles and relationships between the different levels of government and different regulatory responsibilities is further complicated by the large number of institutions and actors in the overall regulatory system. There are around 30 central government departments in New Zealand, each with a different regulatory lens and relationship with local government and, at the same time, there are numerous local authorities (78 in total, made up of 67 territorial authorities¹ and 11 regional councils), each with different regulatory capabilities and responsible to a diverse range of communities. The regulatory system can therefore be described as simultaneously vertical (across different levels of government and the private sector), horizontal (among the same level of government) and networked (OECD, 2009).

A complex, multi-level regulatory system raises serious risks for good regulatory governance and effective regulation. The presence of multiple actors at different levels of government, and across the same level of government, creates a number of gaps that need to be managed (Box 1.5). Minding these gaps represents one of the primary challenges of multi-level regulatory governance.

Box 1.5 Mind the Gap

- The *information gap* is characterised by information asymmetries between levels of government when designing, implementing and delivering public policy. Local government will tend to have more information about local needs and preferences, and also about implementation costs and local policies.
- A *capability and capacity gap* is created when there is a lack of human, knowledge (skill-based), or infrastructural resources (including public administration infrastructure) available to carry out tasks, regardless of the level of government.
- The *fiscal gap* is represented by the difference between local government revenues and the required expenditures for local authorities to meet required standards.
- An *administrative gap* arises when administrative borders do not correspond to functional economic areas at the local level. This has implications for the implementation of effective regulation that requires a minimum scale that can sometimes only be obtained through policies favouring horizontal cooperation, thereby reducing territorial fragmentation.
- A *policy gap* results when there is incoherence between local policy needs and national level

¹ Six of which also have the functions of regional councils, sometimes known as unitary authorities (including Auckland).

policy initiatives. It can occur when central agencies take purely vertical approaches to policy issues that are inherently cross-sectoral (for example, energy policy, water policy) with no or inadequate cross-agency coordination, and where implementation issues at the local level are not joined up and coordinated with central government (where the policy initiatives originate).

- An *accountability gap* is where there are unclear or overlapping responsibilities across and between levels of government for regulatory decisions. The absence of clear accountabilities has direct implications for incentives on actors within the regulatory system and incentives for performance.

Source: Adapted from OECD, 2009.

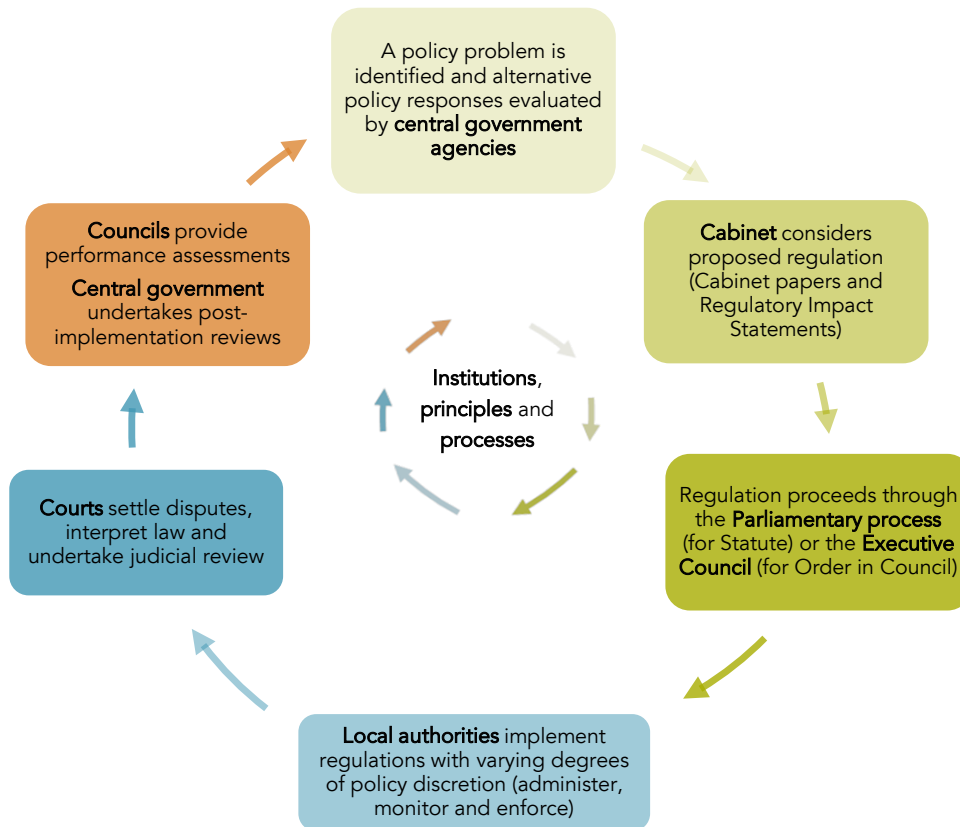
These gaps introduce risks to the integrity of the regulatory system, and may result in:

- the objective of the regulation not being met;
- duplication and overlapping responsibilities;
- different regulatory regimes not interacting or aligning well;
- unintended consequences;
- risks being borne by those not well placed to mitigate them;
- unnecessary costs for all parties;
- unnecessary infringement of property rights;
- perverse incentives, gaming and opportunism; and
- unclear accountabilities.

1.6 The Commission's approach

The Commission's approach to this inquiry is to take a 'whole-of-system' view. This approach received general support from inquiry participants (Box 1.6). The 'regulatory system' is a term used to describe the institutions, principles and processes through which regulations are made. The system can be thought of as consisting of six elements (Figure 1.3).

Figure 1.3 The regulatory system



Box 1.6 Participants support for the 'whole-of-system' approach

There was general support for the Commission's 'whole-of-system' approach to local government regulation for a number of reasons.

Devolved and delegated regulations require a system approach

As emphasised in the report the mixture of devolved and delegated regulatory functions gives rise to systemic problems that cannot be addressed by focus on one particular area (Federated Farmers, sub. DR. 111, p. 2)

The Council is in full agreement with the Commission's approach to the inquiry that because almost all of local government's regulatory functions are devolved or delegated from central government, it has been important (and critically necessary in this Council's view) to look at the regulatory system in its entirety (Taranaki Regional Council, sub. DR 75, p.1).

The performance of the entire system is what counts

We support the 'whole-of-system approach' the Commission has used to review the regulatory framework, and support its view that the performance of the entire system determines how well regulations achieve their objectives (Wellington City Council sub. DR 69, p.1).

Reviewing the system as a whole leads to better outcomes

There is no desire to point blame at different parts of the system, but to assess and review its efficiency as a whole and look for improvements in all parts of the regulatory system (including at central government level) which will have the outcome of improving the regulatory performance of local government (Hawke's Bay Regional Council, sub. DR 67 p.2).

1.7 Building the evidence base

The Commission's findings and recommendations have been informed by a comprehensive engagement process. This began with the release of the inquiry Issues Paper, which attracted 59 submissions. This was followed by the release of a Draft Report, which outlined tentative findings and presented a number of options for reform for which feedback was sought. Sixty-two submissions were received on the Draft Report.

Information from the inquiry submissions has been supplemented by approximately 112 engagement meetings with representatives from community groups, local government, businesses and central government agencies. A roundtable discussion was also held with senior officials from central government agencies that had a particular interest in and interface with local government. The Commission looked to, where possible, use innovative ways to engage with local government, such as a webinar coordinated through SOLGM, local government cluster meetings and online discussion forums.

The inquiry benefited from the input from an expert Reference Panel, drawn from leaders in the local government sector. The Reference Panel provided important insights about local government and acted as a sounding-board for findings and recommendations. The Panel members were Peter Winder, Basil Chamberlain and David Perenara-O'Connell (for part of the inquiry).

The Commission also conducted two surveys—one aimed at eliciting the views of all local authorities in New Zealand (responses sought from a chief executive officer or senior regulatory manager) and the other targeted at 1,500 New Zealand businesses from a cross-section of industries. Further, case studies on specific regulatory areas have been developed.

The Commission also carried out extensive analysis of Statistics New Zealand data in order to better understand the nature and diversity across local authorities, including research into the composition of regional economies and labour markets.

Together, these have provided a rich picture of the regulatory landscape in which local government operates and how business and the community interact with, and are impacted by, the regulatory system.

1.8 Guide to this report

The next chapter (Chapter 2) defines local authorities and describes their purpose and place in New Zealand's political system. In particular, it describes the constitutional relationships between local authorities and other political actors and governmental institutions. Chapter 3 discusses the increasing pressures and challenges faced by local authorities in undertaking their regulatory responsibilities, and the impact of local regulation on business and the economy.

Chapter 4 provides an overview of the regulatory system and identifies a number of weaknesses in central government design of regulation, local government implementation and administration, and across the regulatory system. The rest of this report looks at ways to improve the regulatory system in order to better deliver desired regulatory outcomes, and to ensure the regulatory system responds to increasing pressures and challenges.

The regulatory design phase is where good regulatory performance starts. How to lift the quality of regulation-making within central government is examined in Chapter 5. A critical decision in regulatory design is the allocation of regulatory functions to different levels of government. Chapter 6 provides a guiding framework for deciding where regulatory functions are best undertaken by local or central government. The capability of local government as a regulator is examined in Chapter 7, and a number of options for improvement are recommended.

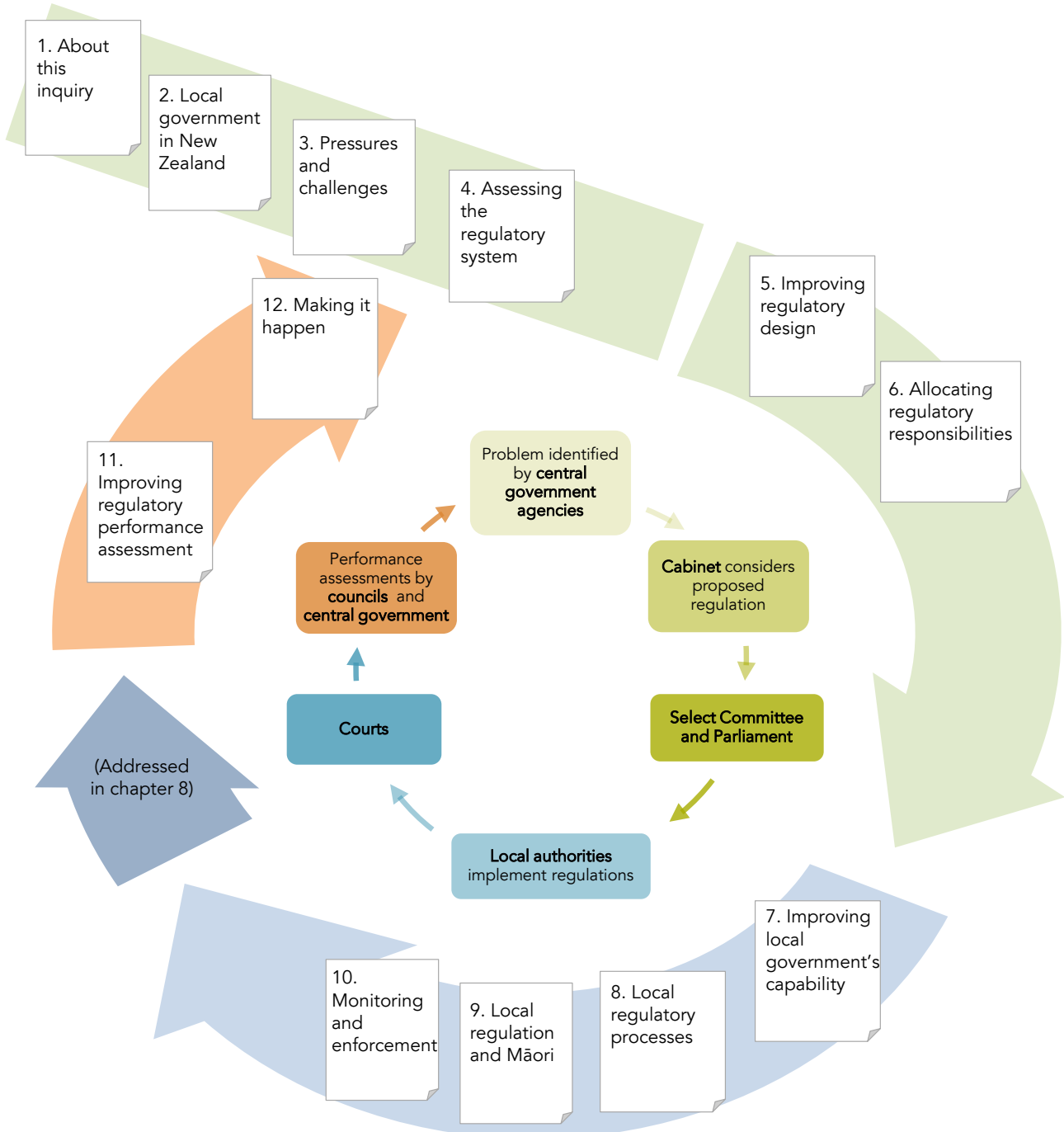
Turning to the implementation and administration of regulation, the efficacy of local government regulatory processes is examined in Chapter 8. A number of recommendations are made to strengthen local decision-making processes, managements systems and regulatory governance. The important role of Māori in local regulation is discussed in Chapter 9, which considers how local authorities can better include Māori in local regulatory decision making. Chapter 10 assesses how well local authorities monitor compliance with regulatory standards, and how well they take enforcement action. A number of recommendations to

strengthen enforcement and improve regulatory compliance are made. It is important that decision makers have good information to assess and improve regulatory performance over time. Chapter 11 examines potential ways to improve regulatory performance assessment.

Finally, Chapter 12 reviews options for strengthening the institutional arrangements within and between the two levels of government, so that they can support the implementation of the reform programme outlined in this report, and provide an enduring improvement in regulatory outcomes.

Figure 1.4 sets out the chapters of this report as they relate to the regulatory system.

Figure 1.4 Overview of this report in relation to the regulatory system



2 Local government in New Zealand

Key points

- Local government has a long history in New Zealand, originating out of provincial settlements, the need for service delivery at the local level and the articulation of local requirements and preferences.
- Local government's structures and powers have reflected its dual roles as a provider of local public service and enabler of local democracy. More recently, the dual role has been explicitly recognised in legislation establishing and empowering local government. The statutory purposes of local authorities are to enable democratic local decision making and action by, and on behalf of, communities; and to meet the current and future needs of communities for good-quality local infrastructure, local public services and performance of regulatory functions in a way that is most cost-effective for households and businesses.
- As a creature of statute, established and empowered by legislation, local government has been frequently restructured and reshaped over the years by central government through legislative change.
- In the absence of explicit legal or fiscal relationships, local and central government are most accurately regarded as two spheres of a system of collective decision making, each with revenue-collection powers to fund the implementation of its particular policies and programmes, and accountable to their respective voters.
- The nature and extent of local government's relationship with central government is context-specific, depending on the particular regulatory framework. Some regulatory frameworks explicitly provide that the relevant Minister or central government department has powers of review of, and intervention in, local authorities' exercise of specific regulatory functions. In the absence of explicit statutory recognition of a line of accountability, a local authority is not accountable to the relevant Minister or government department for the exercise of its regulatory powers.
- Recent changes to the Local Government Act 2002 (LGA) have given the Minister of Local Government enhanced general powers of intervention in local authorities.
- The powers invested in local authorities are extensive and diverse. They span a spectrum between powers that confer substantial discretion and autonomy to local authorities, to delegated powers to implement regulation with little or no discretion.
- Most of the regulation made or administered by local authorities is either required by statute or reasonably required for fulfilling a role delegated by statute.

2.1 Introduction

This chapter defines local authorities and describes their purpose and place in New Zealand's political system. Local government plays an essential role in our system of government as both a provider of services and a voice for local democracy, and its activities have a huge influence on our day-to-day lives. This chapter examines the contextual issues that are fundamental to understanding the roles and place of local government in the regulatory system.

Local government has a long history in New Zealand, originating out of provincial settlements, the need for service delivery at the local level and the articulation of local requirements and preferences. Its structures and powers have reflected its dual roles as a provider of local public services and enabler of local democracy. More recently, the dual role has been explicitly recognised in legislation establishing and

empowering local government. As a creature of statute, the structures and powers of local government have been reshaped over the years by central government through legislative change. The relationships between local government and other governmental institutions and political actors have also shifted in response to legislative and other changes.

The chapter is structured as follows:

- Section 2.2 examines the purpose of local government, by outlining the philosophical roots of local government and how legislation defines its purposes.
- Section 2.3 describes local authorities. It examines the statutory definition of local authorities; the evolution and establishment of local government; and the differences between territorial authorities and regional councils, and between local authorities around New Zealand.
- Section 2.4 describes the constitutional relationships between local authorities and other political actors and governmental institutions.
- Section 2.5 outlines the dimensions of accountability of local authorities.
- Section 2.6 examines the regulatory powers of local authorities. It outlines the sources of local authorities' powers, and considers the effect of the power of general competence. It then analyses the types of powers of local authorities, looking at devolved and delegated powers and which regulatory functions are undertaken on the direction of central government and which are undertaken independently by local government.

2.2 The purpose of local authorities

The dual roles of local government

Local government in New Zealand has two complementary roles: the promotion of local democracy and the delivery of local public services. The articulation of the two roles of local government has a long tradition in political thought.

In the 19th century, Alexis de Tocqueville and John Stuart Mill conceived of local government as facilitating and articulating the local 'voice'. According to thinkers of this tradition, local government is primarily a form of representative democracy.

The role of local government as a provider of services came out of the growth of cities and towns in England in the mid-to-late 19th century and the consequent need for 'municipal services' such as water and sewerage disposal. The English social reformer Edwin Chadwick was concerned about the state of public health and identified local government as being able to provide the services necessary to improve it, as it had the powers to tax and regulate. Chadwick focused on the capability of local government to deliver public services, rather than on its democratic role. In fact, he advocated entrusting certain local affairs to trained and selected experts instead of elected representatives.

In New Zealand, local government has always encapsulated both the democratic and service provider roles. One of the earliest articulations of this was in the preamble to the Municipal Corporations Ordinance 1842, which explained the rationale for the establishment of local boroughs. It explained that boroughs were better able to articulate local preferences and needs, and provide the necessary services to the community:

Whereas it is necessary that provision should be made for the good order health and convenience of the inhabitants of towns and their neighbourhoods: And whereas the inhabitants themselves are best qualified, as well by their more intimate knowledge of local affairs as by their more direct interest therein, effectually to provide for the same: [...]. (Municipal Corporations Ordinance 1842, preamble, quoted in Palmer, 2012, p. 1056)

In 1969, a Royal Commission considered potential reform of local government in the United Kingdom. Its report contains illuminating discussion of the purposes of local government, and the importance of its dual roles as a service provider and a voice for local democracy:

Local government is not to be seen merely as a provider of services. If that were all, it would be right to consider whether some of the services could not be more efficiently provided by other means. The importance of local government lies in the fact that it is the means by which people can provide services for themselves; can take an active and constructive part in the business of government; and can decide for themselves, within the limits of what national policies and local resources allow, what kind of services they want and what kind of environment they prefer. (Redcliffe-Maud, 1969, p. 10-11)

The purpose of local authorities according to the Local Government Act

The LGA explicitly recognises the dual roles of local government in New Zealand. Section 10 states that the purpose of local government is:

- to enable democratic local decision making and action by, and on behalf of, communities; and
- to meet the current and future needs of communities for good-quality local infrastructure, local public services, and performance of regulatory functions in a way that is most cost-effective for households and businesses.

The Local Government Amendment Act 2012, most of which came into force on 5 December 2012, made several material changes to the LGA. One of those changes was the statutory purpose of local government. Until this date, the second purpose of local government under the LGA was to promote the social, economic, environmental and cultural wellbeing of communities.

2.3 What are local authorities?

Introduction

This section will:

- define local authorities;
- explain how local authorities are established;
- outline the evolution of local government;
- outline the differences between local authorities around New Zealand; and
- explain the differences between territorial and regional authorities.

Definition and establishment of local authorities

'Local authority' is the term used in legislation to refer to the forms of local government in New Zealand. New Zealand has had a system of local government since the 1840s. As a creature of statute, established and empowered by legislation, local government has been frequently restructured and reshaped over the years by central government through legislative change. As Kenneth Palmer explains: "The history of local government depends primarily on the policies and mandates of central government, and the practical advantages in conferring local powers to provide and regulate functions and services" (Palmer, 2012, p. 1075).

The evolution of local government has been largely pragmatic and *ad hoc*. Palmer observes that: "The theory and place of local government in the political system does not derive from any formal constitutional entitlement" (Palmer, 2012, p. 1075). Instead, "local government evolved from a practical contrivance lacking any developed constitutional conception of the powers with which it should be entrusted" (Wellington Region Local Government Review Panel, 2012).

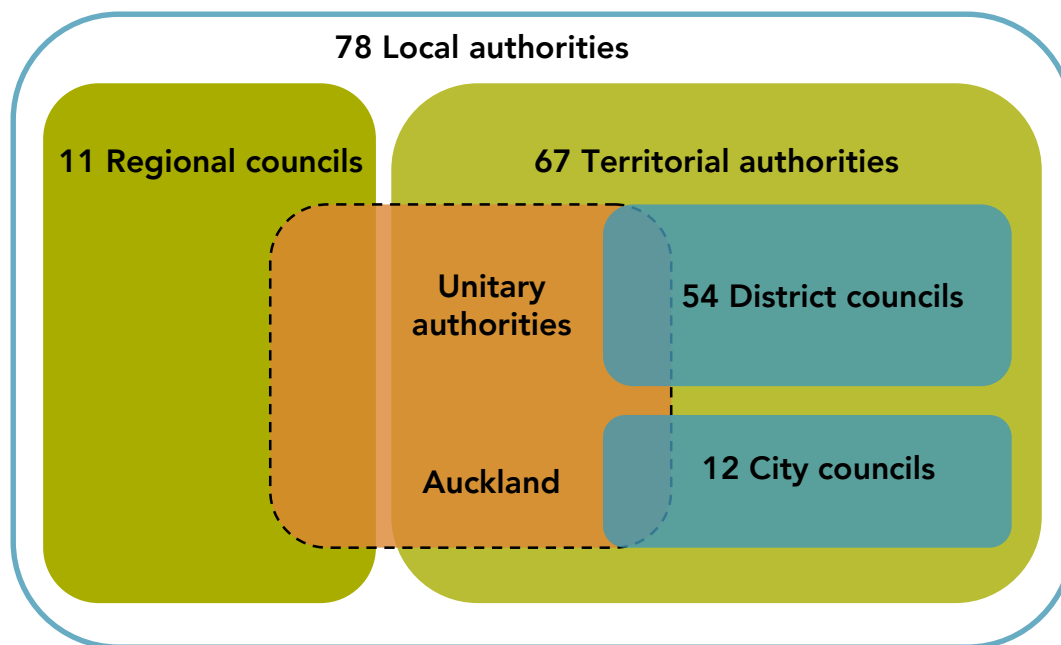
Box 2.2 outlines the evolution of local government from the 1840s to the present, illustrating the frequent changes to its structure, roles and powers.

The current structure of local government has been in place since 1989 when fundamental restructuring abolished multi-purpose and special-purpose authorities, and replaced them with two new forms of local government structures: regional councils and territorial authorities (see s21 of the LGA). Territorial authorities are further broken into three types: city, district, and unitary authorities (a unitary authority is a

city or district council which also has the functions of a regional council). Regional councils and territorial authorities have different roles and functions, which are described in this section below.

Figure 2.1 shows the numbers of types of local authorities. There are currently 11 regional councils and 67 territorial authorities. Of those 67 territorial authorities, 12 are city councils, 54 are district councils and one is Auckland Council. Six of those territorial authorities are unitary authorities.

Figure 2.1 Types of local authorities



Local authorities are diverse

Local authorities in New Zealand are diverse. They operate in different geographical areas and have varying populations, covering densely settled metropolitan areas, smaller provincial cities and towns and sparsely populated rural and wilderness areas. The structure of industry also varies markedly across New Zealand's local authorities. Consequently, different local authorities face quite different issues.

Box 2.1 Diversity of local authorities

This text box outlines some of the differences in the characteristics of New Zealand's local authorities.

Population

Population is a key source of difference between local authorities. 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. Around 65% of councils have a population that could be seated on the permanent seating at Eden Park. The population of all the local authorities in New Zealand is illustrated in Figure 2.3.

Income levels

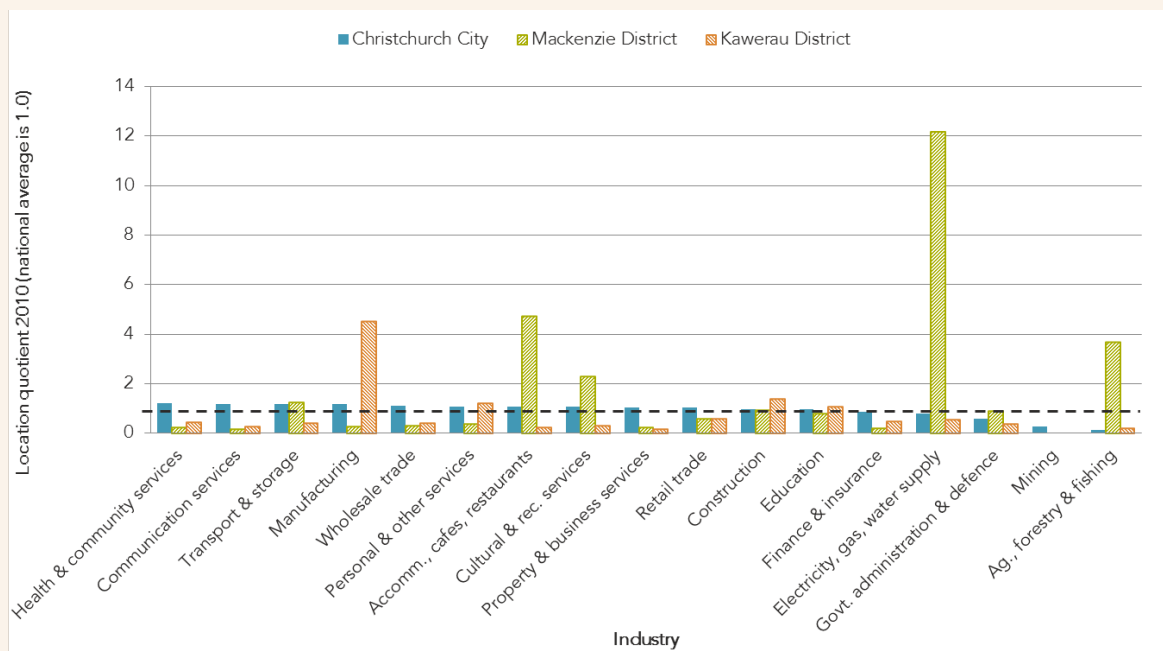
Income levels vary across the country, and are generally associated with the degree of urbanisation and population density. According to Census 2006 data, the highest average (mean) income levels in the 25-44 year old age bracket were in Wellington, followed by Auckland. Territorial authorities adjacent to both of these cities also had high average incomes, as did Queenstown Lakes District. There is a greater distribution of income levels in the North Island than in the South Island.

Physical resources and industry structure

Physical resources and industry structure vary across the country, driving different regulatory needs in different areas. Employment data indicate a pattern of larger 'hub' territorial authorities, while there is greater industrial specialisation in smaller territorial authorities. This drives different regulatory needs and the need for different types of regulatory capacity and capability across territorial authorities.

Some areas have very specialised industries. For example, employment in the Kawerau District is heavily concentrated in manufacturing, reflecting the importance of the nearby Norske Skog newsprint mill in the local economy in 2010. In the Mackenzie District, employment is concentrated in electricity, gas and water supply; followed by accommodation, cafes, and restaurants; and agriculture, forestry, and fishing. Christchurch has a very similar industry structure (based on these pre-earthquake statistics) to the national average, reflecting its position as a regional hub providing goods and services for a wide area. A similar industrial structure can be seen in the Masterton District for the same reason.

Figure 2.2 Industry structures of Christchurch City, Mackenzie District and Kawerau District



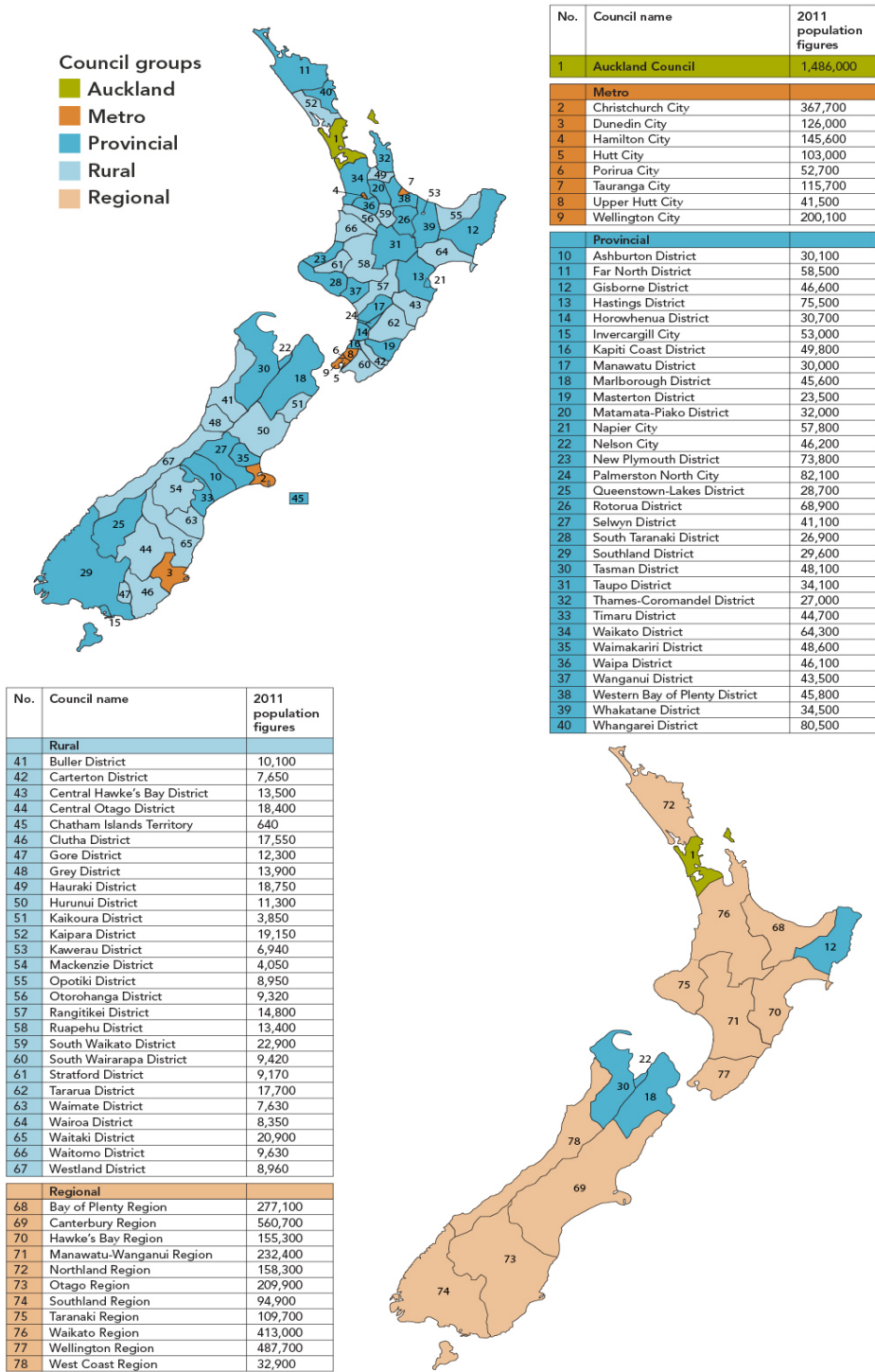
Source: Productivity Commission estimates; using Statistics New Zealand data (prototype Longitudinal Business Database).

Notes:

1. The industry structure of territorial authorities was calculated using employment data from the prototype Longitudinal Business Database (LBD). The percentage of employment in each industry is compared to the percentage of employment in that industry across the country as a whole.
2. A figure above or below the dotted black line (at 1.0) indicates that the percentage of employment in the given industry is higher or lower in that territorial authority, compared to the national average.
3. The results are not official statistics, they have been created for research purposes from the prototype Longitudinal Business Database (LBD) component of the Integrated Data Infrastructure prototype (IDI) managed by Statistics New Zealand.

Figure 2.3 shows the location and population of local authorities. It also groups local authorities into sector groups: metropolitan (populations exceeding 90,000); provincial (populations between 20,000 and 90,000); rural (populations below 20,000); and regional (regional councils and unitary authorities). These sector groups are based mainly on Local Government New Zealand (LGNZ) membership.

Figure 2.3 New Zealand local authorities: population and sector group



Source: Data and map supplied by the Department of Internal Affairs (DIA).

Box 2.2 The evolution of local government

19th century foundations

A spirit of devolution

- Municipal Corporations Ordinance 1842: identified each settlement of 2000 “souls” to be a borough and established a body corporate with powers to do such things as carry out road works, construct water and sewerage systems, make bylaws, impose rates, and “all such purposes as they may deem necessary for the good health and convenience of the inhabitants thereof.” The ordinance was disallowed in 1845.
- New Zealand Constitution Act 1846 (United Kingdom): established municipal districts with elected councillors, who in turn elected the mayor and aldermen. The councils were responsible for electing the members of the lower houses of the two provincial legislatures for the North and South Islands. The Provincial Councils Ordinance 1848 reconfirmed the establishment of the two provincial legislatures.
- New Zealand Constitution Act 1852 (United Kingdom): established six provincial governments (Auckland, Taranaki, Wellington, Nelson, Canterbury and Otago). Municipalities were also constituted in the four main city centres of Dunedin, Christchurch, Wellington and Auckland. The provincial councils were designed to carry out in each province the work of subordinate legislation and administration.
- Provincial legislatures were abolished in 1876.

Ad hoc evolution

- Municipal Corporations Act 1867: provided for a uniform urban territorial authority structure.
- Counties Act 1876: created 36 counties in rural areas with elected councils. A new and complementary Municipal Corporations Act was passed the same year. From 1876, local bodies multiplied, with many *ad hoc* authorities being added, such as harbour boards, rabbit boards and water boards.
- By 1908, the structure of territorial local government recognised the city, borough, county council, town board and road board.

Local Government Act 1974

Fundamental restructuring

- In 1960, a report of the Local Bills Committee into the structure of local government assessed the evolution and efficiency of local government.
- Local Government Act 1974: directed the Local Government Commission to divide the country into regions with a directly elected regional council or an appointed united council in regions of smaller population. The Act also established community councils, district community boards and communities.
- Local Government Amendment Acts in 1988 and 1989 were enacted to lay the foundations for fundamental restructuring reforms. The Acts defined the parameters for new structures, which were implemented by the Local Government Commission. Elected regional councils were established and conferred with water and soil conservation functions; and city or district councils were established based on a ‘community of interest’.

Prescriptive and unwieldy

- The Local Government Act 1974 was heavily prescriptive: before local authorities did anything they needed to check to see that they were empowered to do it.

- The Act was over 700 pages long, filling an entire volume of the *Reprinted Statutes of New Zealand*.

Local Government Act 2002

- The LGA was enacted following a review of the roles of local authorities under the Local Government Act 1974.

Aspirational and wide-ranging

- The LGA restated the functions and powers of local authorities. When enacted, the LGA stated that the purpose of local government was: (1) to enable democratic local decision making and action by and on behalf of communities; and (2) to promote the social, economic, environmental and cultural wellbeing of communities, in the present and for the future. In 2012, the statutory purposes of local authorities were amended. Purpose (1) was retained. Purpose (2) was amended to be: to meet the needs of communities for good-quality local infrastructure, local public services, and performance of regulatory functions in a way that is most cost-effective for households and businesses.
- The LGA confers local authorities with a power of general competence, to be exercised after the authority has complied with the consultative and other procedural and process requirements set out in the LGA.

Prescriptive procedural and process requirements

- The LGA requires local authorities to consult with communities, prepare policy statements, prepare a long-term council community plan and annual plan, follow a prescribed decision-making process, and to use the special consultative procedure for these documents and other significant decisions.

Sources: Palmer (2012); Palmer & Palmer (2004).

Regional councils

All local authorities (whether they are territorial authorities or regional councils) have the same powers of general competence (see sections 10-12 of the LGA and in section 2.6 below). However, territorial authorities and regional councils have distinct functions and responsibilities and different focuses, concerns and relationships with their communities and stakeholders.

When regional councils were established in their current form in 1989, the Local Government Amendment Act (No. 3) 1988 stipulated that the geographic boundaries of regional councils should conform to one or more water catchments. The Local Government Commission (an independent statutory body responsible for making decisions on local government structure and representation) also took into account “regional communities of interest, natural resource management, land use planning and environmental matters” (Statistics New Zealand, 2006).

The 11 regional councils in New Zealand are: Bay of Plenty; Hawke’s Bay; Manawatu-Wanganui; Northland; Taranaki; Waikato; Wellington; Canterbury; Otago; Southland; and West Coast. The head of a regional council is the chairperson, elected by the regional council members after council elections.

Regional councils have responsibility for the following (Department of Internal Affairs [DIA], no date, ‘Councils’ Roles and Functions’):

- managing the effects of using freshwater, land, air and coastal waters, by developing regional policy statements and the issuing of consents;
- managing rivers, mitigating soil erosion and flood control;
- regional emergency management and civil defence preparedness;

- regional land transport planning and contracting passenger services; and
- harbour navigation and safety, oil spills and other marine pollution.

Territorial authorities

The name 'territorial authorities' applies to city and district councils. The powers and responsibilities of city and district councils are the same; the only difference is that city councils generally serve a population of more than 50,000 in a predominately urban area.

When territorial authorities were established in 1989, the Local Government Commission gave considerable weight to the 'community of interest' in drawing up the boundaries of territorial authorities. The Commission found that: "While the size of the community was a factor, the relevance of the components of the community to each other, and the capacity of the unit to service the community in an efficient manner, were the factors on which the Commission placed most emphasis" (Statistics New Zealand, 2006).

There are currently 67 territorial authorities (including 6 unitary authorities): 23 of these are in the South Island, plus the Chatham Islands, and 43 are in the North Island. Eleven of the territorial authorities are city councils and 50 are district councils.

Most territorial authorities (unless they are unitary authorities) fit within the geographical boundaries of a regional council, although some territorial authorities fall within more than one regional council's geographic area. For example, Taupō District Council sits within the Waikato and Hawke's Bay Regional Councils, and Rangitikei District Council sits within the Manawatu-Wanganui and Hawke's Bay Regional Councils (LGNZ, 2011).

The head of a territorial authority is the mayor, who is elected directly by the constituents of the district itself.

The responsibilities of territorial authorities include (DIA, no date; LGNZ, 2011):

- the provision of local infrastructure, including water, sewerage, stormwater and roads;
- environmental safety and health, district emergency management and civil defence preparedness, building control, public health inspections and other environmental health matters; and
- controlling the effects of land use (including hazardous substances, natural hazards and indigenous biodiversity), noise and the effects of activities on the surface of lakes and rivers.

Differences and overlap between regional councils and territorial authorities

Regional councils and territorial authorities have different functions and responsibilities, but they sometimes overlap. For example, territorial authorities' district plans must give effect to regional councils' regional policy statements (s75(3) of the Resource Management Act 1991 [RMA]). This requires coordination between a regional council and the territorial authorities within its boundaries. Environment Southland submitted that, "...in preparing and effectively implementing a Regional Policy Statement, regional councils need a high level of support from the territorial authorities and their planning documents. Obtaining that support and agreement is sometimes difficult to achieve" (sub. 28, p. 1; see also Waikato Regional Council sub. 45, p. 3).

Waikato Regional Council described the overlap in this way:

At present there is considerable overlap between regional and local regulatory roles, particularly with respect to land use, transport and natural hazard management. For example, territorial authorities, through their district plans, are responsible for establishing land use zones and granting subdivision and land use consents. The regional council is responsible for the integration of land use and infrastructure and for the control of the use of land for purposes such as water quality management and natural hazard management. Regional councils also have important transport management responsibilities, and there is a strong relationship between transport and land use management. (sub. 45, p. 3)

Although functions and responsibilities may overlap, regional councils and territorial authorities tend to have a different focus. Waikato Regional Council's submission emphasised the differences, noting that "regional councils are different in their focus, concerns, world view, and relationship with communities and stakeholders, compared to territorial authorities" (sub. 45, p. 3; and sub. DR 92, p. 1). In particular, "[r]egional governance or regulation is focussed on common good resources, whereas local regulation has impacts on individuals and property rights" (sub. DR 92, p. 1).

The differences in the focus and responsibilities of regional councils and territorial authorities can sometimes lead to tension. Environment Southland notes:

There is a tendency for territorial authorities to focus in at the site level of land use policy and to some extent have a lesser recognition for the wider district or region-wide policy options. Environment Southland has been promoting a regional hazard register where all four councils would contribute to the database and use it on a daily basis for land use decision-making. The three territorials have seen that collaborative approach as them giving something away, at the instigation of the regional council. Patch protection and politics quickly come to the fore ahead of the practicality of such an option. (sub. 28, p. 2)

Some submitters advocated a clearer delineation of the roles of regional councils and territorial authorities. Waikato Regional Council said greater clarity was needed particularly around land use, transport and hazards planning (sub. DR 92, p. 1).

2.4 Constitutional relationships

Introduction

'Constitutional relationships' refers to the constitutional arrangements, practices, institutions and rules (as sourced in statute, secondary legislation, judicial decisions, conventions, practices, etc) that describe and prescribe the interactions of the governmental institutions and political actors. Unlike many other countries, New Zealand does not have a formal written document called a 'Constitution'. However, that does not mean that it does not have a constitution. Rather than being found in one formal document, New Zealand's constitution is found in a collection of sources which together establish the framework of our constitution. The sources of New Zealand's constitution are outlined in Box 2.3.

Box 2.3 New Zealand's unwritten constitution

A constitution describes and establishes the major institutions of government, states their principal functions and powers, regulates the exercise of those functions and powers, and governs the relationship between governmental institutions and other political actors.

The major sources of New Zealand's constitution are:

- **The Constitution Act 1986.** This Act is the principal formal statement of New Zealand's constitution. It broadly identifies and describes the major institutions of government.
 - The Queen is the Head of State of New Zealand and the Governor-General is her representative in New Zealand. As a matter of convention, the Queen and the Governor-General exercise their legal powers only on the advice of the Prime Minister or Ministers who have the support of a majority of the House of Representatives.
 - The executive: only Members of Parliament may be Ministers of the Crown. The Crown may not levy taxes, raise loans or spend public money except by or under an Act of Parliament.
 - Parliament: consists of the Sovereign and the House of Representatives. Each Parliament has a term of three years, unless it is earlier dissolved. Parliament has full power to make laws.
 - The judiciary: the independence of which is protected by long-established constitutional principles, which are affirmed by the Act.

- **The prerogative powers of the Queen.** These powers are part of the common law and exist independently of statutes.
- **Other New Zealand statutes.** These include: the State Sector Act 1988, the Electoral Act 1993, the Judicature Act 1908, the Ombudsmen Act 1975, the Official Information Act 1982, the Public Finance Act 1989 and the New Zealand Bill of Rights Act 1990.
- **Certain English and United Kingdom statutes.** Certain relevant English and United Kingdom statutes were confirmed as part of the law of New Zealand by the Imperial Laws Application Act 1988, including the Magna Carta 1297, the Bill of Rights 1688, the Act of Settlement 1700 and the Habeas Corpus Acts.
- **Judicial decisions.** Certain decisions of the courts, for example, uphold rights of the individual as against the state and determine the extent of the state's powers.
- **The Treaty of Waitangi.** Our constitution increasingly recognises that the Treaty is regarded as a founding document of government in New Zealand. The Treaty may indicate limits on majority decision making and found special recognition of Māori rights and interests.
- **The conventions of the constitution.** Conventions are certain practices that regulate, control and, in some cases, transform the use of the legal powers sourced from the prerogative or conferred by statute. Conventions are not enforceable by the courts, but are of critical importance to the working of the constitution.

Source: Keith, 2008.

With central government ministers and departments

The nature and extent of local authorities' relationship with central government is context-specific, depending on the particular regulatory framework. Some regulatory frameworks specifically provide that a local authority is accountable for its operational performance to the relevant minister or government department, directly or indirectly. For example, under the building regulatory framework, the Minister for Building and Construction has powers of intervention if the Minister believes that the territorial authority is not fulfilling its statutory functions (section 277 of the Building Act 2004). The Chief Executive of the Ministry of Business, Innovation, and Employment also has powers to review the performance of local authorities in exercising their statutory functions and powers under the Building Act (sections 204 and 276 of the Building Act 2004).

However, in the absence of explicit statutory recognition of a line of accountability, a local authority is not accountable to the relevant minister or government department for the exercise of its statutory powers. The Commission agrees with the following statement as to the relationship between central and local government:

While local government is a creature of statute, it operates as a largely autonomous provider of services, funded separately by property taxation and held accountable by voters. In the absence of well-defined constitutional or fiscal relationships, local and central government are most accurately regarded as two spheres of a system of collective decision-making, each with revenue-collection powers to fund the implementation of its particular policies and programmes... (Local Futures Research Project, 2006, pp. 13-14)

Local authorities are sometimes characterised as an agent of central government, required to implement national priorities and central government's directions, and accountable to central government. In political science and economics, the term 'agency relationship' is used to describe the situation where a party or parties (the principal(s)) can influence or try to influence the actions of another party (the agent). Such influence could be exerted through legal means (for example, via legislation or regulations) or by political

means (such as lobbying). The legal definition of an agency relationship is much narrower and not applicable to the relationships between political institutions.²

The characterisation of local authorities as an agent of central government seems to reflect a misunderstanding of the respective roles of, and relationship between, local and central government. Local authorities are established and empowered by statute and operate within a regulatory framework largely established by Parliament and the Executive. However, it is incorrect to characterise local authorities generally as agents of central government, always required to implement central government's directions and accountable to central government for their performance. Local authorities exercise a range of types of powers (see further at section 2.6 below) and have varying degrees of discretion and autonomy, depending upon the specific regulatory context.

Local authorities are accountable to and funded by their own communities, which distinguishes local authorities from many other institutions that are also creatures of statute. Local authorities, for example, have materially different characteristics and powers compared with district health boards or school boards. The Commission agrees with the following submission:

The regulatory roles played by local authorities are for the most part specific roles within complex regulatory frameworks. Parliament has mandated local authorities to undertake some roles within these systems and the executive arm of Government to undertake others. The legal obligation on both the local authorities and the executive arm of Government is to act in accordance with the law. ... There is no inherent agency or accountability relationship between a local authority and the executive, just because a Minister has promoted the relevant piece of legislation. Such relationship only exists where Parliament has explicitly legislated to create it. (SOLGM, sub. 48, p. 3)

F2.1

There is no inherent agency or accountability relationship between local authorities and central government simply because local authorities are established and empowered by statute. The relationship between central and local government is context-specific, depending upon the particular regulatory framework.

With the Minister of Local Government

The Minister of Local Government has primary responsibility for policy and legislation affecting local government, and the overall efficiency and effectiveness of the legislative framework within which local government operates. The Minister is also tasked with leading the relationship between central and local government. Except where specifically provided for in legislation, the Minister is not answerable for specific instances of local authorities' operational performance and cannot intervene in local authorities' decisions. The flip side is that, unless specifically provided for in legislation, local authorities are not accountable to the Minister for the exercise of their powers.

Enhanced powers of intervention

The Minister of Local Government has general powers of intervention under the LGA. The Local Government Amendment Act 2012 significantly expanded the powers of the Minister of Local Government to intervene in local authorities. Where there is a "significant problem" in relation to a local authority, the Minister of Local Government can intervene by requiring the local authority to provide him or her with certain information; appointing a Crown Observer, Crown Manager, Crown Review Team, or Commissioners; or calling an election of a local authority. 'Problem' is defined broadly in the LGA as: (1) a matter or circumstance relating to the management or governance of the local authority that detracts from, or is likely to detract from, its ability to give effect to the purpose of local government; (2) a significant or persistent failure by the local authority to perform its statutory functions or duties; or (3) the consequences of a state of emergency. A problem includes a failure by the local authority to demonstrate prudent management of its finances. 'Significant' is defined to mean that the problem will have actual or probable adverse consequences for residents and ratepayers.

² The legal definition of an 'agency relationship' is a relationship where one person (the agent) has the authority or capacity to create legal relations between another person (the principal) and a third party. Where an agency relationship exists, the principal is bound by the act of his or her agent as if the principal had in fact personally done the act in question. An agency relationship is created by the express or implied consent of the parties to it.

The Local Government Amendment Act 2012 gives the Minister significant discretion as to when and how to intervene. There is no check on the exercise of that discretion by, for example, an independent agency. However, the Act requires that the intervention must ensure, as far as is practicable, that a local authority's existing organisational capability is not diminished. As obliged by the Act, the Minister has published on the DIA website a list of matters that will be relevant to the use of the intervention powers. That list identifies (amongst other things) guiding principles to which the Minister must have regard when determining what action, if any, to take. The guiding principles are:

- Ministerial action should be informed by the purpose of local government and the role of and principles relating to local authorities as set out in the LGA;
- Local authorities are responsible for preventing and solving their own problems;
- Local authorities' accountability is to their ratepayers and residents;
- Elections are the primary mechanism for communities to express satisfaction or dissatisfaction with elected representatives;
- The Minister should have regard to what the local authority has done or plans to do about the problem;
- Ministerial assistance or interference should be proportionate to the nature and magnitude of the problem, its potential consequences and its duration;
- Ministerial assistance or intervention should endure for only as long as necessary to resolve the problem and provide for a transition back to normal democratic processes; and
- Ministerial decisions regarding assistance or intervention should be transparent.

The full list of matters that the Minister must have regard to when making decisions about intervention or assistance is available from the DIA at www.dia.govt.nz.

With other central government institutions

Various other central government agencies exercise certain functions and powers relating to local government. The DIA provides policy advice to the Minister of Local Government and information about local government to ministers, other government departments, councils and the public. The Local Government Commission is an independent statutory body whose members are appointed by the Minister of Local Government. Its main role is to make decisions on the structure and representation requirements of local government.

With Parliament

The Controller and Auditor-General is the watchdog over local authorities' financial matters and compliance with certain statutory requirements. The Auditor-General conducts the audits of local authorities' accounts, performance audits at her discretion for some specific functions and conducts inquiries, reporting to Parliament when necessary. The Parliamentary Commissioner for the Environment investigates complaints about local authority decisions on environmental issues. In addition, parliamentary select committees have the power to scrutinise local bills promoted by local authorities, and some other legislation that pertains to local government. Rarely, select committees will conduct inquiries into the system of local government. Ombudsmen, appointed by Parliament as independent review authorities, have the power to inquire into complaints about local government organisations.

With the courts

Local authorities must act in accordance with the law, and are subject to the jurisdiction of the courts and tribunals for how they exercise their powers. Local authorities are subject to judicial review, and the courts also hear appeals against local authorities' decisions under various statutes. Local authorities are accountable through civil liability in damages for wrongs they do.

With their communities

Regular elections are the key element of local authorities' accountability to their communities. One of the two purposes of local government, as identified by the LGA, is the enabling of democratic local decision making and action by, and on behalf of, communities. The Local Elections Act 2001 sets out how the local electoral system works. Elections are held every three years for every local authority and community board.

The accountability of local authorities to their communities is also realised through public meetings, extensive consultation requirements, media scrutiny and the requirement that local authorities conduct their business in an open, transparent and democratically accountable manner. The ways in which communities participate in local authorities' decision making is described in Box 2.4.

Box 2.4 Public participation

A major focus of the LGA is encouraging and enabling public participation in local authorities' decision making. The principal obligation of local authorities is to 'give consideration' to the community views in all decision making (s78(1) of the LGA). Local authorities identify community views in a number of formal and informal ways. The formal processes include:

- ordinary consultation processes;
- special consultative procedure (a prescribed process of formal consultation that must be followed when making certain decisions);
- processes developed to provide opportunities for Māori to contribute to decision making (as identified in Chapter 9);
- referendum or poll of electors; and
- public delegations addressing local authority meetings.

Local authorities also identify community views in more informal ways, such as through informal discussions between members and ratepayers, town-hall meetings, local media, informal focus groups and opinion polls.

With Māori

The LGA includes a specific Treaty of Waitangi clause, which provides that the Crown's obligations under the Treaty are recognised and respected by placing obligations on local authorities to facilitate participation by Māori in local authority decision-making processes (see s4 of the LGA). Participation by Māori in the decision-making process is considered in detail in Chapter 9.

Local iwi have a strong interest in the exercise of local authority regulatory functions. Interests in environmental management regulations are particularly strong where there is a kaitiaki relationship, which the RMA defines 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."

2.5 The dimensions of accountability

Accountability is a complex and contested concept that is defined and used in many different ways. It is broader than the formal legal framework which sets out the constitutional relationships between governmental institutions and political actors (the relationships 'on paper'). Accountability describes the complementary checks and balances that exist in a system to incentivise the making and implementation of good decisions, and to highlight weaknesses or failures.

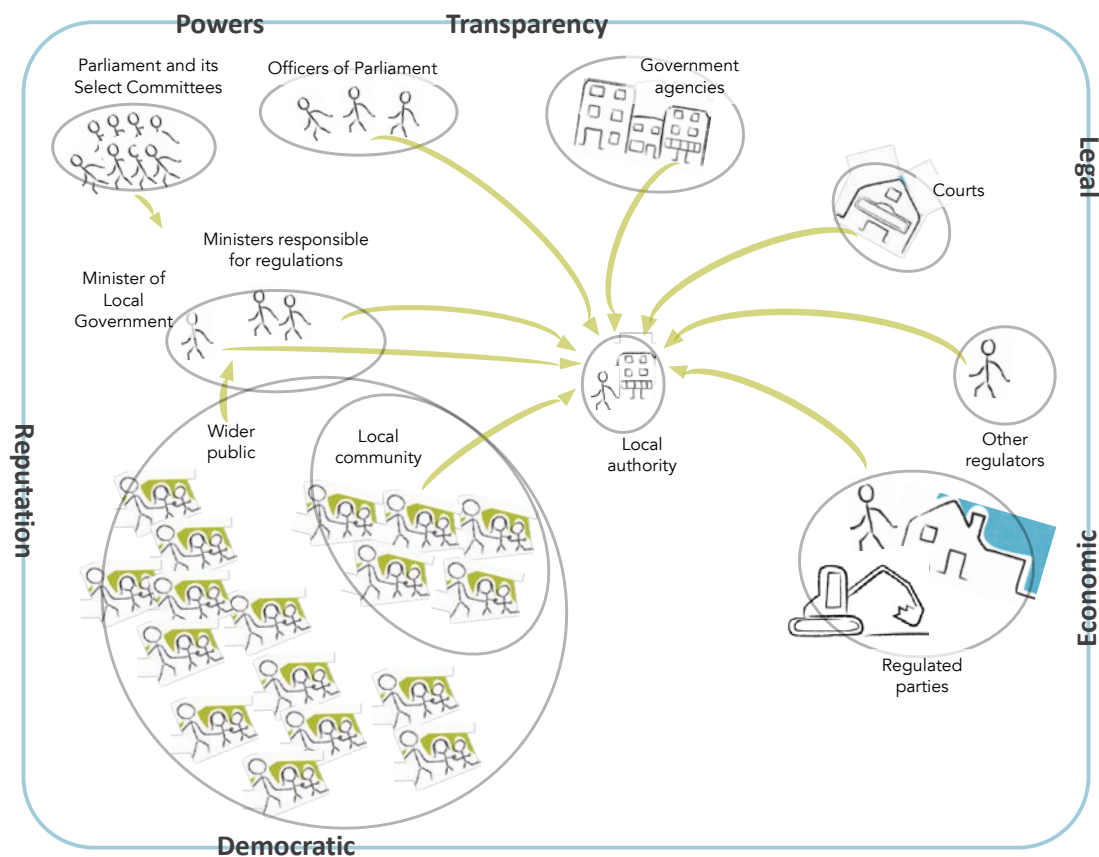
Accountability is multi-dimensional: different types of checks and balances complement each other and apply with varying importance depending upon the particular situation. The following list identifies six types

of checks and balances which together promote the accountability of local authorities and some specific examples of each of these types.

- **Democratic:** for example, regular elections; consultation requirements imposed by the LGA.
- **Legal:** for example, judicial review; decision appeals to tribunals and courts.
- **Reputation:** for example, bad publicity; bench-marking.
- **Transparency:** for example, reporting requirements; financial management requirements imposed by the LGA; the requirement to prepare and have audited a long-term plan.
- **Economic:** for example, the threat by business to move to other jurisdictions that have more business-friendly regulatory frameworks. This pressure is increased by regulatory competition between local authorities to attract and retain businesses.
- **Powers:** local government regulatory powers conferred by Parliament. These can be diminished, removed or augmented. For example, the decision-making processes of local authorities are governed generally by the LGA (see in particular ss76-82) and specifically by other legislation, such as the RMA; the Minister of Local Government has general powers of intervention.

Figure 2.4 summarises the complementary checks and balances on local authorities.

Figure 2.4 Dimensions of accountability in the local government regulatory system



2.6 Regulatory powers of local government

Introduction

This section examines the regulatory powers of local authorities. It outlines the sources of local authorities' powers and considers the effect of the power of general competence. It then analyses the types of powers of local authorities, looking at devolved and delegated powers and which regulatory functions are

undertaken on the direction of central government and which are undertaken independently by local government.

Sources of local authorities' powers

Statutes and regulations invest local authorities with substantial regulatory powers. The starting point is the LGA. Section 12 deals with the status and powers of local authorities. The essential features are (from Palmer & Palmer, 2004, p. 250):

- a local authority has full capacity to carry on or undertake any activity or business, do any act, or enter into any transaction that promotes the purposes of local government as defined in s11 of the LGA;
- the rights, powers, and privileges that it has are subject to the provisions of the LGA itself, other enactments, and the general law; and
- territorial authorities must exercise their powers wholly or principally to benefit the district and a regional council must exercise its powers wholly or principally for all or a significant part of its region.

This Act heralded a changed approach to the legislative grant of powers to local authorities. The approach of the previous legislation (the Local Government Act 1974) was that before local authorities did anything, they needed to check whether or not they were empowered to do it. The LGA abandoned this prescriptive approach and moved towards a power of 'general competence'.

Under a power of general competence, local authorities can do anything that is not expressly forbidden by law or given exclusively to another organisation (Palmer & Palmer, 2004, p. 250). This does not however give local authorities a free hand to do as they wish. The powers of local authorities are limited by:

- the LGA itself, for example, local authorities must make decisions according to the process prescribed in the LGA; local authorities cannot divest themselves of water and wastewater assets;
- other legislation, for example, a local authority cannot levy a poll tax or conduct an election on a different cycle;
- the requirement that any action must promote the purpose of local government and be consistent with the principles set out in s14 of the LGA; and
- the needs and wants of the community as indicated through the decision making and consultation processes prescribed by the LGA.

In addition to this general grant of power by the LGA, a number of other statutes and regulations grant powers to local authorities.

The power to levy rates is found primarily in the Local Government (Rating) Act 2002. Rates are the predominant source of local authority revenue. Unlike local government in other countries, such as the United Kingdom and Australia, local authorities in New Zealand are largely fiscally independent of central government. Each local authority is accountable for the quantum of the rate and choice of expenditure to the local electors (Palmer 2012, p. 479-480).

A significant power for the regulation of a district or region is through the use of bylaws. Bylaws are a type of subordinate legislation. Local authorities have no inherent power to make a bylaw; the right to make bylaws and the content of any bylaw must be authorised by statute. The power to make bylaws is found in several statutes, including the LGA and the Bylaws Act 1910. The LGA prescribes the process local authorities must follow to make a bylaw.

Subject-specific legislation also confers a broad range of regulatory powers and functions on local authorities (see, further in this section below and Table 2.1).

Effect of the power of general competence

The Commission has found that most regulation made or administered by local authorities is either required by statute, or reasonably required for fulfilling a role delegated by statute (see further, in this section below, for an examination of which regulatory functions of local authorities are undertaken on the direction of central government and which are undertaken independently by local government). It does not appear that local authorities are relying on their power of general competence to undertake regulatory functions.

A 2008 survey of local government by the Local Government Commission showed that, although 28% of councils that responded to the survey believed they had undertaken new activities since the power of general competence was introduced, those new activities were ones that local authorities could have undertaken under the LGA 1974 (which did not confer a power of general competence):

It should be noted that certain provisions in the predecessor Act (Local Government Act 1974) provided local authorities with wide powers in certain areas. Upon reviewing examples of new activities or ventures that councils provided, the Local Government Commission notes that few, if any, could not have been entered into under the 1974 Act.

[...]

The impact of conferring full capacity, rights, powers and privileges on local authorities has not seen a significant change in the activities of local authorities. (Local Government Commission, 2008, pp. 18-19)

Or, as one local elected member participating in an engagement meeting with the Productivity Commission put it:

It's nice to know that we have the power of general competence, but I haven't yet found anything I can use it for.

Claims of local authorities acting *ultra vires* (beyond their powers), or undertaking a range of actions that would have been *ultra vires* under the 1974 Act, seem to be largely incorrect. Complaints about the power of general competence are more likely to stem from a disagreement about the merits of a particular function or policy rather than be an issue about the effect of the power of general competence.

A range of types of powers

The powers invested in local authorities are numerous and extensive. These powers span a spectrum between powers that confer substantial discretion and autonomy, through to delegated powers to implement regulation with little or no discretion.

Some powers conferred on local authorities are prescriptive and do not permit any discretion on the part of the local authority. Legislation delegates functions and responsibilities to local authorities, and provides mechanisms for central government direction, intervention and/or performance monitoring. The role of local authorities in this context is to deliver services according to national standards (similar to Chadwick's conception of the role of local government discussed in section 2.2 above). These are often referred to as 'delegated' powers.

For delegated/service delivery types of powers, a minister might specify through Order in Council a national standard which all local authorities must enforce. The order might direct how the local authority is to undertake the specific regulatory function, set specific performance targets and provide for penalties where the target is not met. The Food and Hygiene Regulations 1974, and the functions of territorial authority building consent authorities to ensure that buildings meet the requirements of the Building Code are good examples of this type of power. The performance of local authorities in this context will mainly be assessed on their capacity and ability to carry out regulatory functions to nationally determined standards.

Other powers granted to local authorities confer on them substantial discretion and autonomy as to when and how to exercise those powers. These types of powers are often referred to as 'devolved' powers, and they give effect to local government's role as the voice of local democracy. In this context, local authorities operate largely autonomously of central government, and are empowered to choose which activities to undertake and how to pay for them. Powers of this type enable local authorities to set policy agendas and objectives, develop strategies for achieving those objectives and evaluate the performance of those

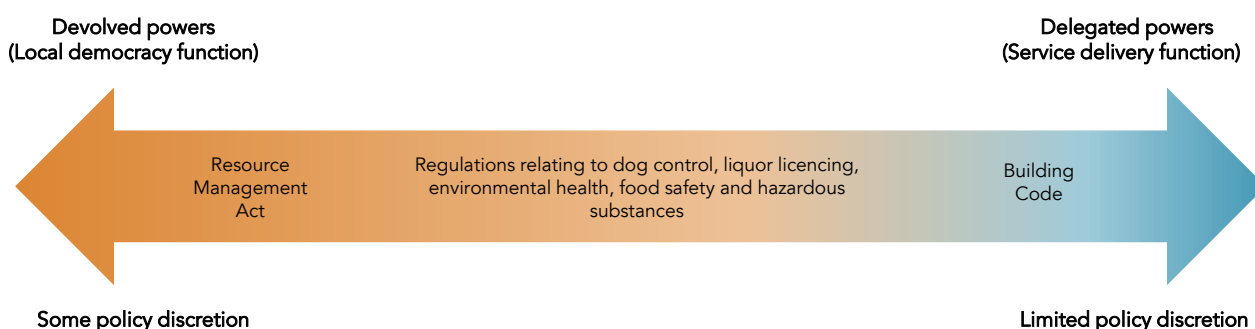
strategies. Their performance will be judged on their ability to consult and reflect community interests and preferences, and to reconcile different community interests and reach a decision. Powers granted under the Resource Management and Local Government Acts are good examples.

In the middle of the spectrum are regulations that have been conferred on local government because local government is considered best placed to tailor regulation to the specific characteristics, needs and preferences of diverse local communities. Different regulations require different types of local input and decision making. The role of local authorities under the Sale and Supply of Alcohol Act 2012, for example, is quite different from their role under the Gambling Act 2003. The challenge for local government in this context is to give effect to local interests, circumstances and preferences in a way that produces the outcomes from the regulation that Parliament intended. However, it is also a challenge for Parliament, where local input and decision making is required, to allocate regulatory responsibilities in a way that enables local authorities to actually make decisions that give effect to local preferences (see Chapter 6).

The classification of the 'type' of a particular power is not easy and is often contested. It was clear from submissions and engagement meetings that there is considerable disagreement both within local and central government, and between local and central government, on the classification of types of powers. In particular, there are different views as to whether a particular power is prescriptive and does not permit any discretion on the part of the local authority, or whether the power is one which confers the local authority with autonomy to decide how and when to act.

Figure 2.5 illustrates the range of types of powers of local government: local authorities exercise a range of types of powers with varying degrees of autonomy, discretion and input of local preferences and characteristics.

Figure 2.5 The spectrum of local authorities' powers



Central government direction or own initiative?

The Commission has been asked to 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.

There are some examples of local authorities using their general bylaw-making power under s145 of the LGA to regulate certain matters on their own initiative: for example, Napier City Council made a bylaw regulating beauticians, tattooists and skin piercers in the city;³ and the Gore District Council made a bylaw for the purpose of reducing long grass and overhanging foliage.⁴

However, most regulations made or administered by local authorities are in response to primary legislation initiated by central government. The Commission has encountered a low level of general understanding about the source of new regulations and regulatory functions. For instance, the increase in the use of National Environmental Standards (NES - regulations issued under the RMA that apply nationally and prescribe standards and requirements for environmental matters) can require local authorities to put in place additional regulations to enforce the new standards. Examples include national environmental

³ Napier City Beauticians, Tattooists and Skin Piercers Bylaw 2008.

⁴ Gore District Council Long Grass/Overhanging Foliage Bylaw 2008.

standards for air quality, which affect the kinds of woodburners people can use to heat their homes; and national environmental standards for soil contamination, which can require testing to be undertaken if the use of a piece of land changes. Individuals and businesses will experience this as a new regulatory intervention by their local authority, and may be unaware that the source of the intervention was central government direction.

Table 2.1 identifies key primary and secondary legislation which confers regulatory responsibilities on local authorities. The regulatory responsibilities identified in the table are of a range of types and significance. Some of the responsibilities accord little discretion to local authorities in how to implement the particular function: these are the 'delegated' powers. Some give considerable flexibility and discretion to local authorities in how they respond to the conferral of responsibilities: these are the 'devolved' powers. Different local authorities will respond differently, meaning there will be variation between authorities in the content and implementation of these regulatory responsibilities.

This table is not exhaustive. It identifies the legislation that confers significant regulatory responsibilities on local government as a sector. It does not identify legislation which confers on local government responsibilities which are not significant, or legislation that affects only one or a small number of local authorities.

Table 2.1 Regulatory activities undertaken by local government

Primary legislation	
Legislation and agency	Regulatory responsibilities of local government
Airport Authorities Act 1966 Ministry of Transport	The Act empowers local authorities to act as airport authorities, for the purpose of establishing, maintaining, operating or managing an airport. Local authorities and airport authorities are authorised to make bylaws for a range of purposes relating to the management and operation of airports.
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 Ministry of Business, Innovation, and Employment	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. Regional Councils are Building Consent Authorities for dams; these usually require resource as well as building consent.
Burial and Cremation Act 1964 Ministry of Health	Requires local authorities to establish, maintain and regulate cemeteries (where sufficient provision is not otherwise made), and grants local authorities power to carry out those responsibilities.
Climate Change Response Act 2002 Ministry for the Environment	Local authorities are subject to the Kyoto Protocol.
Conservation Act 1987 Department of Conservation	Section 35 stipulates that, "A local authority may make contributions out of its general fund or account for the management, improvement, or maintenance of any conservation area even if the area is outside its district."
Dog Control Act 1996 and Impounding Act 1955 Department of Internal Affairs	The Dog Control Act 1996 makes councils responsible for the control of 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. 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).

Primary legislation	
Legislation and agency	Regulatory responsibilities of local government
Electoral Act 1993 Ministry of Justice	Enables electoral officers of local authorities to obtain from the Electoral Commission certain specified information required for any election, by-election or poll required by, or under, any Act.
Fencing of Swimming Pools Act 1987 Ministry of Business, Innovation, and Employment	Territorial authorities must take "reasonable steps" to ensure compliance with the Act's fencing requirements within their district.
Food Act 1981 Ministry for Primary Industries	The responsible Minister can set standards other than the 1974 Regulations (largely to give effect to Food Standards Australia New Zealand 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.
Forest and Rural Fires Act 1977 Department of Internal Affairs and Department of Conservation	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.
Freedom Camping Act 2011 Department of Internal Affairs and Department of Conservation	Under this Act, freedom camping is considered to be a permitted activity everywhere in a local authority (or Department of Conservation) 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).
Gambling Act 2003 Department of Internal Affairs	Territorial authorities are required to develop class 4 (section 101) and Totalisator Agency Board (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.
Government Roadway Powers Act 1989 Ministry of Transport	Local authorities are vested with various powers to execute, manage and consent work on roads, motorways and highways. The Act also confers bylaw making powers to local authorities, for instance, with respect to state highways.
Hazardous Substances and New Organisms Act 1996 (HSNO) Administered by the Environmental Protection Agency for Ministry for the Environment	Section 97 instructs territorial authorities to enforce the HSNO Act in or on any premises situated in the district of the territorial authority. Regional councils play an enforcement role under the HSNO Act where this role overlaps with their functions under the RMA; as 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.
Health Act 1956 Ministry of Health	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). An amendment made to the Act by the Health (Drinking Water) Amendment Act 2007 imposed an obligation on water suppliers

Primary legislation	
Legislation and agency	Regulatory responsibilities of local government
	and water carriers (including local authorities) to monitor drinking water and take all practical steps to comply with standards. It also requires local authorities to report on drinking water quality within its district as required by the Director-General or Medical Officer of Health.
Historic Places Act 1993 Ministry for Culture and Heritage	The Act's purpose "is to promote the identification, protection, preservation, and conservation of the historical and cultural heritage of New Zealand." Local authorities are required to adhere to the Act, and may be authorised to manage, maintain and preserve a historic place or area, in conjunction with the New Zealand Historic Places Trust (the Trust). Local authorities may transfer land to the Trust for the purposes of the Act.
Land Drainage Act 1908 Ministry for the Environment	The Act confers on local authorities the same powers with respect to cleaning, repairing or other maintenance as were had by elected drainage (and river) boards. Local authorities may order the removal of obstructions to waterways and dams, and may also be compelled to do so by individuals.
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. The Act also directs where funds are disbursed through Regional Land Transport Strategies.
Land Transport Management Act 2003 Ministry of Transport	The Act manages the process of developing and maintaining land transport systems to achieve "an affordable, integrated, safe, responsive, and sustainable land transport system" (section (3)(1)). This largely affects regional councils and unitary authorities, who must ensure the production, by a regional transport committee, of a regional land transport programme.
Litter Act 1979 Department of Internal Affairs	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"). Litter Control Officers can request the removal of litter and issue infringement notices and fines.
Local Government (Auckland Council) Act 2009 Department of Internal Affairs	The Act establishes the Auckland Council as a unitary authority for Auckland, conferring appropriate powers on the council.
Local Government Act 1974 Department of Internal Affairs	Residual regulatory powers – roads, sewerage and stormwater, waste management, navigation and safety; other matters. Navigation responsibilities include those relating to harbourmasters appointed by regional councils. Continues to confer bylaw making powers in various statutory areas.
Local Government Act 2002 Department of Internal Affairs	Establishes and empowers local authorities. Confers local authorities with a power of general competence, empowers local authorities to make bylaws and prescribes how local authorities exercise their regulatory functions.
Local Government Official Information and Meetings Act 1987 Department of Internal Affairs	Regulates the public availability of official information held by local authorities.
Maritime Transport Act 1994 Ministry of Transport	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. The Act also confers powers of investigation and enforcement (prosecution) to local authorities for acts endangering safety.
Prostitution Reform Act 2003	Local authorities are empowered to regulate the location and advertising of

Primary legislation	
Legislation and agency	Regulatory responsibilities of local government
Ministries of Justice and Health and the Department of Labour	brothels through bylaws.
Public Transport Management Act 2008 Ministry of Transport	The Public Transport Management Act 2008 confers various powers on regional councils – standard setting for commercial public transport services; regulation of commercial public transport services; requirements for public transport services to be provided under contract by the council.
Public Works Act 1981 Ministry of Transport; Ministry for Primary Industries	This Act regulates the execution of public works, including by local government. The Act grants local authorities powers necessary to carry out public works, including (but not limited to) acquiring necessary land, managing compensation processes, conducting surveying and managing road traffic.
Reserves Act 1977 Department of Conservation	Section 65 gives the administering body of any recreation reserve the power to pass bylaws to control public access and movement. This includes regional councils.
Resource Management Act 1991 Ministry for the Environment	The Resource Management Act confers significant powers and functions on local authorities concerning the regulation of activities relating to natural and physical resources. Local authorities are required to prepare and implement plans and policy statements and process and adjudicate resource consent applications.
Sale of Liquor Act 1989 and Sale and Supply of Alcohol Act 2012 Ministry of Justice	The 1989 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 2012 Act will replace the 1989 Act from 18 December 2013. The 2012 Act aims to give local communities more input into licensing decisions. It will empower territorial authorities to develop, in consultation with their communities, local alcohol policies about the sale and supply of alcohol.
Soil Conservation and Rivers Control Act 1941 Ministry for the Environment	Some residual enabling clauses for local authorities and catchment, drainage and river boards to perform certain functions (for instance, purchasing plant and machinery) for soil conservation and river control purposes.
Takutai Moana Act 2011 Department of Conservation	If a customary marine title planning document is lodged with the local authority that has statutory responsibilities in the district or region where that title is located, the local authority must take the planning document into account when making any decision under the LGA with respect to the customary marine title area.
Transport Act 1962 Ministry of Transport	This Act allows territorial authorities to make bylaws about road use, and lists the offences enforceable by parking wardens.
Waikato-Tainui River Settlement Act 2010 Office of Treaty Settlements	The Act gives effect to the settlement of raupatu claims (2009); and establishes co-management arrangements of the Waikato River by the Waikato Regional Council and Tainui.
Walking Access Act 2008 Ministry of Agriculture and Forestry	The Act enables controlling authorities (which can include local authorities, as appointed by the New Zealand Walking Access Commission) to enact bylaws to maintain walkways within their jurisdiction, and regulate their use.
Waste Minimisation Act 2008 Ministry for the Environment	The Act requires territorial authorities to adopt a waste management and minimisation plan to promote effective and efficient waste management and minimisation within their district.
Wildlife Act 1953 Department of Conservation	The Minister can coordinate the policies and activities of local authorities that relate to the Act.

Secondary legislation	
Secondary Legislation	Regulatory responsibilities of local government
- Enacting (primary) legislation - Agency	
Amusement Device Regulations 1978 (Machinery Act 1950) Ministry of Business, Innovation, and Employment	The Regulations vest in local authorities the power to grant permits for Amusement Devices.
Building (Accreditation of Building Consent Authorities) Regulations 2006 (Building Act 2004) Ministry of Business, Innovation, and Employment	The Regulations set the criteria and standards that an applicant (including a local authority) must meet to be accredited as a building consent authority.
Building (Dam Safety) Regulations 2008 (Building Act 2004)	The Building (Dam Safety) Regulations 2008 prescribe the criteria for dam specification and came into force on 1 July 2012. This legislation operates under section 161 of the Building Act 2004, which requires regional councils to adopt a policy on dangerous dams.
Camping Grounds Regulations 1985 (Health Act 1956) Ministry of Health	Local authorities are required to enforce the provisions of the Regulations within their district, and to inspect camp grounds. Local authorities are also authorised to conduct regular inspections of relocatable homes.
Food and Hygiene Regulations 1974 (Health Act 1956 and the Food and Drug Act 1969) Ministry of Health	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.
NPS Coastal Policy 2010	The National Policy Statement (NPS) on Coastal Policy 2010 is designed to guide local authorities in their management of the coastal environment. The document states policies in order to achieve the purpose of the RMA with respect to New Zealand's coastal environment.
NPS for Freshwater Management 2011	The NPS for freshwater management provides a guide to councils on achieving national objectives for water management through regional policy statements and plans.
NPS for Renewable Electricity Generation 2011	The national policy statement on renewable electricity generation covers the construction, operation, maintenance and upgrading of new and existing structures for renewable electricity generation.
NPS on Electricity Transmission 2008	The national policy statement on electricity transmission requires local authorities to give effect to its provisions in plans made under the RMA.
Resource Management (National Environmental Standards for Assessing and Managing Contaminants in Soil to	These Regulations provide a national environmental standard for activities on pieces of land whose soil may be contaminated in such a way as to be a risk to human health. The activities are removing or replacing a fuel storage system, sampling the soil, disturbing the soil, subdividing land and changing the use of the piece of land. The activities are classed as permitted activities, controlled activities, restricted discretionary activities, or

Secondary legislation	
Secondary Legislation - Enacting (primary) legislation - Agency	Regulatory responsibilities of local government
Protect Human Health) Regulations 2011	discretionary activities.
Resource Management (National Environmental Standards for Electricity Transmission Activities) Regulations 2009	These Regulations provide national environmental standards for electricity transmission. The Regulations categorise activities that relate to the operation, maintenance, upgrading, relocation, or removal of existing transmission lines. Activities are categorised as permitted activities, controlled activities, restricted discretionary activities, non-complying activities, or discretionary activities.
Resource Management (National Environmental Standards for Sources of Human Drinking Water) Regulations 2007	The National Environmental Standard for Sources of Human Drinking Water requires regional councils to take the effects on drinking water quality into account when granting water permits or discharge permits; and including or amending rules in a regional plan in relation to permitted activities. Regional councils and territorial authorities are also required to impose a notification requirement on certain resource consents if a specific event occurs that may have a significant adverse effect on a drinking water source.
Resource Management (National Environmental Standards for Telecommunications Facilities) 2008	These Regulations provide national environmental standards for telecommunication facilities. The standards relate to the radiofrequency fields of all telecommunication facilities and the dimensions and noise levels of telecommunication facilities in road reserves.
Resource Management (National Environmental Standards Relating to Certain Air Pollutants, Dioxins, and Other Toxins) Regulations 2004	These Regulations set out 14 standards. The NES prohibits certain activities that discharge significant quantities of atmospheric toxins; sets five standards for outdoor air quality; establishes a design standard for wood burners in urban areas; and requires greenhouse gas (methane) emissions to be collected and destroyed at landfills over 1 million tonnes of refuse.

3 Pressures and challenges

Key points

- Local authorities undertake complex regulatory roles in an increasingly challenging environment. The main pressures acting on local government in performing their regulatory functions are:
 - population growth in some local authorities (posing difficult trade-offs between different priorities for the use of resources) and population decline in other local authorities (posing challenges in undertaking regulatory roles due to shortfalls in capability);
 - increasing diversity and greater community expectations, which present difficulties for local authorities in reconciling different community interests and making decisions;
 - a steady stream of new statutes over the last decade affecting local government regulatory activities to varying degrees;
 - a greater need for more technical information and technical skills in order to make decisions relating to environmental pressures; and
 - risk of exposure to legal challenge for losses where a duty of care is owed in undertaking regulatory responsibilities.
- Alongside pressures on councils, there are important regulatory cost pressures on business that impact on productivity and profitability, and ultimately the economy. These include:
 - compliance costs of meeting regulatory obligations;
 - delays in obtaining responses from local authorities and holding costs associated with sequencing of multiple regulatory requirements and decisions by local authorities; and
 - wider economic costs that are incurred from regulation that distorts productive behaviour of individuals and businesses. These are often hidden, as projects are not undertaken, or are undertaken at a smaller scale than they would have been.
- The Commission's survey of business showed that almost three quarters of businesses had at least some contact with local government through the regulatory process. Of those that did:
 - 39% report that local government regulation places a significant financial burden on their business; and
 - nearly half of respondents thought the time and effort involved in complying with local authority regulations is too large, and 70% of respondents were dissatisfied with the fees charged.
- When there is pressure on the regulatory system, there is a greater risk of poorer regulatory outcomes, and costs could be higher than they need be to achieve the regulatory outcomes desired. New Zealand's regulatory system therefore needs to be strong enough to be able to respond to these pressures.

Chapter 2 described how local government responsibilities have developed over time. This chapter focuses on the pressures faced by local authorities in undertaking their regulatory responsibilities, and the impact of local regulation on people, business and the economy. Understanding these pressures is important for the design of the regulatory system. The challenge is to design a regulatory system that achieves the greatest net benefit from regulation. To do so, the regulatory system needs to provide regulatory institutions with the tools and processes to meet the pressures and challenges of delivering quality regulation in a rapidly

changing environment. See Chapter 8 for discussion of local decision-making processes and Chapter 12 for discussion of institutions.

3.1 Local government pressures

Population growth and decline

Population growth and decline present particular regulatory challenges. There is significant variation across local authorities in the projected annual rates of population growth or decline (Figure 3.1), and regions that are expected to grow will face different regulatory challenges than those expected to decline.

Local authorities experiencing declining populations face reducing rates income and capability challenges. Such authorities may not have the capability to undertake the full range of regulatory functions or they may face high costs for the expertise needed. Rangitikei District Council notes that for smaller councils, expertise typically lies in a smaller number of staff and this “can easily lead to dependency on external advisers, resulting in higher costs and no development of internal capability” (sub. 35, p. 4). Horowhenua District Council notes that local authorities can struggle in their service delivery because of geographic isolation and the difficulty in attracting suitable resources (sub. 42, p. 3).

Local authorities with growing populations face different challenges. For example, they must balance land and water use and they may come under pressure to speedily consider and process resource consents. Local authorities with fast growing populations also face the challenge of providing enough brownfields or greenfields land in their districts for residential housing (Box 3.1).

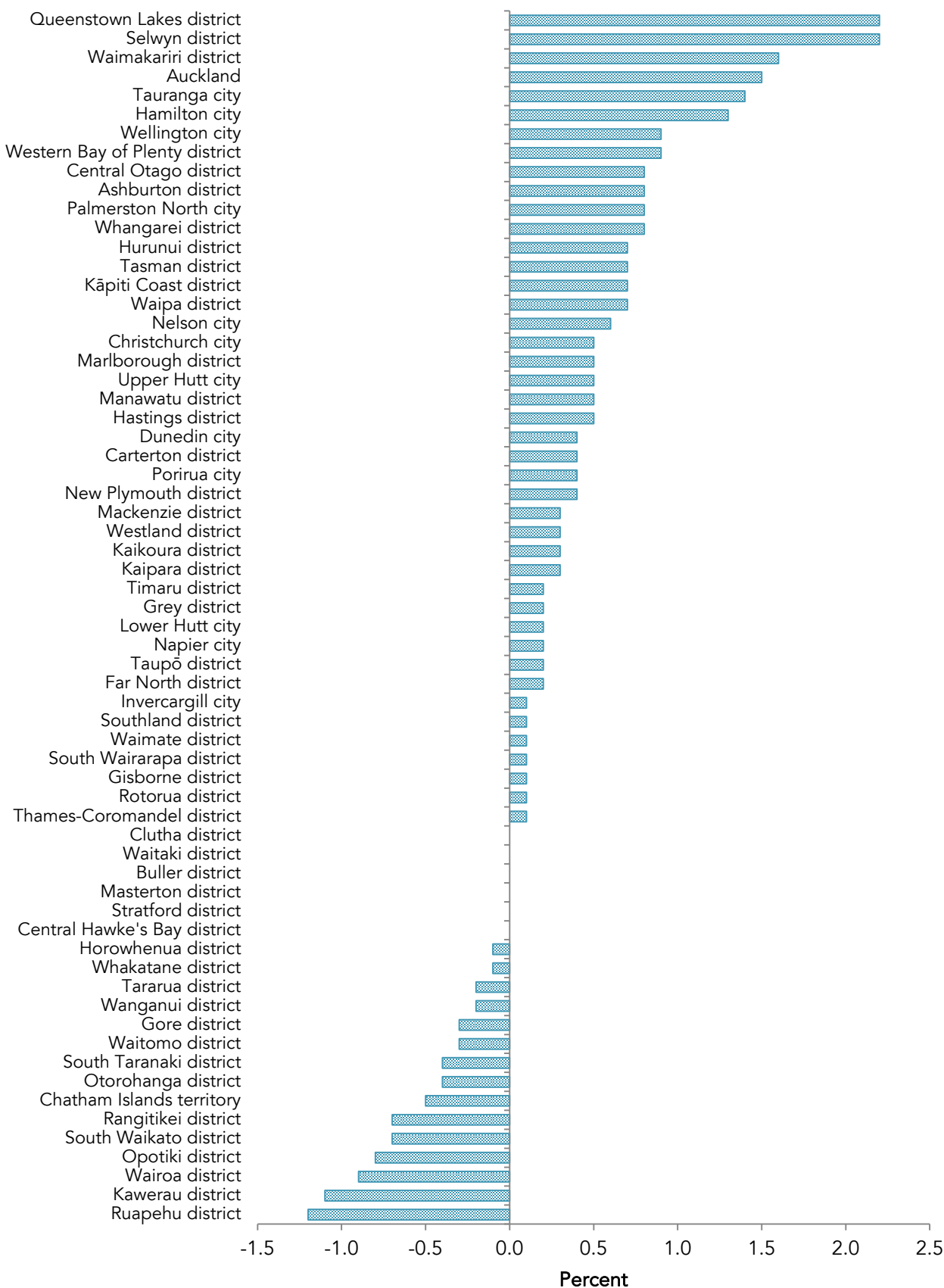
Such authorities must make difficult trade-offs between priorities for land use and other resource use. These trade-offs are made more difficult by the different priorities and preferences of their communities regarding the shape of their growing cities. Some ratepayers may have a strong preference for the status quo, which can add to the challenge of adapting to growing populations.

Growth also changes the nature of demand for council services. The Waikato Regional Council notes that “increasing pressure on water supplies, high class soils, air quality, wastewater and waste management infrastructure is likely” (sub. 45, p. 29). Rangitikei District Council observes that “increasing urban concentration is likely to mean an increased demand for regulatory services, to settle conflicting uses of property and behaviours” (sub. 35, p. 1).

F3.1

Different regulatory challenges are faced by regions experiencing population growth compared to regions experiencing population decline. Local authorities experiencing population decline face less demand for regulatory services, and may have difficulty undertaking their ‘service delivery’ regulatory roles due to shortfalls in capability. Local authorities that are growing may face difficulties in making trade-offs in reconciling the different priorities for the use of resources.

Figure 3.1 Projected average annual population growth by territorial authority, 2006-2031



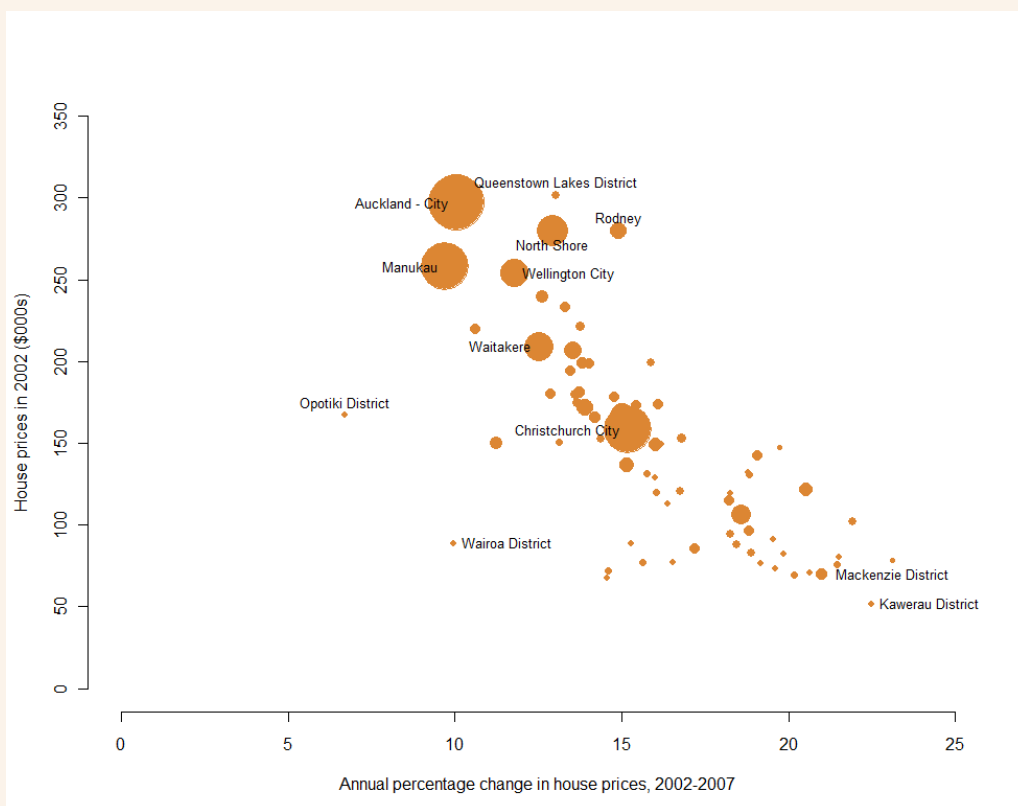
Source: Statistics New Zealand, 2012a (medium population projections).

Box 3.1 Population pressure and the demand for more residential land

Real house price increases during the housing boom of the 2000s varied markedly across territorial authorities, ranging between 70% and 240%. Although house prices across the country tended to converge during the boom, there were some important exceptions. In the Queenstown Lakes District and metropolitan areas in Auckland and Wellington, houses were among the most expensive in the country in the early 2000s. However, these regions still experienced strong real house price appreciations over the boom, suggesting that demand pressure, and therefore pressure on the territorial authority to zone land for residential housing, was much greater than in other parts of the country.

Figure 3.2 plots the average house prices in different local authorities in 2002 on the vertical axis, against the average annual percentage change of these house prices from 2002 up to 2011. The size of the dots indicates the relative size of the population of a local authority.

Figure 3.2 Changes in real house prices, 2002-2011



Source: Productivity Commission calculation based on Quotable Value data.

Notes:

1. The Auckland Council has taken over the functions of the Auckland City Council, Manukau City Council, Waitakere City Council, North Shore City Council, Papakura District Council, Rodney District Council and most of Franklin District Council.

This figure illustrates that while the average annual percentage growth in house prices in Auckland was not as great as in other local authorities like the Mackenzie District, the growth was around 10% which was still quite significant. As Auckland is home to more than a one third of New Zealand's population, and around 30% and 40% of its housing stock by number and value respectively, it is not surprising that the impact of house prices and housing affordability—and the Council's spatial planning response—has become a national issue.

Increasing diversity

Diverse communities imply diverse needs. New Zealand's communities have diverse cultures, age profiles, interests and expectations of local government. This poses challenges for local authorities and the way in which they engage and consult with people on the issues that affect them.

Many local and regional communities are changing in their ethnic composition. For example, the Waikato Regional Council notes the increasingly multicultural and diverse nature of the Waikato regional population, with European, Māori, Asian and Pacific populations increasing by 0.5%, 1.3%, 3.9% and 3.1% respectively per year. Increasing ethnic diversity may increase the need for new ways to communicate with and involve local groups (sub. 45, p. 30).⁵

Although New Zealand is experiencing population ageing, there are marked differences in the age profiles of local authorities (Appendix B: Figure B.6). Māori and Pasifika populations tend to have higher levels of growth due to natural increase, so areas with relatively higher Māori and Pasifika populations tend to be younger on average. Other local authority areas are experiencing ageing at a greater rate as a result of population out-flows, as younger people leave the area in search of employment opportunities, or an in-flow of retirees moving closer to family and to 'retirement-friendly' locations. Whangarei District Council commented that population ageing was "especially evident and prominent in provincial or rural areas" (Whangarei District Council, sub. 10, p. 2).

Changing age profiles drive changing expectations and ways of communicating. Older people are likely to have different priorities from younger people and may have different expectations about the role of local government. At the same time, the advent of the internet and social media mean that younger people communicate in quite different ways (though many older people are also adept at these new forms of communication).

Community expectations

Community expectations of local government are increasing. Local councils report that there is pressure from communities for better local services, including regulatory services. Many communities are increasingly expecting local councils to deal with social issues such as alcohol abuse and associated crime. Waikato Regional Council notes:

Already there is pressure for better drinking water [and] reduced congestion on roads... In some cases this may also result in increasing demands for being involved in decision making. This is likely to be particularly the case at the territorial authority level as people wish to become more involved in local 'place shaping'. (sub. 45, p. 31)

Councils are increasingly using the regulatory and planning tools available to them in dealing with these issues and Parliament has given local authorities more tools to do so, such as the ability to develop Local Alcohol Policies. However, the challenge for local authorities and central government agencies is to coordinate joined-up initiatives that are located in specific communities. In this, councils could be expected to take on a coordinating role with central government agencies and local communities.

Additionally, submissions note that Treaty settlements and the growing influence of Māori present a challenge and opportunity for local authorities. Rotorua District Council notes "the growing role of iwi in the community as a legal perpetual land owner, significant natural economic resource owner, investor and environmental custodian" (Rotorua District Council, sub. 11, p. 7).

The submission from Civic Futures presents a useful summary of the effect of social changes on regulation:

Changes in ethnicities, age distributions and life expectancy are likely to have a range of influences, including shifts in societal norms; calls for different things to be permitted, prohibited or controlled; and different perceptions of risk and who should bear this. (Civic Futures, sub. 7, p. 3)

⁵ Ethnic composition in turn affects population growth patterns in urban territorial authorities. For example, Māori and Pasifika populations tend to have higher levels of growth due to natural increase, which can contribute to higher levels of overall population growth in local authorities with relatively higher Māori and Pasifika populations. In addition, international migrants tend to settle in main urban areas, predominantly Auckland, Christchurch and Wellington (Productivity Commission, 2012a, pp. 71-72).

F3.2

Increasing diversity and greater community expectations present difficulties for local authorities in reconciling different community interests and making decisions.

Continuous flow of new regulation

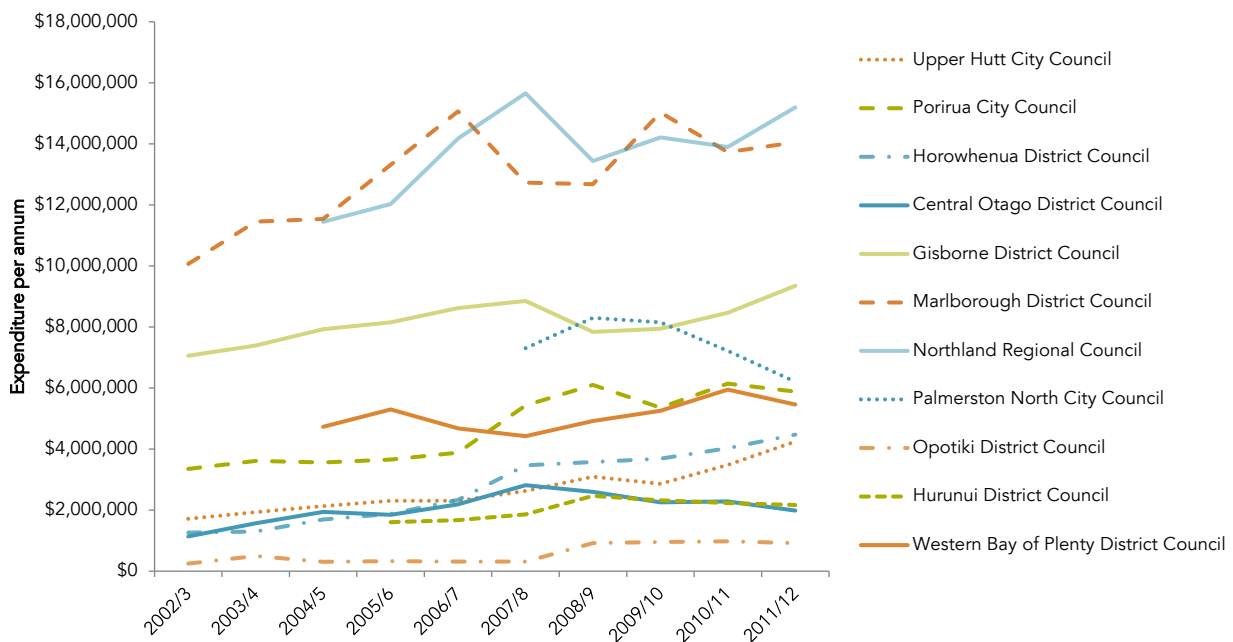
Inquiry participants from local government were consistent and persistent in their concerns about the amount of legislation resulting in increasing regulatory duties and driving up regulatory expenditure (see, for example, Local Government New Zealand [LGNZ], sub. 49, p. 20).

The Commission reviewed the amount of legislation passed by Parliament that has affected the conduct of local authority regulatory functions over the last decade. This confirmed an increase in local government regulatory responsibilities. The review indicated a steady stream of new local government regulatory responsibilities or modifications to existing responsibilities over the last decade.

However, the analysis of how new statutes affect or potentially affect local regulatory activities needs to be treated with some caution. It is very difficult to categorise the new statutes into those which created significant new regulatory workloads and those which required little change to existing regulatory processes.

In addition, despite the stream of new statutes, there does not appear to have been a significant increase in regulatory expenditure within local authorities in the last 10 years. Instead, the trend in regulatory expenditure has varied across local authorities and, in some authorities, there have been modest expenditure decreases (Figure 3.3).

Figure 3.3 Annual expenditure on regulatory activities of selected local authorities, 2002/3 to 2011/12



Source: Local authority annual reports for the years 2002/03 to 2011/12.

Notes:

- There is no consistent regulatory expenditure category across councils. Each line in this graph represents a set of activities, and each set of activities is grouped in a different way to other local authorities. As a result, it is not possible to make direct comparisons between councils. Instead, the value of this graph is in providing a general indication of the broad trend of regulatory expenditure across local councils.
- Activities included in the graph: Upper Hutt City Council "Planning and regulatory services", comprising city planning, environmental health, building control, animal control and parking enforcement); Porirua District Council "Environmental management", comprising environment and city planning, district plan administration and monitoring, building compliance, environmental standards and animal control; Palmerston North animal control, building control, land administration, public health, resource consents, city planning, urban design, environmental protection and planning; Horowhenua District Council "Environmental Services", comprising district planning, health and safety licencing, building control, animal control and parking enforcement; Central Otago District Council "Environmental Services", comprising dog control and registration, liquor licencing, environmental health (incl. food), building control, planning, Clutha Resource Consents and abandoned land; Opotiki District

Council animal control, regulatory, environmental and development management, liquor, building control, noise control, health inspection, dangerous goods and regulation and inspection; Hurunui District Council resource management and planning, building compliance, public health and liquor licencing and animal control; Western Bay of Plenty District Council resource management, environment protection, district plan implementation, building and health, animal control and 'other'; Northland District Council resource management planning, consents, environmental monitoring, land and rivers and maritime operations; Grey District Council animal control, building, conservation, environmental health and environmental planning; Marlborough District Council environmental policy, biosecurity, environmental science and monitoring, environment monitoring, resource consent, building control, environmental health, environmental protection, land memoranda, animal control, harbours, compliance section, public consent information, legal section and hearings.

F3.3

There has been a steady stream of new statutes over the last decade, affecting local government regulatory activities to varying degrees.

Pressure on the physical environment

As the Waikato Regional Council notes, "the complex inter-relationships between the economy and the environment will need to be well managed, including through appropriate regulation" (sub. 45, p. 35). Councils will have to contend with future demands on the environment from housing development and intensification of agriculture, as well as the potential opening up of access to mineral resources and the development of new energy sources.

Councils also have to deal with the impact of the environment on the community. The Canterbury earthquakes illustrate the potential for catastrophic and long-lasting impacts from natural events. In a different vein, councils with long coastlines face "continuing coastal erosion and other natural hazards that will be exacerbated by climate change" (Department of Conservation, 2010).

Environmental pressures create challenges for the way councils set, monitor and enforce regulations. A number of regional councils have experienced major changes in land usage, particularly those areas that have experienced growth in dairying. This has resulted in pressure on councils around consenting, monitoring and enforcing rights to use and discharge water. Fonterra considers that "water quality and quantity issues are arguably the main policy trend likely to affect local government regulatory functions and the primary sector" (Fonterra, sub. 29, p. 4).

Environments are complex systems and technical know-how is becoming more important in their management. Local authorities are having to commission or undertake technical modelling and interpret complex information in making decisions relating to environmental impacts. Examples include the Taranaki Regional Council report on the hydrogeological risk of fracturing for gas recovery (2011) and the Kāpiti Coast District Council's Shand Report on erosion hazard (2012). As a result of these technical demands, the Waikato Regional Council notes the need for credible experts on a variety of issues and argues that communities need good access to such experts (sub. 45, p. 35).

Future environmental scenarios are also uncertain, which poses a challenge for planning future regulatory needs. For example, recent Ministry for the Environment (MfE) advice to local government on preparing for climate change notes that "there is much uncertainty about the extent of climate change and about social, economic and environmental change", and argues for the need to consider a range of possible futures when assessing climate impacts (MfE, 2008a, p. 32).

F3.4

Councils making decisions with environmental implications increasingly need access to:

- technical information and skills in interpreting technical information;
- methods of modelling uncertain scenarios; and
- skills in engaging with communities and stakeholders on technical issues.

Exposure to legal challenge

There is a perception that local authorities face an increasing risk of legal challenge in undertaking their regulatory responsibilities. This is likely to be due, in part, to the increased number of new regulations, the increasing complexity of the regulatory responsibilities local authorities are required to undertake, and perhaps a greater willingness on the part of individuals and businesses to challenge the regulatory decisions that affect them.

As identified in Chapter 2, local authorities must act in accordance with the law and are subject to the jurisdiction of the courts and tribunals for how they exercise their powers. Local authorities are subject to judicial review, and the courts also hear appeals against local authorities' decisions under various statutes. Local authorities are accountable through civil liability in damages for wrongs they do. Under tort law, a party can be held liable if it owes a duty of care to the claimant, if the failure to take care caused the damage, and if the damage caused the loss to the client and the loss was foreseeable. All of these elements need to be established for a claim to be upheld.

The most high profile and costly cases where local authorities have been found negligent and liable for the losses caused, are the cases taken against territorial authority Building Consent Authorities (BCAs) that issued compliance certificates for residential buildings that have subsequently have been found to be defective (Box 3.2).

Councils also owe a duty of care when it comes to the information placed on Land Information Memorandum (LIM) reports. A recent Supreme Court decision, *Marlborough District Council v Altimarloch Joint Venture Limited and Others* [2012] NZSC 11, confirmed the duty of care owed by the Council in respect of mandatory LIM material, leaving councils open to claims for losses as a result of the council negligently providing incorrect information.

The risk of legal challenge is of increasing concern to councils, especially when faced with new regulatory responsibilities. For example, the Resource Management (National Environmental Standard for Assessing and Managing Contaminants in Soil to Protect Human Health) Regulations (2011) took effect in January 2012. The new requirements are legally binding on local government, and territorial authorities will need to adjust their processes to manage contaminated land. LGNZ received a legal opinion from its lawyers about the risk of council liability from the requirements of the new National Environmental Standard (NES). The advice notes that:

Civil liability in negligence or breach of statutory duty, where some action or inaction on the part of the Council causes loss, is perhaps the most obvious legal risk to territorial authorities as a result of the NES. (Simpson Grierson, 2013, p. 4)

The advice suggests that updating council information about contaminated soils, and combining relevant information from sources such as dangerous goods files, property files and resource consent databases, would be prudent. This appears to be an example of where new regulatory responsibilities impose a risk of liability to councils and a significant work load in an attempt to mitigate it.

Box 3.2 Building control regulation

Performance-based regulation

In the early 1990s, New Zealand moved away from a very prescriptive building control regime to a more performance-based regime. The aim was to allow for innovation that could improve the quality and lower the cost of building. The new building compliance regime specified minimum performance criteria for building work, that might be achieved in various ways, but which would ensure the health and safety of building occupants. Performance-based regulation requires the skills and capabilities to assess new building methods and products by those responsible for consenting and inspecting new buildings.

Leaky homes

In 2002, problems with leaking and rotting became evident in houses that were constructed in a 'Mediterranean style' using monolithic cladding over untreated timber framing (an innovative building approach at the time). The new type of design (which did not have eaves) relied on careful construction to avoid rain water, driven by wind, penetrating the outer envelope (and escaping if it did). Between 22,000 and 89,000 homes built between 1992 and 2005 may have been affected but a consensus view puts the likely figure at 42,000 homes.

Capability

The Hunn Committee established in 2002 to investigate the problem reported that the majority of building officials employed by territorial authorities and building certifiers had trade backgrounds with years of practical experience on site as a builder or related trade. However, the level of knowledge of science and technology needed under the new Building Act and the Building Code meant that experience may not have been adequate in the new regulatory environment.

Civil action for damages

Territorial Authority Building Consent Authorities (BCAs) issue compliance certificates, which verify that the building work complies with the Building Code. If the building is subsequently found to be defective, a homeowner can take a civil action against parties for damages. Such a claim was upheld in a case against Invercargill City Council (*Invercargill City Council v Hamlin* 1994 [1994] 3 NZLR 513), which established the precedent for claims against BCAs by homeowners with leaky building syndrome. Recently, a majority of the Supreme Court (Chief Justice Elias and Justices Tipping, McGrath and Chambers) in *Body Corporate No. 207624 v North Shore City Council* [2012] NZSC 83 held that the council owes a duty of care to the owners of all buildings, irrespective of whether the buildings are residential or non-residential, in relation to its statutory functions.

Joint and several liability

In the case of leaky buildings, other parties such as builders and building designers can also be found negligent and held liable. However, the risk faced by BCAs is compounded by the rule of joint and several liability⁶, which potentially exposes them to the full costs of remediation where building work is subsequently found to be defective. Under joint and several liability, the plaintiff may collect from all or any one of the liable parties until the judgment is paid in full. If any of the liable parties do not have enough money or assets to pay an equal share of the award, the others must make up the difference – the BCAs become, in effect, 'the last man standing'. The issue for territorial authority BCAs is that because they have the power to levy rates, they have 'deep pockets', relative to other parties, to meet claims for defective buildings, while the typically small firms in the building industry do not.

Source: Hunn, Bond and Kernohan, 2002; Productivity Commission, 2012a.

⁶ The Law Commission has been asked to review the joint and several liability rule, and to consider alternatives, and has released an Issues Paper on this topic (New Zealand Law Commission, 2013).

F3.5

Local authorities have an acute and increasing awareness the risk of exposure to legal challenge for losses where a duty of care is owed in undertaking their regulatory responsibilities.

3.2 Cost pressures on business and the economy

Ineffective regulation can impose excessive and unintended costs

Chapter 1 described the important role of regulation in safeguarding wellbeing, but warned of the costs of excessive and ineffective regulation. Poorly conceived regulatory arrangements not only fail to achieve stated objectives, but also impose excessive and unintended costs that can undermine the very purpose of regulatory intervention. Such costs affect business productivity and profitability, and ultimately economic performance.

In addition to administrative costs for councils, the most significant costs of regulation, as they relate to the New Zealand economy, are the compliance cost on business and the potential for regulations to distort the behaviour of individuals and businesses (Box 3.3).

Box 3.3 Regulatory costs

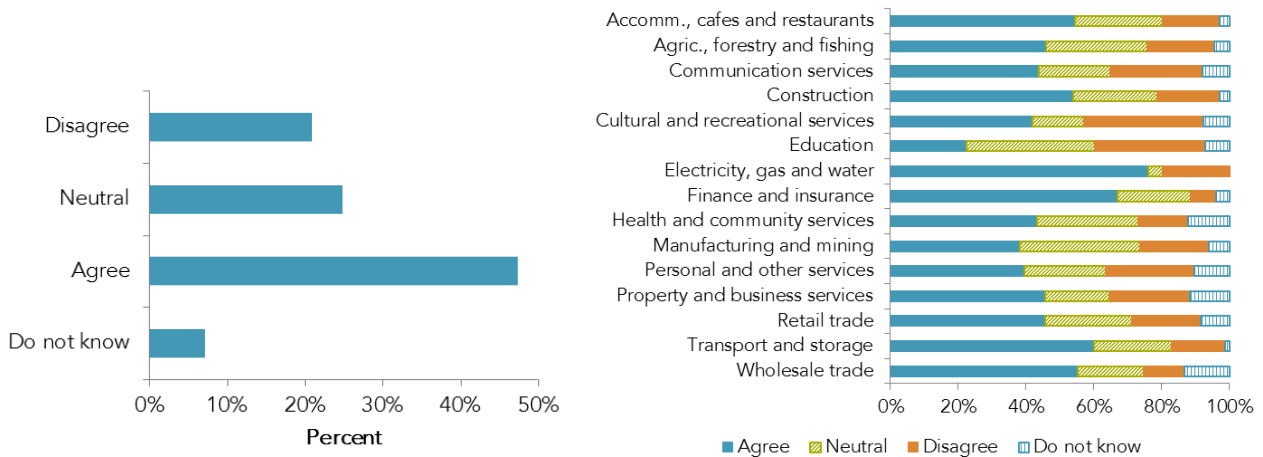
There are three main types of costs associated with regulation.

- *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. Time is required to keep up to date with new regulatory obligations, and small businesses in particular may struggle to comply with increasing or changing regulatory requirements. 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.

Business survey feedback on regulatory costs

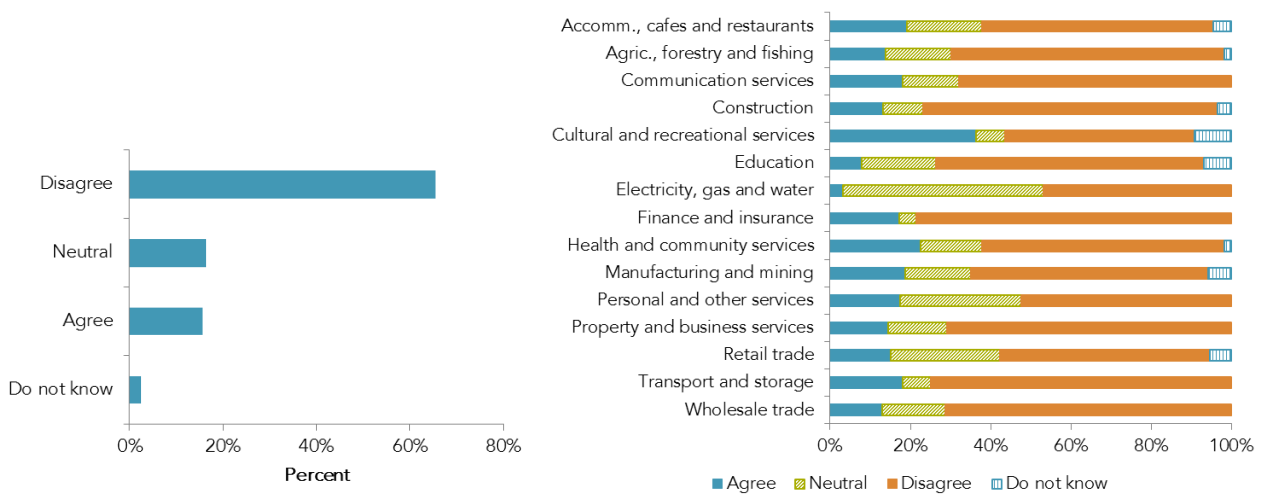
Businesses surveyed by the Commission reported a concern with local regulatory costs. Almost three quarters of these businesses had at least some contact with local government through the regulatory process over the past three years. Of those that did, 39% report that local government regulation places a significant financial burden on their business. Nearly half the respondents thought the time and effort involved in complying with local authority regulations is too large (Figure 3.4) and 70% were dissatisfied with the fees charged (Figure 3.5).

Figure 3.4 Survey result: The time and effort to comply with council regulation is too large



Source: Productivity Commission, 2012b.

Figure 3.5 The fees charged by the council for regulatory functions were reasonable



Source: Productivity Commission, 2012b.

For some businesses, the compliance costs associated with regulatory requirements can be substantial. Airfoam Wall Insulators notes in its submission to the inquiry that compliance costs “vary enormously from council to council, in some cases adding 50% to the cost of our process for an entire home” (Airfoam Wall Insulators, sub. 46, p. 1).

The cost of regulatory compliance can also have an impact on the compliance behaviour of businesses. LGNZ notes that the cost of compliance “leads to activity being undertaken which is non-compliant” and considers that “affordability is a major factor which influences the ability of local government to maintain a high level of compliance in the regulatory environment” (LGNZ, sub. 49, p. 7).

There was a particularly strong negative reaction to the costs issue from the electricity industry. This may in part be explained by the fact that, as infrastructure providers, lines companies are designating authorities under the Resource Management Act 1991 (RMA), and can require land to be zoned for their purposes. Appeals against these designations are seldom successful, but are resource intensive. The Commission was told by one lines company that 50% of the cost of a new substation can be the resource consent, despite it being a designating authority. The Electricity Networks Association noted that “the time taken before new plans and plan changes become operative can be problematic, and can lead to uncertainty in applying for resource consents and designations” (sub. 12, p. 2).

Businesses raised the holding costs associated with delays in obtaining responses and decisions from local authorities as an important issue. An example of holding costs is where a business purchases a piece of land

for \$1 million to build a new factory, and the RMA process takes two years instead of one year. The business bears the cost of holding the land (for example, interest charges, opportunity cost and lost potential revenue for an extra year). Holding costs can be much larger than council fees and other costs. Holding costs were also a theme in the Commission's recent housing affordability inquiry (Box 3.4).

Box 3.4 **Lessons from the housing inquiry: time delays, uncertainty and complexity**

The Commission's 2012 inquiry report into housing affordability noted that the slow pace at which land for housing is planned, zoned and released contributes to the high price of sections and thereby house prices. The inquiry report considered that holding costs incurred on land waiting for re-zoning or consenting puts pressure on section prices on the one hand, and speed to the market influences the viability of development.

A submission to the housing inquiry commented that:

[Councils] do create unnecessary costs, whether it be in fees but also it is the delays in getting the various Consents ... opportunity costs in some cases have been over \$1,000 per day. (Carrus Corporation, housing inquiry sub. 8, p. 9)

Fletcher Building submitted that the extra information that was required by local authorities was costly for no discernible benefit:

Significantly more information is now supplied to local authorities than was previously required. This adds administrative costs to the land development and residential construction process. This increased information does not appear to have had a corresponding improvement in the quality of housing stock and its environment. (Fletcher Building, housing inquiry sub. 21, p. 7)

The key lesson is that costs associated with providing information, administrative costs and delays in obtaining the necessary consents, are an important issue for business.

Source: Productivity Commission, 2012a, p.119.

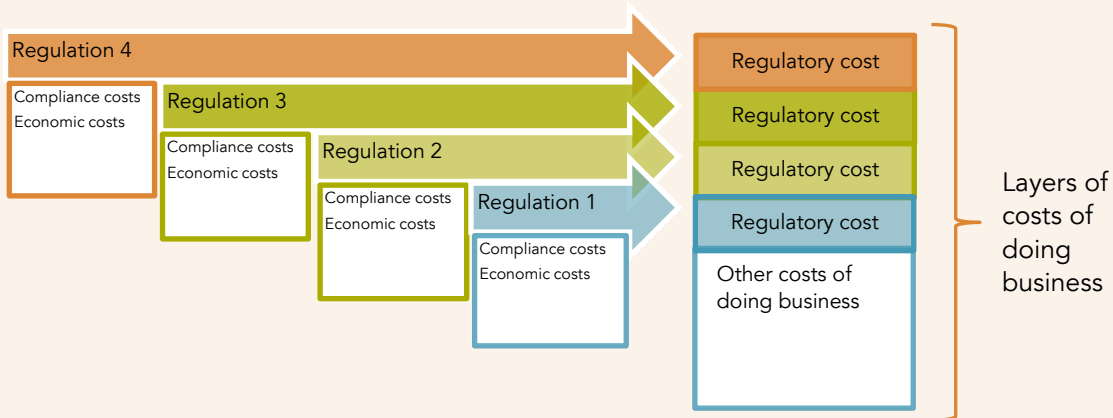
When dealing with multiple regulations, sequencing costs can also be important. Sequencing costs arise when a business has to wait for one approval before it applies for another. For example, a bar may have to invest in a fit-out of its premises in order to obtain a building consent, before it can then apply for a liquor licence. If the liquor licence is declined, the business may have incurred costs that cannot be recovered (sometimes called 'sunk costs'). The need to obtain approvals in a sequence can also result in holding costs and make investing risky. It is therefore important that the different regulations applying to the same business activity are well-aligned. Understanding the regulatory process from the customer's point of view is important in keeping compliance costs to a minimum and needs to be considered in regulatory design (Box 3.5).

Many businesses also encounter additional costs in dealing with multiple councils. Costs that arise from inconsistent regulation across councils can be significant and frustrating for businesses (see Chapter 9).

Box 3.5 The cumulative impact of regulation

When a new regulation is introduced, it will add to the regulatory costs already being met by businesses (Figure 3.6). It is therefore important that the cumulative impact of adding to the existing stock of regulation impacting on businesses is considered as part of regulatory design processes.

Figure 3.6 The cumulative effect of regulations on businesses



It is important to note that not all of the compliance costs of regulation arise from local authority processes. The Commission's engagement process indicated that, at least for resource consents, the costs and delays involved in the process can have less to do with local authority processes, and more to do with the ability of applicants to generate sufficient evidence about the likely effects of their application. The time taken to produce robust evidence on effects was therefore the real constraint on speeding up the resource consenting process, rather than local authority efficiency.

F3.6

Delays in obtaining responses from local authorities, and the sequencing of multiple regulatory requirements and decisions by local authorities, can impose substantial holding costs on business.

3.3 The challenge of a regulatory system that responds to pressures

Local authorities undertake complex regulatory roles in an increasingly challenging environment. When there is pressure on the regulatory system, there is a greater risk of poorer regulatory outcomes, and costs could be higher than they need be to achieve the regulatory outcomes sought. A robust regulatory system needs to provide regulatory institutions with the tools and processes to meet the pressures and challenges of delivering quality regulation in a changing environment. Key questions for this inquiry are:

- Are there weaknesses in the way in which local authorities undertake their regulatory functions that could be improved?
- How can the overall regulatory system be improved to help local authorities effectively undertake their regulatory roles?

Addressing these questions will not only help ensure that local authorities are able to meet the challenges and pressures in undertaking their regulatory responsibilities, it should help ensure that regulations are designed and implemented well to deliver important social, environment and economic goals.

4 Assessing the regulatory system

Key points

- The Commission has identified a number of weaknesses in the regulatory system. Some of these weaknesses stem from shortcomings in the regulatory design process at the central government level. Others stem from the way regulation is implemented and administered by local government. There are also generic weaknesses within the regulatory system as a whole.
- Weaknesses at the central government level include poor options analysis, a lack of quality engagement with local government during policy development and limited implementation analysis.
- These weaknesses are compounded by quality assurance processes that are only partially effective, and by reduced incentives on central government agencies to undertake rigorous policy analysis when political and fiscal costs are (in part or full) transferred to local authorities.
- While decision-making processes used by local government are generally adequate, considerable room for improvement exists – there could be better tailoring of regulatory objectives to local conditions, consideration of a broader range of options and better account taken of implementation issues.
- The single biggest issue businesses have in their dealings with councils is perceived inconsistency in the application and administration of regulatory standards. Businesses perceive variation to be as common in regulatory areas with national standards as in areas where councils have a level of autonomy and discretion to tailor responses to local conditions.
- Councillors can sometimes become inappropriately involved in regulatory decisions.
- The statutory requirement for notified resource consent applications to be heard by independent hearings panels (if requested by an applicant), combined with the limited ability of councils to reject the recommendations of such panels, diminishes councillors' ability to 'own' and be accountable for resource management decisions.
- The level of monitoring and enforcement activity that is occurring at the local level is inadequate in some areas, and councils lack the appropriate enforcement tools to achieve regulatory outcomes.
- Issues with the quality of analysis and decision making, concerns in the business community about inconsistencies in the way regulations are administered, and the problems identified with monitoring and enforcement, may signal underlying capability weaknesses.
- The inquiry has uncovered a number of broader weaknesses in the regulatory system.
 - Performance reporting and post-implementation reviews provide few feedback loops to assist councils to improve the way they deliver regulatory functions.
 - There are questions around whether or not the current systems for including Māori in decision making rely too heavily on a level of capacity that often is not available in Māori organisations. If the system is reliant on participants possessing a level of capability and capacity that they do not have, then the desired outcomes are unlikely to be achieved.
 - There is a poor relationship and interaction between central and local government. This is having a detrimental impact on New Zealand's regulatory system.
- If regulatory outcomes are to be improved, then a more productive relationship and interface is needed between central and local government.

4.1 Good processes are needed for good regulations

The health of local economies and the wellbeing of the communities they support are affected by the quality of regulations and the manner in which those regulations are administered. Well-functioning regulatory systems will result in regulations that promote wellbeing through, for example, protecting the community from unwanted environmental degradation, anti-social behaviour or health risks. Moreover, these benefits will be achieved at the lowest possible cost to those being regulated.

To fully understand the regulatory performance of local government, the Commission has sought to understand how well the regulatory system is functioning as a whole. The aim of this ‘whole-of-system’ approach is to enable a fuller understanding of where improvements could lead to better outcomes from regulation—both in terms of the benefits they deliver and the costs they impose on society. As Hawke’s Bay Regional Council notes:

We believe that in looking towards better local government regulatory performance it is necessary to look at the performance of regulation across the whole system...There is no desire to point blame at different parts of the system, but to assess and review its efficiency as a whole and look for improvements in all parts of the regulatory system (including at central government level) which will have the outcome of improving the regulatory performance of local government. (DR. 67, p. 2)

This approach is consistent with the recommendations of the Organisation for Economic Co-operation and Development’s (OECD) Council on Regulatory Policy and Governance which states that governments should:

Adopt an integrated approach, which considers policies, institutions and tools as a whole, at all levels of government and across sectors... (OECD, 2012, p. 6)

And that,

Regulators should be encouraged to see themselves as part of an integrated system of regulation and to work together and learn from each other. The first step is to improve awareness of the complexity in the regulatory system... (p. 30)

This chapter begins with an overview of the regulatory system. It then discusses weaknesses in the regulatory system at three levels—the central government, local government and system-wide level. In assessing the regulatory system, the Commission has assembled evidence from a number of sources. These are listed in Box 4.1.

Opportunities for improving these areas of weakness are discussed in detail in the rest of the report.

Box 4.1 Sources of evidence used to inform assessment of the regulatory system

Evidence for the findings in this chapter has been drawn from a wide range of sources. Taken together, this information provides a compelling basis for the findings in this chapter and the recommendations presented in the following chapters. Sources are as follows:

- the Commission’s local government survey and business survey (see Productivity Commission, 2012b);
- insights gained through the engagement meetings (112 in total) with central government agencies, local authorities, businesses and other stakeholder groups and experts;
- two rounds of stakeholder submissions (120 received);
- advice from a reference panel drawn from experts in the local government sector;
- the Commission’s assessment of six Regulatory Impact Statements (RISs) impacting on local government regulation since 2009 (see Box 4.3);
- previous reviews relevant to New Zealand’s regulatory system, such as external reviews of RISs

commissioned by the Treasury, reports from the Better Public Services Advisory Group (2010), the Review of Expenditure on Policy Advice (Committee Appointed by the Government to Review Expenditure on Policy Advice, 2011), and agency Performance Improvement Framework Formal Reviews conducted by the State Services Commission (SSC, 2012a; SSC, 2012b);

- a review of local government decisions made in the past five years in the areas of land allocation, waste management and minimisation and dog control (Box 4.5); and
- a review of the performance information contained in the annual reports of 14 councils (Appendix F).

4.2 Overview of the 'regulatory system'

The 'regulatory system' is a term used to describe the institutions, principles and processes through which regulations are made, implemented, enforced and reviewed. New Zealand's regulatory system takes shape through the three branches of government – the Executive, the Legislature, and the Judiciary. Together, these three branches of government, and the institutions that support them, are responsible for the formulation and interpretation of statutes and their associated regulations.

The operation of the regulatory system is deeply intertwined with New Zealand's constitution. The constitution provides the fundamental basis for legitimate government. It establishes many of the key institutions of government, the powers of these institutions and (importantly) the principles and processes through which these powers can be exercised to make regulations. In doing so, the constitution provides checks and balances to protect individual freedoms and liberties from undue interference by the State. As the Legislative Advisory Committee (LAC) notes:

... parliamentary democracy should be understood, as it is by the Courts, to be a system of equilibrium between the right of the majority, through Parliament, to make law binding on individuals, and yet a respect for individuals' rights, whether old or new. Parliamentary democracy is not simply the proposition that anything a majority decides must be always right and good. Rather it proceeds upon a presumption that when the majority vote for a law which constrains individuals or takes away any of their freedom of person or property it will only be for a good reason. That good reason may be a judgement that the price of constraining some individuals' liberty and perhaps taxing some of their property or otherwise interfering with their property and goods is a cost which is outweighed by the benefit to the community as a whole. (LAC, 2001, p. 46)

As noted in Chapter 2, New Zealand's constitution is not contained in a single document; rather it is drawn from a number of key statutes, common law principles and constitutional conventions.⁷ More broadly, New Zealand has inherited many of the British traditions of government—most notably the Westminster system of representative government and parliamentary sovereignty. These traditions are encompassed in many of the parliamentary conventions that guide our system of government.

New Zealand has also adopted centuries of British common law rights dating back to the 13th century and the Magna Carta. These fundamental common law rights protecting liberty and property are preserved through the Imperial Laws Application Act 1988 and the New Zealand Bill of Rights Act 1988 (LAC, 2001).

Together these constitutional documents and conventions provide the foundations upon which all regulations are created in New Zealand.

Elements of the regulatory system

The regulatory system can notionally be thought of as consisting of six elements:

- problem identification and policy design and development;

⁷ Constitutional conventions are rules that have become established via frequent use and custom. While some constitutional conventions have been put into statutes, the majority are not enforceable under the law and adherence to them is reliant on people respecting and obeying them (for example, the convention that the Governor-General acts on the advice of his or her ministers).

- Cabinet consideration;
- passing of regulation through the Legislature (via an Act of Parliament) or the Executive (via Executive Order);
- implementation, monitoring and enforcement;
- judicial interpretation and review; and
- performance assessments and post-implementation review.

Each of these is introduced below.

Problem identification and policy design and development

Most regulations have their genesis in the identification of a policy problem. An accurate definition of the policy problem is crucial as it allows the objectives of government action to be clearly stated.

For any given policy objective, there are likely to be a number of potential courses of government action—each with their own advantages and disadvantages. During the policy development process, the relative merits of the options are assessed. This assessment should include the identification of the costs and benefits of each option and an analysis of how the costs and benefits are distributed throughout society.

Consideration also needs to be given to how each option will be implemented and the process for monitoring, evaluating and reviewing the success of government action once it has been implemented. It is during policy development that agencies consider whether a regulatory function is best delivered by local or central government.

Consultation is another important element of policy development. This includes consultation with other government departments as well as groups outside the public sector. The Cabinet Manual notes, “Effective and appropriate consultation is a key factor in good decision making, good policy, and good legislation” (Cabinet Office, 2008, para. 7.24).

To encourage robust policy analysis, Cabinet requires agencies to conduct a Regulatory Impact Assessment (RIA) on all policy initiatives that could potentially create or change legislation or regulations (Cabinet Office, 2008, para 5.71)^{8,9}. Agencies are (by convention) politically neutral and bound to provide honest, frank and independent advice to the government of the day, regardless of the political party in power.¹⁰

Cabinet requires that the findings of the RIA be summarised in a Regulatory Impact Statement (RIS) attached to the relevant Cabinet papers when submitted for deliberation. As explained in the Treasury’s RIA Handbook:

The RIS provides a summary of the agency’s best advice to their minister and to Cabinet on the problem definition, objectives, identification and analysis of the full range of practical options, and information on implementation arrangements. By contrast, the Cabinet paper presents the minister’s advice or recommendation to Cabinet. (New Zealand Treasury, 2009, p. 22)

The Treasury’s Regulation Impact Assessment Team (RIAT) is involved in providing quality assurance of RISs where the proposed regulation is likely to have a significant impact on society, the economy or the environment, or where there is significant policy risk, implementation risk or uncertainty (New Zealand Treasury, 2009). The RIAT provides feedback to Cabinet on whether the RIS meets quality requirements, partially meets the requirements or does not meet requirements. The RIAT has discretion to allow agencies to manage their own quality control of the RIA process where it believes the agency has the capability, expertise and systems in place to undertake rigorous analysis (RIA ‘self-assessment’).

⁸ RIAs are also required if a policy initiative is expected to result in a paper being submitted to Cabinet.

⁹ Exceptions to this requirement exist where the impact of the changes are believed to be small.

¹⁰ The principles under which the public service must act are set out in the Cabinet Manual para 3.50-3.56.

Cabinet consideration

Once a policy has been developed, the responsible minister will raise the proposal to Cabinet for consideration. Ministers submit papers to Cabinet outlining the proposed legislation or regulation, the policy issues that it is addressing and the likely implications of the policy for government finances and the community. These papers are accompanied by a RIS. Most matters that go to Cabinet for a decision (including those dealing with local government regulatory functions) are first considered by one or more Cabinet Committees. The Cabinet Legislation Committee examines all draft bills and regulations before they are approved for introduction to the House or passed to Cabinet for approval. The Committee ensures the policy content has been approved by the appropriate Cabinet Committee, and that the relevant requirements (such as those set out in the Cabinet Manual and the Cabinet Guide) have been satisfied.

Once a bill has been approved by Cabinet it is introduced to the House. Regulations that are made via Orders in Council are sent to the Executive Council for formal approval (see below).

Parliament and Executive Council

Changes to the regulatory functions of local government most commonly occur through either an Act of Parliament or an 'Order in Council'¹¹.

Orders in Council do not go through the parliamentary process; rather they are made when the Governor-General and Cabinet Ministers meet as the Executive Council, and the Governor-General signs the regulation proposed by ministers (Palmer and Palmer, 2004). Regulations made by Order in Council are notified in the *New Zealand Gazette* and generally come into force 28 days after notification¹². They are also reviewed by the Regulations Review Committee—a select committee that assesses the fundamental legal and constitutional principles upon which the Order in Council is made.

The passage of a bill through Parliament consists of three 'readings' and examination by the appropriate subject select committee. Select committees enable members of Parliament to examine issues in greater detail than would be possible within the context of debates within the House. They can also provide the public with an opportunity to comment on proposed legislation and to participate in committee inquiries (Parliamentary Brief: Select Committees, Office of the Clerk of the House of Representatives, 2010).

Once a bill is referred to a select committee, the committee usually has six months to make its assessment and provide a report to the House. The report will include recommended amendments to the bill, and a commentary explaining the recommended changes and the issues it has considered (Office of the Clerk of the House of Representatives, 2006, Parliament Brief: The legislative process).

Implementation

The implementation phase of the regulatory system is when monitoring and enforcement begins. For local authorities, this will involve varying degrees of autonomy to tailor implementation to local conditions.

Judicial interpretation and review

The court system is the primary avenue through which disputes over breaches of regulations are resolved. In fulfilling this function, the courts assign meaning to language used in statutes and regulations. Where ambiguity in the wording of a statute exists the courts will interpret the law in accordance with precedent and their interpretation of the 'intent of Parliament' (LexisNexis New Zealand, 2012).

The courts also play an important role in supervising the exercise of power by the Executive. When a minister, public servant, local authority or tribunal acts in a manner that is outside their powers or in a manner that is not consistent with a fair process, their decision can be reviewed by the court (Palmer, 2004). This is commonly referred to as 'judicial review' of a decision.¹³

¹¹ Regulatory responsibilities of local authorities can also be influenced by other regulatory instruments such as rules and codes.

¹² Instances when the 28-day rule may be waived include where the regulation is made in response to an emergency, where the regulation has little or no impact on the public and where early commencement is necessary to avoid unfair commercial advantage (Cabinet Manual. Para 7.92)

¹³ It is important to distinguish between 'judicial review' and the hearing of an 'appeal'. Whereas an appeal deals with whether a previous decision was correct in its interpretation of the law or facts, a judicial review deals with issues such as the legality of the decision, breaches of natural justice and failure

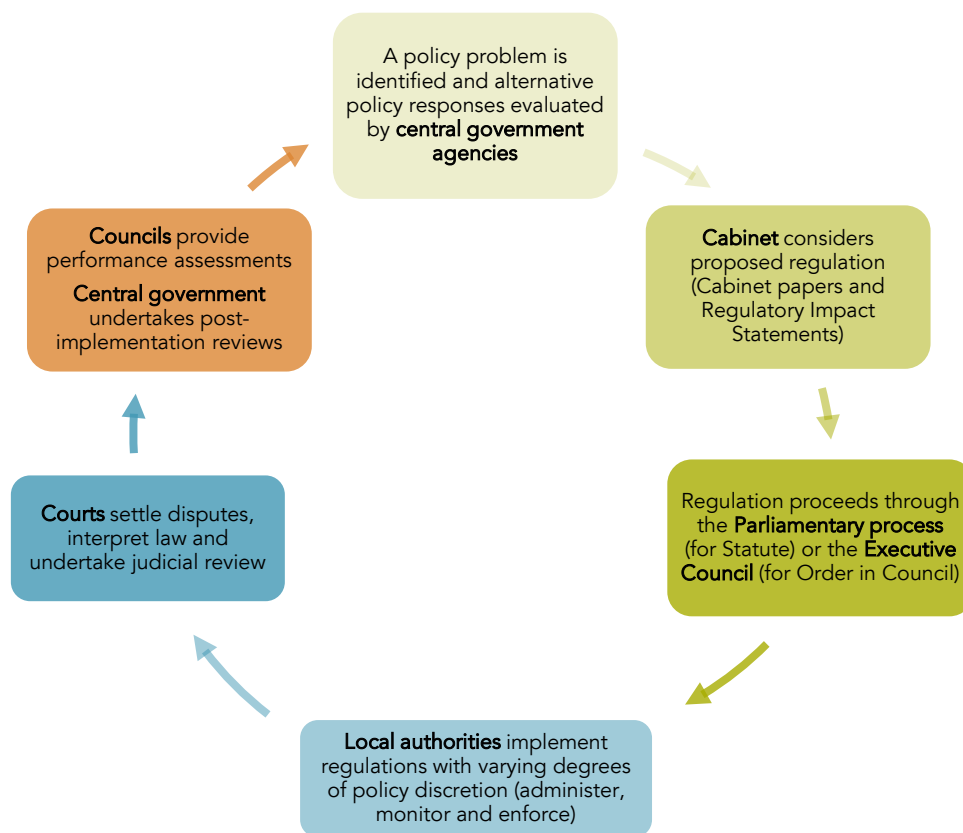
Post-implementation and performance reviews

The stock of regulation should be 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).

Under the RIS regime managed by the Treasury, post-implementation reviews (PIR) are conducted on any significant regulation or legislation that is introduced without a RIS that meets the government's standard. Similarly, the Local Government Act 2002 (LGA) includes a sunset clause that requires bylaws to be reviewed after 10 years.

Central government agencies also undertake reviews of how well local governments are fulfilling their regulatory functions. For example, MfE conducts a biannual survey of councils aimed at gathering information on RMA implementation issues. Similarly, the Ministry of Business, Innovation, and Employment (MBIE) undertakes technical reviews of Building Control Authorities (BCAs) to assess how well they are implementing the Building Act 2004. These are discussed in more detail in Chapter 11.

Figure 4.1 Representation of the regulatory system involving local government



The current regulatory system is not working as well as can reasonably be expected. Some of the problems stem from the design of regulations at central government level, some are problems with the way regulation is implemented and administered by local government and there are generic weaknesses with the regulatory system as a whole.

4.3 Weaknesses at the central government level

Good regulatory outcomes require all elements of the regulatory system to be operating well and the interface between the elements to be as efficient as possible. The Commission has identified a number of weaknesses in the processes used by central government to develop regulations that are delegated or devolved to local government. This section highlights the weaknesses in four areas:

to follow a process that could legitimately have been expected. The grounds for judicial review exist within the complex area of Administrative Law. A detailed summary of these grounds is beyond the scope of this inquiry. Interested readers should see Palmer (2004), Joseph (2001).

- incentives faced by central government to undertake rigorous analysis of local issues;
- the level and quality of implementation analysis;
- the level and quality of engagement with the local government sector; and
- the performance of regulatory quality assurance processes.

Incentives for rigorous analysis

Good regulatory design is founded on rigorous analysis of the problem definition and options for response. However, when accountability for the quality of regulation is unclear, there is a risk that the incentives for rigorous analysis can be reduced. This situation can arise when communities give central government the credit for introducing a new regulation to fix a 'problem', but blame councils for the financial and compliance cost of the regulation. In this case, central government has weak incentives to design the regulation carefully.

Conversely, communities may attribute high compliance costs to poor central government regulation rather than deficiencies in the way the regulation is administered by councils. If this were the case, councils would have weak incentives to administer regulation efficiently.

Throughout the inquiry, councils have expressed a strong view that central government agencies lack adequate accountability for the quality of regulations passed to local authorities. The Society of Local Government Managers (SOLGM) refers to this situation as an 'accountability disconnect':

We would suggest that much of the debate about the performance of local authorities in their regulatory roles in New Zealand hinges on this accountability disconnect around the design of the regulatory frameworks. The incentives for central government to ensure that the legislated regulatory processes it designs are cost-effective and proportionate, are significantly weakened where it knows that the costs of administering the system will be collected through a fee levied by a local authority or through local rates because it knows that the public will see the local authority as the agency responsible for the level of those costs. (SOLGM, sub. 48, p. 7)

While the proposition put forward by SOLGM is plausible (and consistent with the views of many other stakeholders), it is impossible to be categorical about the extent to which the 'accountability disconnect' is impacting on the quality of regulation devolved or delegated to local government. What can be said with confidence is that when allocating regulatory functions, central government is more likely to ensure the quality of the underlying regulation if the public holds it directly accountable.

Put another way, if ministers and their advisors are shielded from the full budgetary and political cost of their policy decisions, they may be more likely to allocate regulatory functions to councils without first considering all possible policy options (including no regulation). A further implication is that agency chief executives may be less inclined to develop the capability within their agency to fully analyse issues relating to the local government sector.

The quality of regulations can also be affected by the incentives created by the organisational cultures and management structures within central government agencies. Good regulation is unlikely when organisations place insufficient emphasis on providing high quality advice, or where officials are rewarded for 'tailoring' advice to avoid painting the Minister's preferred option in a bad light. Indeed, the Better Public Service Taskforce observed that some central government leaders are "responsive to Ministers but are weaker in their ability to provide more strategic advice that is robust over time and that will meet future needs" (p. 19).

While difficult to prove empirically, it is likely that weak incentives on central government during the policy-making process are contributing to insufficient implementation analysis and a lack of quality engagement with the local government sector around regulatory design.

F4.1

Current institutional arrangements can shield central government from the full fiscal and political cost of assigning regulatory functions to local government. This can have the effect of reducing the quality of regulations.

The quality of implementation analysis

Local government is often the conduit for delivering central government policy. As such, the ability of central government to achieve national policy objectives is strongly linked to the ability of local government to undertake the regulatory functions assigned to them. This ability can be limited by financial, capability and capacity constraints. If regulatory outcomes are to be achieved, these constraints need to be taken into consideration during rigorous implementation analysis.

Yet, the need to undertake more thorough analysis of local implementation has been discussed for some time. In 2004, a joint officials group delivered a report to the Central Government/Local Government Forum concluding:¹⁴

...there appears to be some justification for central government policy-making to better incorporate into its analysis the effect of changes to regulatory responsibilities on local government ... (the Department of Internal Affairs [DIA], 2006)

Similarly, a study conducted by PricewaterhouseCoopers (2009) concluded:

We believe that closer scrutiny and clearer thinking by lawmakers about the aim of legislation and the impacts it has on Council activities could deliver significant net benefits. (p. 6)

Given the results of previous studies, it is not surprising that the Commission's survey indicated that 53% of councils 'strongly disagreed' with the statement 'Central government agencies have a good understanding of the local costs and impacts of new regulations devolved or delegated to local government'. A further 38% 'tended to disagree' (8% were 'neutral'). These results were consistent with information obtained during engagement meetings and with many of the submissions to the inquiry—a selection of which is provided in Box 4.2.

Box 4.2 Stakeholder views on implementation analysis

Society of Local Government Managers

We agree that implementation concerns are poorly understood, and generally left for last. We refer you to the eight principles of effective implementation that we included with our previous submission. Effective regulation requires both good policy design and good implementation – and when viewed in this light poor implementation is a risk for both local and central government. (DR. 83, p. 4)

Palmerston North City Council

We [also] agree that too often Central Government imposes regulatory responsibilities and obligations on Councils without fully considering their impacts and costs. An example of this is microchipping of dangerous dogs and the national dog database. (sub. DR 79, p. 2)

Waitaki District Council

We have learned lessons ourselves from failures to fully assess the implications of policies of our own making, let alone those of Government. And we are well aware of examples such as Building Act changes, where the implementation timeframes have had to be extended because they were initially unrealistic. While grateful for the time extension, it was frustrating to us that the original timeframes were so unrealistic. (sub. DR 86, p. 4)

Waitomo District Council

...there is real and appropriate concern that central government agencies do not fully consider

¹⁴ The officials group comprised representatives from central and local government.

the impact of new regulations on local government especially in relation to on-going costs. This incomplete assessment of impact can be in the appropriateness of regulations or standards themselves, or in fully understanding the impact of compliance monitoring or in the enforcement of regulations. (sub. 9, p. 5)

Whangarei District Council

Capability is a substantive issue for local government, especially smaller councils with reduced resources, especially when dealing with the 'one size fits all' legislation that conflicts very strongly with local preferences. (sub. 10, p. 6)

The apparent weakness in implementation analysis may be linked to the observation that few central government agencies have many staff with an in-depth knowledge of the local government sector. Evidence suggests this gap in capability is well known within central government (and has been for some time). For example, a Cabinet paper produced in 2004 noted that central government involvement in the Community Outcomes Process may be hindered unless issues of:

...preparedness of agencies, and ensuring qualified and mandated staff for regional-level engagement are addressed. (Cabinet Policy Committee, 2004)

More recently, a performance review of DIA noted:

... as noted in DIA's Self review for this Review, sector-wide local government policy issues will challenge it given the current stage of capability development in the Policy Group. Care needs to be taken to continue to build capability while meeting the expectations of Ministers and stakeholders. Again, this is well understood in DIA. (SSC, Treasury and the Department of the Prime Minister and Cabinet [DPMC], 2012a, p. 24)

However, there is also evidence to suggest that implementation analysis may be a general weakness of policy analysis in New Zealand. For example, an independent analysis of RISs conducted by the New Zealand Institute of Economic Research [NZIER] (2011a, p. 6) noted:

...the sections on implementation, review and monitoring were sometimes seemingly tacked on as an afterthought.

A similar review conducted by Castalia (Castalia Strategic Advisors, 2012, p. 10) commented:

The implementation and monitoring, evaluation and review sections were the weakest components of many RISs.

Yet, there is little evidence to suggest that implementation analysis of local government issues is better or worse than the analysis of other sectors—a point reaffirmed by the Commission's review of six RISs covering changes to the regulatory roles of local government. This proposition was tested with Treasury officials who commented that implementation analysis in RISs for policies impacting local government was not discernibly weaker than for other sectors – indeed this is recognised as being the weakest component of many RISs. They did note, however, that where implementation of central government policy relies on the involvement of local government, there is a risk that weakness in this area may significantly impact how effectively the policy is delivered.

Box 4.3 Assessment of RISs relating to local government

The Commission reviewed six RISs relating to local government regulation. The RISs were assessed against the core components of the RIA framework—problem definition, options analysis and implementation analysis.

The RISs examined were on the following regulatory proposals: Heritage New Zealand Pouhere Taonga Bill (2011), Freedom Camping Bill (2011), Nga Wai o Maniapoto (Waipa River) Bill (2010), Alcohol Reform Bill (2010), National Policy Statement for Renewable Electricity Generation (2011) and

the Resource Management (Simplification and Streamlining) Amendment Bill (2009).

The review assessed whether local government regulatory issues and impacts were adequately taken into account in the regulatory decision-making process, according to the standards and expectations set out in the RIA handbook.

There is a risk the six RISs chosen are not representative of policy advice to government on issues impacting local government. Nevertheless, the results were broadly consistent with previous RIS reviews undertaken by the Treasury and with submissions to the inquiry and information obtained during stakeholder engagement meetings. For this reason the analysis should be viewed as one input into a much wider evidence base assembled during the course of the inquiry.

F4.2

There is often limited analysis of local government's capability or capacity to implement regulations prior to the allocation of additional regulatory functions (or changes to existing functions).

F4.3

Central government agencies with oversight responsibility for regulations do not have knowledge of the local government sector commensurate with the importance of the sector in implementing these regulations.

The level and quality of engagement with local government

Effective engagement has long been recognised as a vital ingredient of good implementation analysis and policy formulation—a point emphasised in a 2010 review of government expenditure on policy advice:

For many important issues the government is only one, albeit central, player in the policy advice process – there are other players such as local government, iwi and industry or population groups that affect and are affected by the policy advice decisions of central government. Outside parties can be important as partners in “co-production” of public services. How the engagement with these outside stakeholders is structured and conducted can be crucial to the policy outcomes. (Committee Appointed by the Government to Review Expenditure on Policy Advice, 2010, p. 43)

Yet limited engagement with local authorities by central government has been a consistent theme that has emerged throughout the inquiry. The Commission's review of six RISs found that four of the six illustrated inadequate public consultation. Of particular concern is the limited engagement early in the policy development process when critical decisions on the design of regulations are being made. SOLGM notes:

Our experience is that Government agencies typically consult local government at the political level (usually through Local Government New Zealand) at an early stage at the level of – “do you think the headline policy intent [is] a good idea?” We see this as appropriate. However we believe that there is a lot of scope for improvement of the more detailed design of legislation by a greater willingness to include managers and staff of local authorities in the more detailed development process. (sub. 48, p. 11)

The Waitomo District Council has a similar view:

For an effective regulatory regime, it is important that appropriate consultation be carried out at the early stages of development with all of the affected parties. In the case of regulations developed by Central government, it is often the case that no substantive consultation is carried out with local authorities even when the responsibilities of monitoring and enforcement are intended to be devolved to this tier of government. In a lot of instances, the first consultation starts only after a Bill has been introduced in Parliament when what is clearly required is a close liaison with local government and sectoral representative bodies like Local Government New Zealand right at the outset in order to get

the complete picture of problem definition, intended or unintended consequences and overall impacts. (sub. 9, p. 6)

These sentiments are supported by the results of the Commission's council survey, which found that:

- 68% of local governments 'tended to disagree' or 'strongly disagreed' with the statement that 'local government feedback during the engagement process was taken into account when drafting new regulations';
- only 21% of councils 'agreed' or 'strongly agreed' that central government engagement was 'positive and constructive'; and
- 63% of councils 'tended to disagree' or 'strongly disagreed' with the statement that engagement with central government was 'viewed by my council as having a positive impact on the quality of central government regulation'.

Recent Performance Improvement Framework Reviews (PIF) of central government agencies further reinforce these findings. For example a PIF of MfE conducted in 2012 noted:

...TLAs consider that they are not sufficiently engaged with nor listened to. The water NPS is an example of this, as it required significant water infrastructure investment by councils, with little warning, for something they did not understand and which they considered MfE had not thought through. TLA views were sought late in the process. The stakeholder survey identified that MfE needs to work harder at understanding how policy is operationalised and where national policies need to take into account local differences. (SSC, Treasury and DPMC, 2012b, p. 46)

Of course, consultation with 78 different councils, each with its own set of circumstances, is challenging and often costly. While these costs (and benefits) will vary from case to case, for most substantive regulatory issues there are likely to be net benefits from engaging with councils early in the policy process - a point highlighted by the OECD's Council on Regulatory Policy and Governance:

Involvement of sub-national governments in regulation making takes time, but medium-long term benefits should outweigh the costs of co-ordination. Countries that successfully approach regulatory reform in this way can expect to reap productivity benefits across the economy, through the redesign of regulatory process and the removal of regulatory burdens and better co-ordinated action. (OECD, 2012, p. 30)

F4.4

Engagement with local government during the design of new regulations is generally poor, resulting in a missed opportunity to improve the quality of policy advice from central government agencies and the resulting quality of regulation.

The performance of quality assurance processes

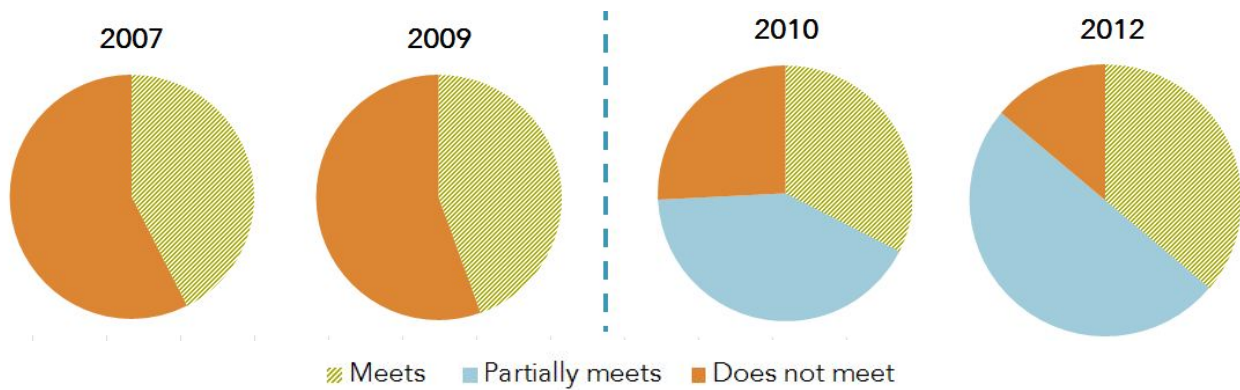
Sound quality assurance processes are an important feature of a well-functioning regulatory system. However, current processes are not working as well as they should be.

External reviews undertaken on behalf of the Treasury illustrate that the general standard of RISs is low¹⁵. The most recent review, conducted in 2012, concluded that only 36% of the 42 RISs reviewed fully met the Treasury's quality assurance criteria. A further 50% partially met the criteria and 14% did not meet any of the criteria (Castalia Strategic Advisors, 2012).

These results were consistent with, but slightly better than, the previous review (NZIER, 2010), which found 32% of RISs reviewed fully met the Treasury's quality assurance criteria, 42% partially met the criteria and 26% did not meet the criteria. Figure 4.2 shows the results of four external RIS evaluations conducted since 2007.

¹⁵ The Commission notes that the RISs reviewed covered a range of policy topics not just those relating to local government.

Figure 4.2 Results from external RIS reviews



Source: Castalia Strategic Advisors, 2012.

Notes:

1. The line indicates when the evaluation criterion changed from 'adequate/inadequate' to 'meets/partially meets/does not meet' requirements.

Box 4.4 RIS Quality Assurance Criteria

RISs are assessed by the RIA Team as either "meets" the criteria, "partially meets" the criteria or "does not meet" the criteria. The criteria used as the basis of this assessment are set out below.

Complete

- Is all the required information (including the disclosure statement) included in the RIS?
- Are all substantive elements of each fully-developed option included (or does the RIS identify the nature of the additional policy work required)?
- Have all substantive economic, social and environmental impacts been identified (and quantified where feasible)?

Convincing

- Are the status quo, problem definition and any cited evidence presented in an accurate and balanced way?
- Do the objectives relate logically to, and fully cover, the problem definition?
- Do the options offer a proportionate, well-targeted response to the problem?
- Is the level and type of analysis provided commensurate with the size and complexity of the problem and the magnitude of the impacts and risks of the policy options?
- Is the nature and robustness of the cited evidence commensurate with the size and complexity of the problem and the magnitude of the impacts and risks of the policy options?
- Do the conclusions relate logically and consistently to the analysis of the options?

Consulted

- Does the RIS show evidence of efficient and effective consultation with all relevant stakeholders, key affected parties, government agencies and relevant experts?
- Does the RIS show how any issues raised in consultation have been addressed or dealt with?

Clear and concise

- Is the material communicated in plain English, with minimal use of jargon and any technical terms explained?

- Is the material structured in a way that is helpful to the reader?
- Is the material concisely presented, with minimal duplication, appropriate use of tables and diagrams and references to more detailed source material, to help manage the length?

Source: New Zealand Treasury, 2009.

The Commission's own review of six RISs found that none of the six fully met the Treasury's quality assurance criteria; instead two partially met the criteria and four did not meet the RIA requirements (see Box 4.3). Further, none of the RISs examined provided a robust discussion of the trade-offs involved in deciding whether a regulatory function is better undertaken by central or local government. In the Commission's view, the two self-assessed RISs, which the responsible agencies rated as 'meets' the RIA requirements, were considerably below the standard that would be expected by the Treasury.

Even though the quality of RISs has improved in recent years, it is concerning that, some 15 years after RIS requirements were introduced, about two-thirds of RISs still fail to fully meet the Treasury's quality assurance requirements (as indicated by the most recent external review).

It is apparent that on occasions, central government agencies approach RIS requirements as an 'administrative hurdle' rather than an important source of information for Cabinet. This view undermines the value of the RIS system. It also risks undermining public confidence that regulations are being developed in a rigorous manner.

F4.5

The Regulatory Impact Statement process has a valuable role to play in ensuring the quality of regulations delegated or devolved to local government. However, at present this value is not being fully realised.

4.4 Weaknesses at the local government level

The ability of local authorities to achieve regulatory outcomes is critically dependent on the quality of their internal decision-making processes and their capability in regulatory administration. During the course of the inquiry, it has become clear that weaknesses exist in the way in which some regulations are being implemented, administered and enforced. These weaknesses can often be traced back to gaps in regulatory capability. Weaknesses at the local level can also be a result of the statutory constraints on what and how local authorities regulate locally.

Good local decision making, administration, management and enforcement will be a product of:

- the statutory processes local authorities must follow and how councils implement that process, particularly the quality of the analysis they undertake and the process for good consultation and participation;
- the culture and quality management systems of local authorities;
- how well councils monitor and enforce regulations;
- regulatory capability within councils; and
- how well councils are governed.

Statutory requirements for the local decision-making process

Two legislative provisions establish minimum standards for local government regulation making.

- Section 77 of the LGA requires local authorities to assess the benefits and costs of regulatory options given the present and future interests of the district or region. The LGA also explicitly acknowledges in

s79 that the assessment will be proportionate to the significance of the matters affected by the decision. However, all local bylaws are required to go through a full special consultative procedure (SCP) process.

- Section 32 of the Resource Management Act 1991 (the RMA) requires local authorities to carry out an evaluation before issuing or changing a policy statement or a plan. This evaluation needs to consider whether the proposal represents an efficient and effective way to achieve the stated objectives, the costs and benefits associated with the proposal and the risks of action or inaction on the part of the local government.

How local authorities carry out the local decision making process

Analysis

The Commission looked at the quality of the information and analysis provided for a selection of decisions made by local authorities over the past five years. The objective was to assess the quality of the decision-making process, not the substantive content of regulatory decisions. The focus was, therefore, on whether the information and analysis provided to decision makers allowed a well-informed decision to be reached (Box 4.5).

Box 4.5 Assessment of the information and analysis provided to make local authority decisions

The Commission reviewed the processes used by local authorities to make regulations. The sample size was 27 examples, across small, medium and large local authorities. The examples all occurred within the past five years, and were in the areas of land allocation, waste management and minimisation and dog control.

The review was informed by a desk top analysis of staff reports, submissions, expert analysis and meeting minutes. These were supplemented by interviews with council staff.

The review specifically tested the hypothesis that larger local authorities are able to follow better regulatory processes because of their greater financial resources and internal capability. This was shown not to be the case.

While the local authorities in the sample followed generally adequate regulatory decision-making processes, areas for improvement were identified. Specific issues included the following.

- **Insufficient tailoring of regulatory objectives to local conditions:** Local government decisions often adopt the objectives listed in national legislation, rather than thinking critically about how those objectives might apply within their specific area.
- **Few options were considered:** In several of the decisions reviewed, the options analysis was confined to only considering the status quo and one possible change. In all cases the decision-making process would have been improved by considering a wider range of options.
- **A tendency to assess alternative options with the same broad characteristics:** Options that have quite different dimensions should also be analysed.
- **Options were often not evaluated against stated objectives:** That is, many decisions did not include a discussion of how successful each option is likely to be in achieving the stated objective of the regulation.
- **Implementation analysis was often overlooked:** Little thought was given to implementation challenges, the need for ongoing monitoring or review and compliance costs.

F4.6

While decision-making processes used by local government are generally adequate, considerable room for improvement exists in several areas.

Chapter 8 provides further discussion on, and recommendations for, improving the quality and transparency of regulatory analysis.

Consultation

A number of inquiry participants noted the lack of discretion and inflexibility of the statutory requirements to consult under the LGA, especially the requirement that all new bylaws or changes to bylaws go through the Special Consultative Procedure (SCP) regardless of the importance of the issue, the amount of discretion possible and the ability of consultation to influence the outcome. This can drive cost, frustration and inefficiency into the consultation process. This issue is addressed in Chapter 8.

Participation in local plan and policy-making

Considerable attention has been focused on RMA decision-making processes, in particular, the Commission heard concerns that:

- appeals to the Environment Court lead to increased transaction costs (time and money);
- the Environment Court process of hearing appeals *de novo* creates incentives that undermine participation in the local decision-making process¹⁶ and that the length of time taken to progress a plan or policy change undermines 'regulatory agility'—the ability of local authorities to respond to emerging environmental issues in a timely way.

These concerns all relate to the efficiency and cost-effectiveness of local plan and policy-making processes (Box 4.6).

Box 4.6 Concerns with the efficiency of decision-making processes under the RMA

The single change that can transform the pace and costs of resource management policy making is to remove recourse to the Environment Court on RMA policy matters. The current role of the Court in making policy decisions is anomalous and causes perverse incentives that compound to make policy-making too slow. Without a change of this nature policy-making will continue to substantially lag behind the dynamic and rapidly changing effects associated with changes to land use and our economy. (LGNZ, sub. 49, p. 39)

Staff throughout the regions told us that the speed of getting policy through the RMA planning process is frustrating and cannot keep up with the speed of changes to the factors affecting water quality. The rapid growth in the dairy sector is a good example, with planning documents not allowing for the increase in the cumulative effects of non-point source discharge. (Office of the Auditor-General, 2011a, p. 57)

The policies and rules that govern the use and allocation of natural and physical resources directly impact on the economic value of resources and the structure and operation of property markets. Failure to adjust the policy framework can (and has) result in quite damaging environmental outcomes. A lack of responsiveness can also result in substantial missed economic opportunities. (Hawke's Bay Regional Council, sub. DR 67, p. 6)

The Commission has focused on the incentives for participation and efficient information gathering in decision-making processes under the RMA, challenged some 'received wisdom' about the efficiency of the process, and makes recommendations about how the process can be improved (Chapter 8).

Quality management systems of local authorities

The single biggest issue businesses have in their dealings with councils is perceived inconsistency in the application and administration of regulatory standards.

Inconsistencies can affect a significant proportion of businesses. Of the businesses surveyed during the inquiry, 30% had dealt with more than one council on regulatory issues. These businesses tended to be larger firms, with more than 20 employees.

¹⁶ Cases in the Environment Court are heard *de novo*, which means that the Court considers all the relevant issues afresh.

Forty-four percent (147 out of 332) of the business survey respondents that dealt with multiple councils agreed with the statement: “I found the regulations inconsistent between councils”. These were mainly in the construction industry (44 respondents); agriculture, forestry and fishing industries (27 respondents) and property and business services (34 respondents).

Of all those businesses reporting inconsistency between councils, the areas of highest inconsistency were in planning, land use or water consents and building consents. Building regulation is subject to nationally consistent standards. Yet respondents who said that councils were inconsistent reported as much variability in building regulation as for land use planning, an area where high levels of variation would be expected as a result of local policy making.

F4.7

Businesses perceive variation to be as common in regulatory areas with national standards as in areas where councils have a level of autonomy to tailor responses to local conditions.

When regulatory approaches reflect local preferences, communities benefit from regulations that are better aligned to local conditions—resulting in an allocation of council resources that is more efficient, and achieves more of the regulatory outcomes that are valued by that community. However, the Commission’s survey of businesses indicated frustration where variation did not appear to reflect local preferences. For example, during engagement meetings the Commission heard that some local authorities require liquor outlets to hold food hygiene certification while others do not (ostensibly for the sale of such items as packaged chips, peanuts and ice). While such examples may be ‘the exception rather than the rule’, they can negatively impact public perceptions of the management of the regulatory system.

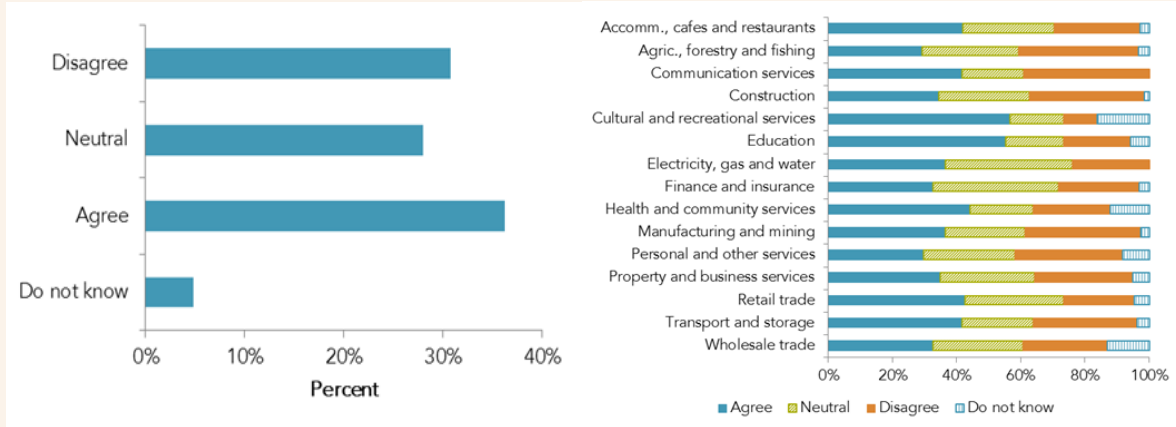
A further concern to business and the community is variation in the manner in which different council staff interpret and apply regulations. Such variation can give the impression that regulations are being applied in an *ad hoc* or inequitable manner. Typical comments received from the business survey included “sometimes you don’t know where you stand when they change the person inspecting you” and decisions depend on “the council officer we get on the day”.

Results from the Commission’s business survey relating to perceptions of customer service are presented in Box 4.7.

Box 4.7 Customer service results from the business survey

Those respondents who had an opinion on the consistency and reliability of local authority advice were fairly evenly split between those who agreed with the statement and those who did not. A significant number of responses were neutral on this matter. By industry, those working in the agriculture, manufacturing and mining, and transport and storage industries were most likely to disagree.

Figure 4.3 The council provided reliable and consistent advice

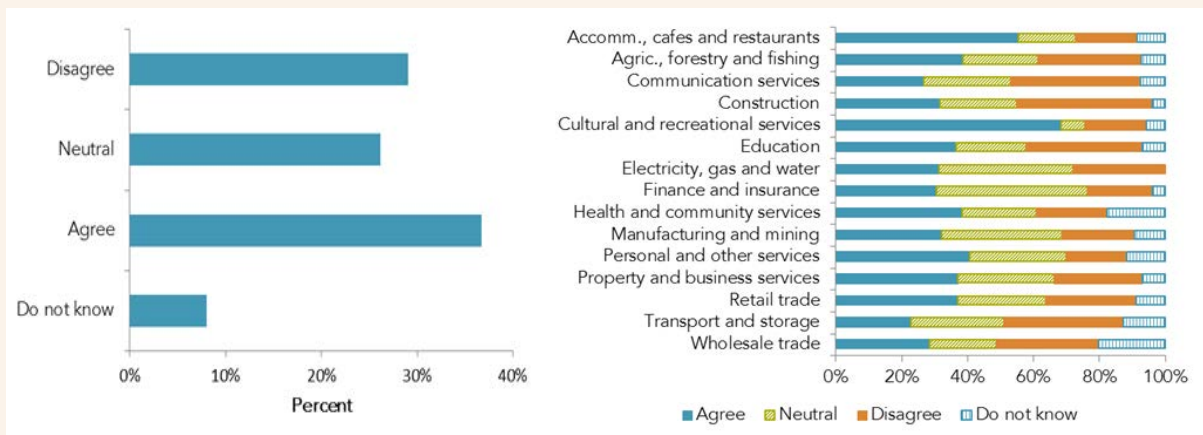


Source: Productivity Commission, 2012b.

Most businesses surveyed found the information they received from the council was clear, although a significant proportion disagreed. Despite the mixed results about the provision of information, most respondents felt that they understood the requirements on their businesses. Positive responses were particularly noteworthy in the accommodation (including café and restaurant) and construction industries (both of which tend to have many small firms and multiple regulatory regimes to comply with).

Respondents were fairly evenly split between those that felt processing times for applications or information requests were reasonable and those that did not. Those industries most affected by resource consent tended to be less positive about processing times.

Figure 4.4 The time taken to process my application or respond to my information request was reasonable



Source: Productivity Commission, 2012b.

Survey respondents generally felt that local authority processing times had not improved over the last three years. Twenty seven percent of the survey respondents were dissatisfied with the regulatory services and approach of their local authorities.

There is a general need to improve quality management systems that would ordinarily be used to resolve consistency issues and broader issues in the administration of regulations. This deficiency has been largely accepted by the sector during engagement meetings. Chapter 8 outlines the features of good quality management systems and ways that good practice can be facilitated within councils.

Weaknesses in monitoring and enforcement

Investment in good policy-making processes can be significantly undermined if monitoring and enforcement are done poorly or insufficiently. Regulation that is poorly enforced rarely fulfils its public policy objective: indeed, there is strong evidence that inadequate attention to compliance issues often underlies regulatory failure (OECD, 2002).

General conclusions about the overall 'sufficiency' of enforcement strategies within the local government sector are difficult to make. Nevertheless, stakeholders have raised a number of issues regarding the enforcement of regulations administered by local government.

- **Risk-based approaches are often not well implemented:** There is variation in the quality and sophistication of risk-based approaches utilised by councils, with some councils adopting approaches that provide little incentive for businesses to alter their compliance behaviour. A particular concern is that many local authorities may struggle to undertake risk profiling on their own, because the small volume of compliance work that many local authorities undertake will be insufficient to identify trends and patterns in different groups.
- **Insufficient compliance monitoring:** The Commission has heard from a range of inquiry participants that monitoring of local regulation is often inadequate and that this has undermined the achievement of regulatory objectives. A range of explanations have been postulated, including weak incentives to monitor regulations that produce national rather than local benefits and a lack of resources to fund monitoring activities.
- **Insufficient range of enforcement tools:** Throughout the inquiry, councils have expressed a strong view that the enforcement tools at their disposal are not always sufficient to achieve good regulatory outcomes. The most commonly cited 'gap' in the enforcement toolbox is the limited access that local authorities have to the use of infringement notices.
- **Insufficient penalties to deter non-compliance:** Although some infringement fines—noticeably in the area of the RMA and liquor licensing—have been increased recently, local authorities submitted that further increases are required. Stakeholders have highlighted areas where they believe penalties do not provide a sufficient incentive to comply with regulations or the cost of pursuing the penalty is greater than the penalty itself.

F4.8

There are indications of a low level of prioritisation of monitoring and enforcement resources based on risks. Constraints on the use of infringement notices—combined with the low level of fines where infringement notices can be used—can also inhibit councils' capacity to encourage compliance with regulation.

A fuller discussion of these enforcement issues and recommendations for improvement is provided in Chapter 10.

Capability

Delivering regulatory outcomes will be heavily influenced by the capability of local government to perform the regulatory responsibilities assigned to them. Issues with the quality of analysis and decision making, concerns in the business community about inconsistencies in the way regulations are administered, and the problems identified with monitoring and enforcement, may signal underlying capability weaknesses.

Federated Farmers considers that the regulatory system is "haphazard and inconsistent ... in terms of the operation of the legislation". In its view, provisions within empowering legislation are "poorly applied at the

local level” and it is particularly critical of policy analysis done under section 32 of the RMA (sub. DR 111, p. 3). McDermott similarly suggests that the section 32 analyses vary greatly in quality.

All too often they do little more than go through the motions with insufficient analysis to enable the costs and benefits to be weighed up and fully informed decisions to be made. (Phil McDermott, sub. DR 60, p. 7)

McDermott also suggests that regulators and those they are regulating may not understand each other’s perspectives. The implication is that regulators will not always appreciate business pressures, but equally businesses may not be skilled in working with councils:

... It is too easy for people to enter the workforce in a particular agency or institutional domain (central or local government, public or private business, voluntary sector etc.) and neither experience nor appreciate the cultures, motivations, competencies, and operations pertaining to the other domains which their actions (including regulations) impinge on. (sub. DR 60, p. 9)

Councils—particularly smaller councils operating in rural areas—recognise that they face capability challenges (Box 4.8).

Box 4.8 Councils’ views on capability issues

Yes, capability issues vary between areas of regulation and also size and location of council. Some specialist skills can be difficult to recruit to remote/smaller councils i.e. Environmental Health Officers and Building Control Officers. This difficulty can add cost to service delivery. (South Taranaki District Council, sub. 39, p. 5)

An example is the difficulty that rural local authorities are facing in attracting and employing suitably qualified building control officers to implement the new regulations that have come into effect. Often, new regulations impose extensive training requirements to improve the capability of the organisation in the new area, which then leads to added costs which subsequently get passed on to either ratepayers or businesses. (Waitomo District Council, sub. 9, p. 6)

Capability is a critical issue, particularly for smaller councils where expertise typically lies in a small number of staff. This can easily lead to dependency on external advisers, resulting in higher costs and no development of internal capacity. ... Shared services can assist in this issue, evidenced by the shared service for animal control between Manawatu and Rangitikei District councils... (Rangitikei District Council, sub. 35, p. 4)

It is likely that some smaller rural authorities will experience difficulties from time to time in recruiting and retaining appropriately experienced staff to perform their regulatory functions... There is not necessarily a correlation between the size of Local Government and its capacity. In the case of smaller Councils, there is often recognition of the value of co-operation between Councils which tends to off-set the lack of scale. (Waimakariri District Council, sub. 30, p. 13)

Given that the adequacy of regulatory skills is fundamental to the capability of local government to efficiently achieve regulatory outcomes, opportunities to improve these skills should be explored. Chapter 7 investigates ways that this can be achieved.

Governance

Although the Commission has not carried out a complete assessment of council governance, not least because it is a broad area which affects more than just the regulatory roles of councils, there are two specific areas of governance where weaknesses have been identified:

- inappropriate involvement in regulatory decisions; and
- the ability of councillors to ‘own’ and be accountable for decisions.

Inappropriate involvement in regulatory decisions

Councillors can become inappropriately involved in regulatory affairs, such as decisions about investigations and prosecutions.

The LGA includes several provisions that are aimed at deterring such behaviour. For example, elected officers must swear on taking office that they will exercise their powers impartially and in accordance with their judgments as to the best interests of the community (cl 14 of Schedule 7 to the LGA).

Further, local authorities must adopt a code of conduct which sets out the standards of behaviour that are expected from all elected members (cl 15 of Schedule 7 to the LGA). As an example, the Auckland Council Code of Conduct (2011) identifies certain principles that elected members must abide by (such as that members must act with honesty and integrity; and impartiality, ie members should make decisions on merit and in accordance with their statutory obligations when carrying out their statutory obligations). It also contains specific rules about conflicts of interest.

The Crown Law Prosecution Guidelines also provide guidance to good behaviour (although local authorities are not required to comply with these guidelines). Para 4.2 states:

In practice in New Zealand the independence of the prosecutor refers to freedom from political or public pressure. All Government agencies should ensure wherever it is reasonably practicable to do so, that the initial prosecution decision is made by legal officers independently from other branches of the agency and acting in accordance with these Guidelines¹⁷. (Crown Law Office, 2010)

Despite these provisions, there is evidence of, or concern about, political interference in prosecution decisions (Box 4.9).

Box 4.9 Submissions noting the possibility of councillor involvement in enforcement or prosecution decisions

There is some Councillor involvement in administration and enforcement of regulations at WDC. Decisions to prosecute are vetted and sometimes vetoed by councillors. Decisions are not delegated to staff. (Whangarei District Council, sub.10, p. 8)

Legislative change is needed to better recognise and delineate between the governance arm of Council and the enforcement and regulatory arm of Council. For example, a legislative requirement on Councils to follow the Solicitor General's Guidelines, or something similar, would assist in removing the political element from enforcement/prosecution decisions. This is needed to better enhance the independence of enforcement related decisions, particularly as most political involvement occurs during the investigation phase, which can cause unnecessary additional time and cost. (Christchurch City Council, sub. DR 88, pp. 6-7)

Southland District Council has a high level of delegation of regulatory functions to senior professional staff, to assist with timely and cost-effective processing. In situations where elected representatives are involved in decision-making, and one or more members has made comments or taken other action which could call into question their objectivity; then the Council ensures it uses an independent decision-maker/hearing commissioner in such instances. (Southland District Council, sub. 5, p. 3)

The involvement of politicians in decisions on when to investigate and prosecute can undermine both regulatory outcomes and public confidence that regulations are being administered fairly and impartially.

The systems needed to ensure the appropriate involvement, and deter the inappropriate involvement, of councillors in prosecution decisions is discussed in Chapter 8. Chapter 8 also discusses ways to ensure that conflicts of interests are managed when councillors are appointed to independent hearings panels (IHPs).

The ability of councillors to 'own' and be accountable for decisions

There is considerable debate about the role of councils in resource management decision making, and councillors' accountability (and the incentive to 'own' the decisions that are made). It is important that, public accountability for regulations aligns with the ability to make, amend, or decide not to make a proposed regulation. At present, councils can be required to appoint an IHP to hear a notified resource consent application. There is reason to believe that legal precedent means councils cannot depart from the

¹⁷ The previous iteration of these guidelines contained a specific provision that decisions about prosecution must not be influenced by concerns about political advantage or favour.

recommendations of IHPs, unless the IHP has failed to use good process. It is likely that even then, the only option councils will have is to have the matter reheard. This has weakened the ability of councils to influence decisions they are ultimately accountable for. Proposed changes (MfE, 2013a) to require councils to appoint IHPs to hear submissions and make recommendations on the content of district plans and regional policy statements may weaken the 'ownership' of these decisions. This issue is discussed further in Chapter 8.

4.5 Generic weaknesses across the regulatory system

Weaknesses in performance assessment

Performance assessment drives the continuous improvement of regulatory regimes. It does this by providing feedback loops through which weaknesses in the regime can be identified and rectified, and by making the performance of elected officials transparent to the public (therefore sharpening their incentive to make better decisions).

Local governments are subject to a large number of reporting requirements set out in the LGA. The performance framework in the LGA is largely based on the basic performance model established in the Public Finance Act 1989 and the State Sector Act 1988. The objective is to drive performance at the local level, rather than from central government, by enabling communities to be better informed about the activities of their councils. Amendments to the LGA in 2010 included reforms relating to standardised measures, which are intended to allow communities to compare infrastructure services across local authorities.

The LGA co-exists with several other performance frameworks for local government.

- The RMA provides that the Minister for the Environment may investigate the exercise or performance by a local authority of any of its functions, powers, or duties under that Act or regulations under the Act (s24A). In addition, every local authority must monitor—amongst other things—the efficiency and effectiveness of the way it administers RMA requirements (s35(2)).
- The Building Act 2004 provides for the chief executive of the responsible department to monitor the performance by territorial authorities, building consent authorities, or regional authorities of their functions under the Act, and carry out reviews of territorial authorities (s204).
- The Food Act 1981 provides that the responsible minister may issue performance standards in relation to the exercise or performance, by territorial authorities, of certain functions, powers and duties (s8ZE).
- The Hazardous Substances and New Organisms Act 1996 provides that the responsible minister may appoint the Environmental Protection Authority to intervene if the minister considers that any territorial authority is not exercising or performing any of its functions, powers or duties under that Act to the extent that the minister considers necessary to achieve the purposes of the Act (s101(1)).

In addition, central government departments have set up monitoring practices under these legislative provisions, including MfE's biennial survey of local government RMA administration and the biennial audit of BCAs by International Accreditation New Zealand.

Finally, parliamentary and central government regulation monitoring mechanisms are relevant to local government's administration of delegated or devolved legislation, notably the parliamentary Regulations Review Committee and the Treasury's regulatory oversight functions (see Chapter 6).

While this framework has considerable strengths, the Commission has identified three important weaknesses:

- a weak 'whole-of-system' mindset and inadequate feedback loops;
- a lack of balance in what is measured; and
- insufficient focus on assessing performance information.

Weak 'whole-of-system' mindset and inadequate feedback loops

Good regulatory outcomes require all the elements of the regulatory system to be performing well. If regulatory outcomes are not being achieved, decision makers must be able to diagnose which element of the system is under performing, and rectify it accordingly. This requires performance measurement that spans the entire regulatory cycle—from problem definition, to policy and regulatory design, implementation, monitoring and enforcement and post-implementation review.

This point is noted in several submissions to the inquiry:

[There is value in] external review of major regulatory regimes and comparisons of the practices among local authorities, including surveys of firms and households that are directly affected. (Local Government Forum, sub. 51, p. 26)

We believe that it is important to evaluate and feedback ineffective regulatory implementation against what was intended by the legislation. (Manawatu District Council, sub. 38, p. 9)

In general, current performance assessment arrangements do not adequately recognise that regulatory performance is the 'sum of individual parts' of the overall system. Further, there appears to be a general lack of focus on how activities across a regulatory regime fit together and influence each other.

A related issue is that current performance reporting provides few feedback loops to assist councils to improve the way they deliver regulatory functions. This issue was raised in several submissions:

Annual reports are currently filed for Sale of Liquor and Animal Control activities. However, feedback on what this reporting achieves is sparse (aside from the internal feedback within a local authority). The information supplied needs to be for other than statistic gathering purposes – it needs to be directed towards both process improvement (generally within territorial authorities) or policy improvement (applies to central and local government). It should also directly drive the process of policy updating (amendments to Acts and subordinate Regulation, Bylaws or Council Policy). (Napier City Council, sub. 44, p. 6)

Under the Dog Control Act every year a section 10 report is submitted to the Department of Internal Affairs on functions undertaken, however, feedback is not received in return. This could be done in the same fashion as the MFE and Department of Building survey and reports. (Rotorua District Council, sub. 11, p. 23)

Other councils noted that where feedback loops do exist there can be a considerable delay between assessment and receiving feedback.

When there is a feedback loop for monitoring, sometimes it can take a considerable amount of time to be communicated to the affected parties and follow up on actions taken are minimal. This is one of the weakest links of local/central government communication. (Waikato District Council, sub. 16, p. 7)

One notable exception is the system of Corrective Action Request operated by MBIE. Several stakeholders noted that this system provides BCAs with timely and (mostly) useful feedback.

F4.9

Currently, few performance assessments provide feedback loops aimed at improving council delivery of regulatory functions. Further, there is a need for more focus on how activities across a regulatory regime fit together and influence each other.

Lack of balance in what is measured

The ultimate objective of any regulatory regime is to alter behaviour in order to achieve some socially desirable outcome. However, the Commission's review of performance information contained in the annual reports of 14 councils indicates that local government performance measures are often dominated by timeliness and transactional measures. These measures do not provide a basis for confidence that outcomes are being achieved. The review of the performance information is provided in Appendix F.

The focus on process-related measures is partly driven by the statutory reporting requirements and partly by the difficulty of measuring impacts and outcomes. As Ashburton District Council notes:

The most common performance indicators relate to statutory processing times. Assessing the final outcome of regulation is more important, but it is also far more difficult to measure and consequently it tends to be avoided. (sub. 40, p. 11)

However, a focus on timeliness and other process measures can draw council resources away from other important activities. This point is raised by LGNZ in its submission to the inquiry.

It is common to attempt to measure regulatory performance based on the time and cost of consent processes. Such measures ignore more important issues such as the quality of the consent process and appropriateness of the decision and can lead to unintended consequences. (LGNZ, sub. 49, p. 41)

Hutt City Council and Western Bay of Plenty District Council have a similar view.

Systems based upon timeframe achievement will only result in timeframe improvements potentially at the expense of quality and effectiveness in achieving the aims of the regulation. Something akin to the Building Consent audit process is a better way of assessing performance and getting meaningful feedback on which to build improvements. (Hutt City Council, sub. 51, p. 2)

Measures based on timeframes for standard outputs seem appealing, but they can force staff to rush through complex issues, to the detriment of outcomes. (Western Bay of Plenty District Council, sub. 33, p. 14)

F4.10

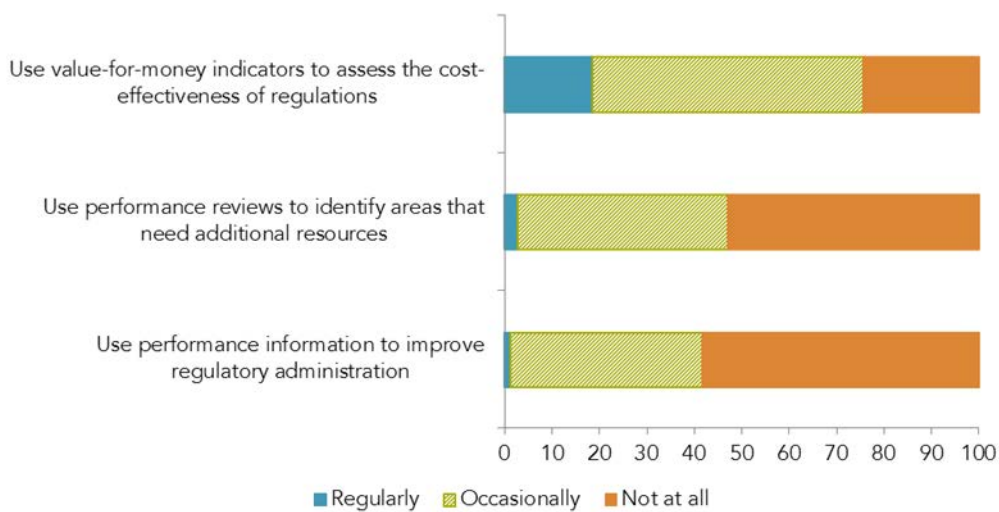
Local government performance measures are often dominated by timeliness and transactional measures. These measures do not provide a sufficient basis to determine whether local authorities are achieving impacts associated with their regulatory activity, or whether regulation is achieving its intended outcomes.

Insufficient focus on assessment of performance information

As noted, local government is subject to numerous reporting requirements through the LGA, RMA and other Acts. While the objective of these requirements is to drive improvements in performance, most councils see these reports as a compliance exercise rather than a tool to improve the way they do business.

The Commission’s survey of councils found that nearly six out of ten councils (58%) do not use performance information to improve their processes. About half of surveyed councils (53%) do not use performance reviews to identify areas that need additional resources. Further, very few of the surveyed councils regularly use the information to consider the cost-effectiveness of regulation.

Figure 4.5 Local authority responses to question: how routinely does your council do each of the following?



Source: Productivity Commission, 2012b.

F4.11

Performance assessments are often seen by councils as a compliance exercise for central government rather than as a means of improving their own performance.

Meeting the Crown's obligations to Māori

Māori groups are a significant community of interest for local authorities - indeed iwi and hapū rohe (areas) are at a regional or sub-regional level, meaning a lot of their interests will be local in nature. However, unlike other interest groups, both the LGA and the RMA include specific statutory provisions requiring the inclusion of Māori in decision-making processes.

The LGA recognises and respects the Crown's obligations under the Treaty of Waitangi by placing obligations on local authorities to facilitate participation by Māori in local authorities' decision-making processes (s4). Local authorities must be informed about how their decision making can impact on Māori community wellbeing. The provisions apply to all Māori in the city, district or region. They acknowledge that Māori, other than manawhenua, may be resident in the area.

The RMA extends the recognition of the relationship between Māori and the natural environment, and identifies how local authorities must consult and work with tangata whenua. Local authorities are required to consult with iwi authorities when preparing or changing regional policy statements, regional plans and district plans, and to engage with tangata whenua in other resource management decisions. The RMA also imposes obligations of consultation with tangata whenua. There are different requirements for resource consents, notice of requirements and plan development processes.

Appropriately involving Māori in decision making is complex and involves recognising kaitiakitanga. This creates a situation where councils must effectively mesh two different systems of governance—local representative democracy and the tikanga of local iwi (ie the traditional rules for conducting life, custom, method, rule and law)¹⁸. As New Plymouth District Council notes:

Local authorities have been challenged to be engaged with Tangata whenua, and to understand the Maori world view, and the arrangements of Iwi and Hapū within their boundaries. (sub. 58, pp. 3-4)

F4.12

To appropriately involve Māori in decision making, councils must effectively mesh two different systems of governance—local representative democracy, and the tikanga of local iwi.

While local authorities and iwi are best placed to work through this relationship at the local level, there are practical issues, such as whether or not the current systems for including Māori in decision making rely too heavily on a level of capacity that often is not available in Māori organisations. If the system is reliant on participants possessing a level of capability that they do not have, then the desired outcomes are unlikely to be achieved. Furthermore, unnecessary delays and costs may be driven into the system due to subsequent appeals.

This issue was raised in several submissions, for example, LGNZ notes:

There is a huge problem with the capacity within iwi and hapū to be able to sufficiently consider the matters being addressed in many of the consent applications and also the timescales involved in the considerations. This in turn has a profound impact on the planning process and the ability of local government to do its business in a more inclusive way, which is the principal intent of the Treaty of Waitangi. (sub. 49, pp. 12-13)

¹⁸ Definitions of these concepts are derived from Ko Aotearoa Tēnei: A Report into Claims Concerning New Zealand Law and Policy Affecting Māori Culture and Identity (2011).

F4.13

The current system for involving Māori in resource consent decisions is often mismatched to the capability of Māori. On the strength of evidence from business, Māori and local authorities, the current system for involving Māori in consent decisions does not appear to be working well for anyone, due largely to the costs and timeframes involved.

Chapter 9 reviews a number of examples of leading practices that are being used by local authorities to manage this complex issue.

Poor interaction between central and local government

For a regulatory system to work well its elements must interact well together. Effective interaction is promoted by sound administrative frameworks with clear specification of roles, clear lines of accountability and good processes for ensuring substantive and timely communication. However, for these administrative arrangements to work well, actors within the regulatory network must work well together—a point highlighted in a recent publication by the UK Institute for Government:

However good the formal structures are, much of the quality of the relationship will come down to the individuals involved and their willingness to put time and effort into creating effective relationships. There is widespread agreement that good relationships are characterised by ‘trust’ and ‘mutual respect’, by ‘communication’ and by “being clear about what we expect from them and what they can expect from us”. (Rutter et al., 2012, p. 29)

Throughout the inquiry the Commission has observed a poor relationship and interaction between central and local government. This is affecting the effectiveness and quality of the interaction between the two spheres of government. Within local government there exists a high level of distrust with central government agencies. This is illustrated by the fact that 63% of councils surveyed by the Commission ‘tended to disagree’ or ‘strongly disagreed’ with the statement that engagement with central government was seen as genuine and engendered a sense of trust.

Councils often highlighted a lack of implementation analysis and engagement as being symptomatic of a lack of respect for, and understanding of, the role of local government. On the other hand, central government points to problems with monitoring and enforcement, lack of timeliness and inconsistency as symptomatic of broader deficiencies within the local government sector. Criticism is also levelled at local government for its reluctance to act as an agent of central government in regulatory implementation and administration.

The poor interaction between central and local government is not conducive to the development of good public policy, and is having a detrimental impact on New Zealand’s regulatory system. Perhaps the most obvious consequence is a reduction in the exchange of information and ideas between the two spheres of government—resulting in regulation that is below the quality that it otherwise could have been. There is also a tendency for both parties to shift blame for poor regulatory outcomes to the other sphere of government.

A new approach is needed that will recast the relationship between central and local government to one of ‘co-producers’ of regulatory services. This approach will require central government to think laterally about what ‘whole-of-government’ means in the New Zealand context. With this in mind, the Commission notes that the Better Public Service Initiative (BPSI) and the associated State Sector Reform (Public Finance) Bill reinforce the need for agency chief executives to think in the collective interests of government. As explained in the Pre-Introduction Parliamentary Briefing to the Bill:

Chief executives must be aware of the system-wide influences on their departments, the system-wide opportunities and connections that departments should make, and the reciprocal system-wide impacts and implications of departmental policies and activities and those of related agencies. (SSC, 2012, p. 5)

While local government is not explicitly recognised as part of the BPSI, an opportunity exists to use the momentum behind the BPSI as a catalyst for improving the connection between central and local

government. This would see a renewed emphasis on system-wide impacts and acknowledge local government as an important part of 'the system'—albeit one that sits outside central government.

Ways to improve the interface between the two spheres of government are discussed in Chapter 5. Institutional considerations are discussed in Chapter 12.

F4.14

The lack of effective interaction between central and local government is having a detrimental impact on New Zealand's regulatory system. The uneasy relationship between the two spheres of government is rooted in divergent views and understandings of the nature of their respective roles, obligations and accountabilities.

5 Improving regulatory design

Key points

- In a number of areas, central government regulation making is below the standard set for the public sector. These areas include the level and quality of engagement with local government, the rigour and content of implementation analysis and the performance of quality assurance processes.
- Improvements are needed in four key areas:
 - the interface between central and local government needs to be improved;
 - incentives to undertake rigorous policy analysis need to be strengthened;
 - central government agencies need to enhance their knowledge and understanding of the local government sector; and
 - meaningful engagement with local government needs to occur early in the policy process.
- To move forward will require both central and local government to demonstrate a commitment to fostering more open and constructive interaction. To this end, there would be significant value in developing a protocol that articulated an agreed set of behaviours and expectations that would apply when developing and implementing regulations.
- The protocol would be a jointly developed document signed by representatives from both local and central government.
- Other measures that would improve the quality of regulations delegated or devolved to local government include:
 - the development of strategies to lift the capability within central government agencies to undertake rigorous analysis of issues impacting on the local government sector;
 - greater scrutiny by the Treasury's Regulatory Impact Assessment Team of regulatory proposals impacting on the local government sector; and
 - the development of a regulatory change programme that signals areas of local government regulation that may come under review in the coming 12-24 months.

5.1 Introduction

The majority of regulatory functions undertaken by councils are required or enabled by statutes initiated by central government and reflecting government policy. As such, when considering how to improve the regulatory outcomes delivered by councils, it is important to consider measures that will lift the overall quality of the regulations that councils are tasked with implementing. The Local Government Forum notes:

A critical issue is the quality of the regulatory regimes that local authorities are required to apply. Governance at central government level is of vital importance in this regard. (Local Government Forum, sub. 15, p. 25)

Chapter 4 highlighted a number of areas in which central government regulation making is below the standard set for the public sector in documents such as the RIA Handbook (New Zealand Treasury, 2009) and the Legislation Advisory Committee (LAC) guidelines (LAC, n.d.). Weaknesses in current approaches include a lack of meaningful engagement with local government, limited implementation analysis and quality assurance systems that are only partially meeting their intended purpose. These shortfalls are

compounded by the difficulties in assigning responsibility for regulatory outcomes when regulations are designed by central government and implemented by local government.

Weaknesses in the policy process are perpetuated by institutional arrangements that can shield central government from the full fiscal and political cost of decentralising regulatory functions. As noted earlier, this can reduce the incentives for central government agencies to undertake thorough analysis of regulations prior to passing them to local government to implement. This in turn may reduce incentives for agencies to invest in developing the skills needed to undertake rigorous implementation analysis of regulations administered at the local level.

The quality of analysis can also be affected by the speed at which officials are sometimes asked to generate regulations, which can limit the time available to assess the benefits and costs of policy options. Chapter 4 also highlighted the link between the quality of regulatory outcomes and the quality of the interaction between central and local government.

Improvements are therefore needed in four key areas (as summarised in Figure 5.1 below):

1. the interface between central and local government needs to be improved, with local government recognised as 'co-producers' of regulatory outcomes;
2. incentives to undertake rigorous policy analysis need to be strengthened along with accountability for providing quality advice on regulatory issues;
3. central government agencies need to enhance their knowledge of the local government sector and increase their capability to undertake robust implementation analysis; and
4. meaningful engagement and effective dialogue with local government needs to occur early in the policy process.

Figure 5.1 Areas where improvements can be made



Improving the interface between central and local government

The place of local government in New Zealand's constitutional framework, and the system of government, is generally not well understood (see Chapter 2). At the same time, the system is complicated by the fact that there are two spheres of decision making, each with their own constituents, accountabilities and funding.

Some central government agencies downplay the largely autonomous nature of local government in New Zealand's democratic system and tend to view the sector as they would a regional office of the agency. On the other hand, local authorities can see themselves as "sovereign entities" and resist initiatives that originate "out of Wellington". The result is a strained relationship between the two spheres of government.

To improve regulatory outcomes, more effective and productive interaction between central and local government is needed. This interaction must be based on the mutual understanding that both spheres of government ultimately exist to improve the wellbeing of New Zealanders, and that their success in achieving this can be significantly affected by the actions of the other.

However, a more productive interaction and mutual understanding cannot be mandated. Rather, it is the product of a collection of experiences built up over time by leaders within both spheres of government. These positive experiences filter through organisations, influencing the behaviour of staff and changing organisational cultures. A key challenge for both central *and* local governments, therefore, is to create the right environment to allow these experiences to occur and for a culture of cooperation to evolve.

This will require the relevant areas of central government to:

- obtain a richer understanding of the roles and functions of local government;
- have greater appreciation of the importance of local government in achieving regulatory outcomes;
- reward 'deep thinking' about local regulatory issues (and provide public servants the time and space to do this); and
- adopt a more collegial and less hierarchical relationship with the local government sector.

Yet promoting more productive interaction is not solely the responsibility of central government. Local authorities must also be committed to the notion that working with central government is in the best interest of their communities.

The Commission's engagement with councils revealed a considerable level of distrust and dissatisfaction with central government agencies. A shift towards a more inclusive and cooperative approach by central government agencies will be of limited value unless local authorities are equally willing to embrace the role of a regulatory partner, and 'stay at the table' when disagreements arise.

Such shifts in organisational culture are inherently difficult. Strong leadership on both sides will be required to break down current assumptions and beliefs that act as a barrier to closer, more constructive interactions. Chief executives (CEs) and senior management teams will be crucial agents of change and, as such, it will be important that they see value in working more closely with the other sphere of government.

While the need to improve the interface between central and local government is an important observation of this inquiry, it is by no means a new challenge. For decades consecutive governments have looked for ways to improve the interface with the local government sector (Box 5.1). Efforts of the past illustrate that it will take more than good intentions as a result of this inquiry report to improve the quality of interaction between central and local government. If effective and enduring improvements are to be made, new approaches and strong institutions are needed.

Box 5.1 Previous initiatives to improve the interface between central and local government

Several initiatives have aimed to improve the interface between central and local government. In the 1970s, the Local Government Consultative Group was established to provide a forum for discussing issues of common interest to central and local government. The group was chaired by the Minister of Local Government and included other Cabinet Ministers (as required), the Secretary for Local Government and the president and management committee of the Local Government Association and the Society of Local Government Managers (SOLGM). More recent initiatives are listed below.

- **2000** – The Local/Central Government Forum was established. The Forum is held approximately every six months and is chaired jointly by the Prime Minister and the President of Local Government New Zealand (LGNZ). It is attended by senior ministers and LGNZ National Councillors.
- **2001** – LGNZ makes a submission to the Local Government Bill, suggesting the inclusion of a set of principles to formalise the relationship between central government and local government.
- **2002** – LGNZ calls for the establishment of effective processes between local and central government to “bring about resolution to the widest possible range of these issues.” It suggests formal engagement in the policy process as a way to ensure that local government concerns are recognised at an early stage of Government planning.
- **2004(a)** – An officials group provides an interim report to the Local Government Forum noting there is scope for central government policy making to better incorporate into its analysis the effect of changes to regulatory responsibilities on local government.
- **2004(b)** – Cabinet directs the Department of Internal Affairs (DIA) to facilitate the central government/local government interface in the Community Outcomes Process to overcome potential barriers to engagement. DIA establishes the Local Government and Community Branch to facilitate the interface between the two spheres of government.
- **2004(c)** – The Ministry for the Environment (MfE) establishes the Chief Executive’s Environment Forum, bringing together chief executives from central and regional government to discuss environmental issues of common concern to members.
- **2006** – DIA releases ‘Policy development guidelines for regulatory functions involving local government’.
- **2007** – Evaluation of DIA’s facilitation of the central/local government interface in the Community Outcomes Process. It concludes that the agency has achieved some targeted success in improving central government engagement in the community outcomes process. The evaluation notes that “Further gains may be achieved using a more strategic approach to identify the central government agencies who should be engaging through the identification of mutually beneficial community outcomes and by addressing, if possible, their underlying reasons for not engaging” (Litmus, 2007, p.7).
- **2013** – DIA establishes the Central Government – Local Government Chief Executives Forum to improve collaboration and engagement and to facilitate discussion and information sharing. The Forum is chaired by the DIA Chief Executive and the President of SOLGM jointly or individually.

Strengthening incentives and accountability

For sustained improvements to be made in the quality of regulations passed to local governments, stronger incentives are needed to undertake rigorous analysis. This means:

- increasing public awareness of the origins of new regulations. That is, ensuring that when new regulations are made that the public is well informed as to whether the regulation is being initiated by

local or central government (thus ensuring public reaction to new regulations are directed to the correct level of government);

- improving quality assurance measures to ensure that Cabinet has good information on which to make decisions - particularly in regard to costs and implementation risks associated with delegating new regulatory functions to local authorities;
- ensuring that internal incentive structures within central agencies reward rigorous analysis and discourage overly hasty responses to 'hot' policy issues; and
- increasing the accountability of ministers for the manner in which their agencies interact with the local government sector.

The Commission notes the recent announcement of the Government's proposed regulatory disclosure regime. The proposed regime will place a legislative requirement on CEs of government agencies to disclose whether or not new regulations meet Cabinet's 'expectations for regulatory stewardship' (Box 5.2).

The proposed stewardship expectations cover several important issues for local government, such as the need for careful implementation planning, and are therefore broadly consistent with achieving the points made above. Notably, local government is not specifically mentioned in the initial list of expectations or in the Memorandum in which the expectations are proposed.

Box 5.2 Initial Expectations for Regulatory Stewardship

Cabinet expects that departments, in exercising their stewardship role over government regulation, will:

- monitor, and thoroughly assess at appropriate intervals, the performance and condition of their regulatory regimes to ensure they are, and will remain, fit for purpose;
- be able to clearly articulate what those regimes are trying to achieve, what types of costs and other impacts they may impose, and what factors pose the greatest risks to good regulatory performance;
- have processes to use this information to identify and evaluate and, where appropriate, report or act on problems, vulnerabilities and opportunities for improvement in the design and operation of those regimes;
- for the above purposes, maintain an up-to-date database of the legislative instruments for which they have policy responsibility, with oversight roles clearly assigned within the department;
- not propose regulatory change without:
 - clearly identifying the policy or operational problem it needs to address, and undertaking impact analysis to provide assurance that the case for the proposed change is robust, and
 - careful implementation planning, including ensuring that implementation needs inform policy, and providing for appropriate review arrangements;
- maintain a transparent, risk-based compliance and enforcement strategy, including providing accessible, timely information and support to help regulated entities understand and meet their regulatory requirements; and
- ensure that where regulatory functions are undertaken outside departments, appropriate monitoring and accountability arrangements are maintained, which reflect the above expectations.

Source: Office of the Minister of Finance and the Office of the Minister for Regulatory Reform, 2013.

Improving capability to undertake analysis of local implementation issues

Local authorities are diverse in terms of their size, social make-up and industry structure. They operate under numerous statutes and have varying levels of capability and capacity to undertake regulatory functions. These factors need to be taken into consideration when designing regulations and when selecting the appropriate level of government to undertake regulatory functions (see Chapter 6).

However, as noted in Chapter 4, few central government agencies possess in-depth knowledge of the local government sector. Further, existing capability tends to exist in small 'pockets' of experienced officers whose capacity is often stretched.

There is a pressing need to ensure that agencies that oversee regulations administered by local government have not only the technical knowledge of the regulatory area, but also a broader understanding of the factors influencing the practical implementation of regulations by the sector.

Meaningful engagement early in the policy process

Done well, higher quality engagement between central and local government will help ensure the success of regulation. A dynamic and constructive dialogue early in the policy process would:

- provide local information to inform the development of sound policy advice—from problem definition through to option selection, identification and assessment of likely impacts, implementation and ongoing monitoring and review. Such local information is not only an important reality check on policy proposals, but can be vital for ensuring that regulatory outcomes are achieved at least cost;
- improve the accountability of central government agencies by exposing proposals to external scrutiny before they reach Cabinet;
- promote local government buy-in to policy reforms, thereby promoting the achievement of the regulatory objectives; and
- aid legitimacy by ensuring that the Government follows appropriate due process in the exercise of its regulatory powers.

To achieve ongoing improvements in this area requires more sophisticated and structured processes for managing the interface between the two spheres of government.

It is important to note that examples of good engagement practices do exist. During the inquiry, several councils drew attention to the engagement process for developing the Food Bill as an example of leading practice (see Box 5.3). This approach illustrates a number of important points.

- Despite there being 78 different councils, each with its own set of circumstances, meaningful engagement with the sector is achievable.
- Engagement with local government should be approached with the mindset that councils are 'co-regulators' or 'policy partners' (rather than 'agents' of central government).
- It is possible to manage the political risks associated with sharing early policy thinking (such as draft bills).
- Ministerial leadership is important for the development of 'co-regulator' relationships.
- LGNZ is an important conduit for tapping into the local government sector.

Processes such as those outlined in Box 5.3 will not be practical for every new regulation. Nevertheless, the use of such constructive engagement should be the 'norm' rather than the 'exception'.

Box 5.3 Food Bill – a case study of good engagement practices

Following Cabinet approval for the development of a new Food Bill (the Bill) in 2006, a small working group, the Territorial Authority Steering Group (TASG), was established in 2007. This was jointly convened by the New Zealand Food Safety Authority (NZFSA)¹⁹ and LGNZ. The purpose of the TASG is to work with the NZFSA to implement decisions of the Domestic Food Review. Representation on the TASG was arranged by LGNZ, who sought to include a mix of large/small and rural/urban territorial authorities. TASG members assisted with the implementation of decisions in their areas/regions. The members also feed the views of their colleagues back into the TASG process.

Summaries of each TASG meeting are made available to all territorial authorities via the territorial authorities' password protected webpage on the NZFSA website. The webpage is a repository for all information about the Bill and territorial authority involvement, including upcoming training, implementation matters and guidance material.

In 2008, the Ministry for Primary Industries (MPI) established a specific local government liaison team to oversee ongoing engagement with territorial authorities around the implementation of the Food Bill. The team attends territorial authority cluster meetings, provides advice on implementation matters, works with territorial authorities on any concerns or issues they may have; and collects information that will assist with the future implementation of the Bill once it is enacted. It provides direct support to territorial authorities via coaching and delivering seminars to food business operators, including promoting the use of 'champions' to promote the Bill.

Additionally, in 2008 NZFSA introduced the *Voluntary Implementation Programme* (VIP). The key objective of the VIP was to provide an opportunity to trial aspects of the new proposed regime for the food service sector, with a view to incorporating lessons learnt when the proposed new Food Act is implemented. Territorial authorities were identified as critical to the success of the VIP which enabled MPI and territorial authorities to trial aspects of the future food safety system under the Bill.²⁰

A number of workshops were held by NZFSA across New Zealand as part of the VIP. These workshops were to prepare territorial authorities for the shift from a model of 'inspection' to 'verification', and included training workshops to upskill Environmental Health Officers on their future role as Food Act Officers and verifiers of template Food Control Plans. These workshops are still provided on an as needs basis.

A contestable Territorial Authority Initiative Fund was established in 2008 to provide funding to territorial authorities for initiatives that contributed to the objectives of the VIP. Two rounds of funding were held, with a total pool of \$500,000. Fourteen territorial authorities received funding to undertake a range of activities, from specific workshops for business operators with English as a second language, to encouraging the use of territorial authority cluster models to work collaboratively in the food safety area.

The TASG has provided significant input into the development and drafting of the Bill. This was made possible by the then Minister for Food Safety, who agreed that the draft of the Bill could be shared with the TASG prior to it being introduced to the House. This allowed for discussion on the workability of the Bill, and allowed the role and duties of territorial authorities as a co-regulator in the food safety area to be clearly established. Input was, and is (they will have input into a draft Supplementary Order Paper to the Bill), considered essential by MPI as territorial authorities have a co-regulatory role in implementing the Bill, so the policy and drafting to reflect this policy must be practical and workable.

Source: Information provided by the Ministry for Primary Industries and confirmed by LGNZ.

¹⁹ The New Zealand Food Safety Authority (NZFSA) merged with the Ministry of Agriculture and Forestry (now the Ministry for Primary Industries) in February 2011. However, in Box 5.3 reference is made to NZFSA to avoid confusion.

²⁰ Targets set by MPI in August 2008 were to have 10 territorial authorities involved and 250 food business operators registered under VIP. With the delay in progressing the Bill, this target has been greatly exceeded with 67 of 68 territorial authorities participating and more than 2,500 food business operators involved in VIP as at November 2012.

5.2 'Partners in Regulation' protocol - A way forward

To move forward will require both central and local government to demonstrate a commitment to fostering a more open and productive relationship. To this end, there would be significant value in developing a protocol that articulated an agreed set of behaviours and expectations that would apply when developing and implementing regulations.

The protocol would aim to promote a constructive interface between central and local government by:

- a) developing a common understanding of, and respect for, the roles, duties and accountabilities of both spheres of government; and
- b) articulating an agreed set of principles to govern the development of regulations with implications for the local government sector.

There is precedence for this type of approach. The Generic Tax Policy Process (GTPP), for example, sets out the principles and processes that the Government will undertake when considering major tax reform. An overview of the GTPP is provided in Box 5.4.

Box 5.4 The Generic Tax Policy Process

Since 1995, tax policy has been developed using the Generic Tax Policy Process. This is a process designed to ensure better, more effective tax policy development through early consideration of all aspects—and likely impacts—of proposals, and increased opportunities for public consultation.

A major reform may pass through the five distinct phases of the policy process, moving from the conceptual to the concrete. The process has three main objectives. They are to:

- encourage early consideration of key policy elements and trade-offs of proposals, such as their revenue impact, compliance and administrative costs and economic and social objectives;
- provide opportunities for substantial external contribution to policy formulation; and
- clarify the responsibilities and accountabilities of participants in the process, particularly those of the Policy Advice Division and the Treasury.

The Generic Tax Policy Process means that major tax initiatives are subject to public scrutiny at all stages of their development. As a result, [the Inland Revenue Department has] the opportunity to develop more practical options for reform by drawing on information provided by the private sector and the people who will be affected. The process also gives us [IRD] greater opportunity to explain to interested parties the rationale underlying proposed reforms, thus improving their long-term sustainability.

Source: New Zealand Inland Revenue Department, n.d.

The protocol would be jointly developed and signed by the government and representatives from the local government sector. To signal strong commitment, it could be signed by the Prime Minister and Minister of Local Government. This would increase the protocol's status as a 'whole-of-government' document. It is equally important that local government illustrates ownership and commitment to the protocol. For this to occur, those signing the protocol must be seen by the sector as legitimate representatives with the authority to 'speak for councils'.

The process of negotiating the protocol is itself likely to lift central government's understanding of the issues faced by local government, and also local government's understanding of the regulatory priorities of central government. Further, the protocol would assist the public to hold decision makers to account by clearly articulating the principles that should guide regulation making.

The protocol would not need to be a legally binding document. Rather, it would be an avenue through which both spheres of government could acknowledge that the current interface is not working and take positive steps to improve the situation. This said, more formal and legislative options are possible.

Finally, while the focus of this inquiry is on regulation, the protocol could also be used as an avenue to reach agreement on a wider set of issues.

Options for providing incentives to comply with the protocol are discussed below in the section titled 'Making the protocol work'.

R5.1

Central and local government should work together to develop a 'Partners in Regulation' protocol. The protocol should develop an agreed set of principles to govern the development of regulations that will have implications for the local government sector.

What would the protocol contain?

While the content of the protocol would be the product of the joint development process, a possible starting point could be to examine the content of similar agreements found in the UK, Europe and Australia. Further insights could be gained from countries such as Germany, France and Spain that have codified the 'rules of the game' for central/local interaction within their written constitutions.

An important limitation of using overseas examples is that they have been developed in very different constitutional and institutional settings. Therefore, while the structure and underlying principles of these documents may help to inform deliberations in New Zealand, they are no substitute for working through an agreed set of principles that are tailored to the New Zealand context.

With this in mind, the discussion below draws on overseas experiences to provide a 'feel' for what the contents of the protocol could contain. The examples given are not recommendations. Rather they are provided to assist both central and local government in coming to a decision on whether such a protocol would be both valuable and workable.

Preamble

The preamble could set out the background and history of the relationship between the two spheres of government, and acknowledge the problems that have given rise to the need for a protocol. It could clearly articulate the purpose of the protocol and the outcomes it is seeking to achieve. It could also clarify the legal context within which the protocol will operate. This could include, for example, highlighting that the protocol does not override or subtract from the statutory commitments of either party. The preservation of autonomy over respective areas of decision making could also be emphasised.

The preamble could acknowledge that both parties understand that they ultimately exist to serve the people of New Zealand. It could provide a clear statement that both spheres of government see the protocol as a jointly owned document and, as such, take joint responsibility for its content and implementation.

A list of objectives

The protocol could include a list of objectives that would contribute to achieving the purpose and intended outcomes listed in the preamble. The objectives could include such things as the development of an agreed policy process for making new regulations, or the fostering of a better understanding of the regulatory priorities of each party.

The objectives could then be used as 'touchstones' for tracking the success of the protocol.

High-level principles

A central feature of the protocol could be a set of principles to guide the formulation of regulations where local government has a significant interest. The principles would need to be broad enough to cover the range of possible policy situations, yet clear enough to ensure compliance could realistically be assessed. For example, the protocol could include a commitment to high-level principles such as acting in good faith

to coordinate and share information, or the recognition that each sphere of government is ultimately accountable to its own constituents.

Roles, responsibilities and commitments of each party

Perhaps the most important element of the protocol would be the commitment each party makes to improve the regulatory system (or any other areas included under the protocol). In overseas agreements, it is common for these to include 'joint commitments' as well as commitments specific to each party.

Joint commitments could include, for example, a commitment for both parties to consider the strategic priorities of the other party when making regulatory decisions, or a commitment to constructive and timely dialogue on emerging regulatory issues.

Central government commitments could include, for example, a commitment to explicitly consider local circumstances and capabilities prior to allocating regulatory functions, or a commitment to seek local government input early in the policy development process.

Local government commitments, on the other hand, could include such things as a commitment to reducing unnecessary inconsistency through the promotion of collaborative arrangements, best-practice sharing and mutual recognition agreements, or a commitment to work with central government to improve the regulatory capability of councils.

Operational issues

Having reached consensus on a set of principles and commitments, measures to implement these agreements would need to be established. These would need to deal with practical issues, such as the date the agreement would come into force and the process for reviewing the agreement upon its expiry.

Table 5.1 below provides examples of common operational clauses contained in Australian inter-governmental agreements.

Table 5.1 Examples of operational clauses used in inter-governmental agreements

Agreement	Key operational clauses
Australian, State and Territory Governments and the Australian Local Government Association (2006).	<p>'The Local Government and Planning Ministers' Council, or its successor Ministerial Council, shall review the progress of the implementation of this Agreement and assess compliance by the Parties with this Agreement.' (p.7)</p> <p>'Questions of the application of this Agreement are to be considered by the Local Government and Planning Ministers' Council including out of session, if they are unable to be resolved by the Parties directly.' (p.7)</p>
State of Queensland 'Partners in Government Agreement' (2012)	<p>'This Agreement will remain in operation for three years from the date of signing.</p> <p>Following the commencement of this Agreement the state government will meet with the Local Government Association of Queensland (LGAQ) to discuss priority action items for the coming year. Thereafter, the state government will meet with the LGAQ annually to review the implementation of the priority action items and the consideration of new priorities.</p> <p>The Premier will meet with the Executive of the LGAQ at least once a year.</p> <p>The Minister for Local Government will meet with the LGAQ executive a minimum of four times per year.' (p.6)</p>
State-Local Government Relations: An agreement between the State Government and Local Government in South Australia (2012)	<p>State and Local Government jointly commit to: (establishing)'...an annual Schedule of Priorities that will reflect the focus of joint work to be undertaken during the year and which will be signed by the parties in the lead up to each financial year...'</p> <p>'... hold at least annually a Minister's State/Local Government Forum to tackle significant issues that arise at the interface between State and Local Government.' (p.3)</p>

Agreement	Key operational clauses
Western Australian State Local Government Agreement (2010)	'The signatories will hold two annual meetings, one of which is to be held for input and discussion prior to each State Budget and the other meeting will be held for discussion of State/local government matters at a strategic level to ensure community needs and expectations are being met and establishing a protocol for forward and agreed subsidiary memoranda. Matters discussed are to remain confidential between the relevant parties unless otherwise agreed.' (p.9)

Making the protocol work

As noted, the process of developing the protocol would itself provide a valuable opportunity to bring the two spheres of government to the table - refocusing the discussion from '*what is*' to '*what should be*' the relationship between central and local government.

Yet the Commission is aware that similar agreements overseas have had mixed success in changing behaviours. For example, in 2007 the local government sector suspended its involvement with a similar protocol in Queensland due to what it saw as a lack of commitment by the State Government. Similarly, the UK's 'Central-Local Concordat' (Appendix 1 in Headlam, 2007) was largely ignored by central agencies and fell into disuse, prompting calls for the codification of its principles in statute (Great Britain, Parliament, 2013). Closer to home, DIA's *Policy development guidelines for regulatory functions involving local government* (2006) have gained little traction with agencies and are seldom used—a point made apparent to the Commission during engagement meetings.

These examples illustrate the importance of supporting the protocol with supplementary measures to increase the incentives to comply.

Incentives on central government

There are number of ways that central government agencies could be incentivised to follow the protocol. Measures range from soft non-statutory directions to codifying the principles of the protocol in statute.

At the most basic level, the use of the protocol could be encouraged through a letter from the relevant minister to the CEs of central government agencies. The letter could draw CEs' attention to the protocol and request that agencies follow it when making relevant regulations. While this approach would be quick and easy to implement, it is unlikely to signal strong government commitment to the protocol and, as such, may provide only a moderate incentive for CEs to develop internal processes to monitor and encourage compliance.

To strengthen the weight and authority given to the protocol, Cabinet could issue a directive instructing agencies to comply. This approach would be simple to implement and would create a firm incentive on agencies to adhere to the commitments contained in the protocol. However, the strength of this incentive may dissipate over time as new issues and priorities become 'front of mind' for the Government.

One option for maintaining momentum would be to incorporate the protocol into the Cabinet Manual as part of the 'Process for Developing Bills'. This could be done in a similar manner to the requirement for Regulatory Impact Assessments of new policy initiatives (see Cabinet Office, 2008, para 5.71). Inclusion in the Cabinet Manual would impose a non-statutory requirement on Ministers and central government agencies to comply with the protocol. It would give the protocol an element of longevity and transparency that may not be as apparent with a letter or Cabinet directive.

Transparency and accountability could be promoted further by asking ministers sponsoring regulatory changes to certify that the proposed changes have been developed in a manner consistent with the protocol. This could take the form of a simple disclosure statement that could accompany relevant Cabinet papers and be made public once Cabinet has reached a decision. Certification could be done in consultation with the Minister of Local Government and the requirement reflected in the Cabinet Manual.

A system of Ministerial certification would be relatively simple to implement, and would be likely to lead to pressure on agencies to comply with the protocol (and to ensure they have the necessary capability to do so). This approach would require Ministers to make an explicit judgement as to whether or not the policy

process complied with the protocol. Depending on the wording of the protocol, these judgements may be easily contested, making certification politically unpopular. However, this risk could be managed through the process of developing the document.

Ministerial certification could initially be a disclosure measure only. As familiarity with the principle of the protocol increased, and the expectations of Cabinet became ingrained, non-certified proposals could face additional measures. For example, significant proposals that have not been developed in accordance with the protocol could be subject to a mandatory Post-Implementation Review (PIR).

An alternative to the Ministerial certification would be to place a disclosure requirement on the CEs of government agencies. This would work in a similar manner to Ministerial certification but could be linked to the agency performance management framework. An advantage of this approach is that certification could be incorporated into the proposed regulatory disclosure regime recently announced by the Government (see Box 5.2).

Incentives could be further strengthened by linking RIS requirements to compliance with the protocol. This approach would see the Treasury's Regulatory Impact Analysis Team (RIAT) responsible for judging and certifying compliance of significant proposals. Proposals that are judged to be non-compliant could be subject to a mandatory PIR—adding a second 'trigger' for a PIR.

The involvement of the RIAT would provide an element of independence in the assessment of compliance. However, it would also add cost and complexity. Care would need to be taken to ensure that the protocol and the RIS quality assurance criteria were consistent and mutually reinforcing. Failure to do this could make both the RIS system and protocol unworkable.

A final option would be to codify the protocol and its commitments in statute. This would make compliance a legally binding obligation on both parties.

Where on the spectrum should the protocol sit?

Joint development of a protocol would in itself represent a significant step forward in the relationship and interface between central and local government. As with any processes of this nature, there needs to be a period of adjustment to new ways of operating and new expectations of Ministers and CEs.

Given this, the Commission recommends that the introduction of the protocol should be accompanied by non-statutory compliance incentives—specifically, inclusion of the protocol requirements in the Cabinet Manual, and a Cabinet directive to central agencies to comply with the protocol in all but exceptional circumstances²¹. Progress towards implementing the protocol should be included in the performance measures of key agencies such as DIA, MfE, MPI and the Ministry of Business, Innovation, and Employment (MBIE).

A review of the protocol should be conducted a suitable period of time after it is introduced. The review should be undertaken by an independent reviewer appointed by the Minister of Local Government in consultation with LGNZ.

The independent review should assess whether or not the protocol is achieving the desired improvements and if amendments are needed to improve its operation and effectiveness. Should the review find that the protocol has not met its objectives, options for strengthening compliance incentives should be examined (both statutory and non-statutory options).

R5.2

The Government should add the requirements of the 'Partners in Regulation' protocol to the Cabinet Manual. A Cabinet directive should be given for all agencies to act in accordance with the protocol. Progress towards implementing the protocol should be included in the performance assessments of central government agencies.

²¹ An agreed set of 'exceptional circumstances' could be developed as part of the process of developing the protocol.

R5.3

A review of the 'Partners in Regulation' protocol should be conducted a suitable amount of time after it is introduced. The review should be undertaken by an independent party appointed by the Minister of Local Government in consultation with LGNZ.

Local government

Incentives are also needed to ensure that local government 'holds up its end of the bargain'. However, given the level of autonomy that local authorities have over their operations, non-statutory options are likely to be more limited than for central government.

Again it is possible to conceive of a spectrum of options with increasing incentives for compliance.

At one end of the spectrum would be simple sector guidelines aimed at assisting local authorities with complying with the protocol. These would be easy to implement but would offer little in the way of incentives to comply.

A step up from this would be to request local authorities to include a 'statement of intent to comply' within their annual plan. This requirement could be written into the protocol itself. A statement such as this would provide an element of transparency and public accountability around council compliance; however, it would rely solely on voluntary compliance and as such is largely dependent on the level of commitment of local authorities to the protocol. This said, if local authorities see value in the protocol, they are unlikely to risk central government walking away from it due to perceived breaches by local authorities. This in itself would provide an incentive on local authorities to include the disclosure statement. There is also likely to be an element of 'self-regulation' within the sector.

Statutory measures are also possible. For example, the Local Government Act 2002 (LGA) could be amended to include a statutory obligation on councils to 'give regard to' the protocol when making regulatory decisions. Stronger wording could also be considered if necessary.

Where on the spectrum should a protocol sit?

In keeping with the non-statutory nature of the protocol, it is (on balance) preferable that local authorities are incentivised to follow the protocol through the incorporation of a 'statement of intent to comply' within their annual plans. This requirement should be written into the protocol.

Again, statutory options should be considered subject to the review of the protocol mentioned above.

R5.4

The 'Partners in Regulation' protocol should include a provision that local authorities include a 'statement of intent to comply' in their annual plan.

How much would it cost?

The development of a protocol would impose modest costs on both central and local government. Resources would be needed to draft the protocol, and Ministerial and council time would be required during the negotiating process. There may also be some ongoing costs to central government when developing policies. These would be associated with more extensive engagement processes and the need to raise capability in certain areas (capability is discussed further in section 5.3 below). However, some of these costs, such as the cost of better engagement, would be incurred regardless of the protocol if leading practice was observed.

Overall, there are likely to be large net benefits from the development of the protocol. These would come in the form of better regulatory outcomes and a reduced risk of regulatory failure.

5.3 Other measures to improve central government regulation making

A number of measures would assist central government agencies to devolve higher quality regulations to local government. While these measures would assist central government in complying with the proposed protocol, they are valuable in their own right and should therefore be considered independently.

Improving capability to assess regulations with a local element

General guidance material and training on what constitutes good policy analysis is readily available to government agencies. Such material plays an important role in lifting the overall policy proficiency of officials. However, there appears to be little emphasis within agencies on the specific knowledge needed to analyse issues involving the local government sector.

There are numerous ways that capability could be improved.

- The Treasury, in conjunction with DIA, could develop local government specific guidance material for preparing RISs. This guidance could build on the guidelines published by DIA in 2006 and include the regulatory allocation framework developed by the Commission (Chapter 6).
- Officials could be given additional training aimed at raising their awareness and understanding of the local government sector. This could include, for example, training in councils' roles and obligations under the LGA, the Resource Management Act 1991 (RMA), Building Act 2004 and other key pieces of legislation.
- Secondees with specific local government expertise could be used to fill capability gaps. Secondments may also be appropriate when demand for these skills is sporadic and therefore developing internal capabilities cannot be justified.
- The use of joint working groups and advisory groups could be promoted. These groups would consist of central government officials and staff from relevant local authorities.
- Additional training of officers in the use of effective consultation processes and techniques could be conducted. This could include assisting officers to understand the value of consulting with local government at different stages of the policy development cycle, and the strengths and weaknesses of different consultation options (such as test panels, focus groups, public meetings, workshops and full public consultation, etc).

R5.5

Central government agencies should develop strategies to increase, and then maintain, their knowledge and understanding of the local government sector.

Amendment of The Treasury's 'significance criteria' to explicitly recognise local government

The Treasury's RIAT is required to provide quality assurance for RISs that are likely to have a 'significant' impact or risk. A proposed regulation is deemed to be 'significant' if it is likely to have:

- "significant direct impacts or flow on effects on New Zealand society, the economy or the environment"; or
- "significant policy risks, implementation risks or uncertainty."

In theory, this definition *should* pick up the 'impacts' of new regulations on local government (as part of the economy and society), and the implementation risks associated with allocating functions to councils (for example, the risk that councils will not have the necessary capability to effectively implement the regulation). However, these impacts and risks are commonly overlooked during the RIS processes.

Clearly greater scrutiny of the regulation-making process is needed. To assist this, the 'trigger' for Treasury involvement should be amended to explicitly cover proposals that have a significant impact on local government. 'Significant impact' could be defined as occurring when one or more of the following criteria apply:

- there will be (or will likely be) large impacts on the resources of councils. This could include the expenditure requirements of councils or commitment of council staff;
- the proposal significantly changes the powers and responsibilities of councils; and
- the proposal is (or is likely to be) reliant on councils to give effect to the regulation.

As capability develops, the need for the RIAT to be involved in the policy development process may decline. This would see the RIAT increasingly exercising its discretion to allow agencies to 'self-assess' proposals where they are confident the agency will adequately take into account the impact of a proposal on local government and the associated implementation risks.

R5.6

The trigger for involving the Treasury's Regulatory Impact Assessment Team in scrutinising Regulatory Impact Statements should be amended to explicitly cover proposals that have a significant impact on local government.

The use of joint regulatory change programs

The quality of discussion on regulatory issues would be improved if councils were given adequate notice of impending regulatory changes (or consultation discussions). To achieve this, agencies with substantive dealings with local government should produce, and make publicly available, a joint regulatory change programme that signals areas of regulation that may come under review in the coming 12-24 months. The programme would be non-binding on agencies to allow for changes in priorities over the year.

The Treasury currently manages a similar process in which it collects annual regulatory change programmes from various agencies but these are not made publicly available. Piggy-backing on this process to develop (and publish) a combined plan focusing on local government would have the following benefits:

- it would allow local government to more easily digest the full government programme and plan for the demands that will be made of it, both in terms of developing and implementing regulations;
- government agencies (and ministers) would develop a better appreciation of the combined demands they are placing on local government, ideally resulting in them collectively rationing regulatory change; and
- it would allow synergies to be identified in the government reform programme, hopefully allowing savings and effectiveness gains to be realised.

The cost of developing a combined regulatory plan is expected to be only marginally higher than the costs already incurred in developing the regulatory plans for The Treasury. As a result moderate net benefits would be expected.

R5.7

The Government, in consultation with local government, should develop and publish a regulatory change programme that signals areas of local government regulation that may come under review in the coming 12-24 months.

6 Allocating regulatory responsibilities

Key points

- The Terms of Reference for this inquiry require the Commission to develop principles to guide decisions about which regulatory functions are best undertaken by local or central government.
- A careful and systematic application of relevant principles can result in an allocation of responsibilities between central and local government that better achieves the objectives sought for regulatory interventions. However, the allocation of functions is rarely simple in practice. Every case will have unique circumstances and implications that impact on the choices made for allocating responsibility.
- A framework is provided to guide the allocation of regulatory roles between central and local government. The framework addresses the following key allocation questions.
 - **Should the regulatory standard or policy be determined centrally or locally?** Factors relevant to this choice include the communities of interest that will be affected by the regulation; where the costs and benefits are likely to fall; how those responsible for setting the regulatory standard or policy can be held to account for decisions; and consideration of the merits or otherwise of accepting variability in regulatory outcomes across regions.
 - **Should the regulation be implemented and administered centrally or locally?** Considerations include whether or not implementation requirements are likely to vary from region to region; the potential for cost efficiencies in allocating responsibility centrally or locally; the existence of incentives on the regulator that might hamper the effective delivery of regulation; the location of the knowledge and capability to implement the regulation; and whether suitable arrangements for funding administration of the regulation exist centrally or locally.
- The Commission recommends updating the Treasury Regulatory Impact Analysis (RIA) Handbook and the Cabinet Office Manual, with a requirement to use the allocation framework where proposals for new or amended regulatory responsibilities are being considered. The framework should also be used to review existing regulation, including where:
 - there are changes in the skills and capabilities required of the regulator;
 - institutional arrangements have changed; and
 - there is mounting evidence of poor regulatory outcomes.
- The framework could be adapted and applied more broadly to consider:
 - the allocation of regulatory responsibilities between territorial and regional authorities;
 - the allocation or reallocation of functions between local authorities and other agencies such as district health boards; and
 - when trans-national regulatory arrangements may have merit.

The process of designing new regulation, or amending existing regulation, has an added dimension when local government is involved. The analysis supporting regulatory change not only needs to ensure that regulation will provide net benefits, but should also assess whether central or local government is best placed to carry out particular regulatory functions. The Terms of Reference for this inquiry require the Commission to develop principles to guide decisions on which regulatory functions are best undertaken by local or central government. The Terms of Reference signal the need for a framework to improve how

central government allocates regulatory functions to local government, or to identify functions that are likely to benefit from a reconsideration of the balance of delivery. This chapter develops and presents a framework for working through the allocation decision.

The chapter is organised as follows:

- **Section 6.1** presents key insights from the international literature on the allocation of roles at different levels of government.
- **Section 6.2** explores allocation considerations as they apply in the New Zealand context.
- **Section 6.3** presents issues relevant to the allocation of regulatory roles raised in submissions to the inquiry and in responses to the Commission's surveys of business and local government.
- **Section 6.4** presents an allocation framework that provides guidance and criteria for allocating regulatory responsibilities between central and local government—with the overall purpose of better achieving the objectives sought for regulatory interventions. To illustrate its use, the framework is applied to the allocation of responsibilities under the Gambling Act 2003 and to the allocation of administrative responsibilities under the Building Act 2004.
- **Section 6.5:** makes recommendations for codifying the use of the allocation framework to improve the quality of advice provided by departments when new or amended regulatory responsibilities are proposed or existing regulations are reviewed.

6.1 Ways of thinking about allocation: insights from the literature

Subsidiarity

Many writers have argued that the principle of subsidiarity should be the starting point for thinking about which level of government should undertake regulatory functions.

This principle has been expressed in subtly different ways, but typically along the lines that, where practicable, responsibility should be allocated to the level of government closest to those affected by the policies made or the actions taken.

There is a significant academic literature devoted to unravelling the philosophical foundations of subsidiarity in order to develop a functional definition of the concept and how it can be applied. For example, Follesdal (1998) highlights three philosophical justifications for favouring decision making by lower tiers of government. 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 at a decentralised level is more likely to lead to more efficient outcomes, as welfare is enhanced when public goods and government decisions are made in correspondence with the preferences of the people for whom they are provided.

The European Union (EU) has adopted a principle of subsidiarity for deciding which level of government—EU or Member States—should take action. To make the principle functional, questions are asked about the community of interest affected by the scale and scope of the action, whether or not action at a higher level is necessary to achieve the objective, and whether or not a greater overall level of benefit would be achieved if the action was taken at a different level of government (Box 6.1).

Box 6.1 The EU principle of subsidiarity as explained by the United Kingdom House of Lords

Subsidiarity

In the EU context, subsidiarity is a concept about the level of governance (EU, national, regional or local) at which action should be taken. The Treaties make the concept into a legal principle, defined in Article 5(3) TEU:

Under the principle of subsidiarity, in areas which do not fall within its exclusive competence, the Union shall act only if and insofar as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level.

It is based on the presumption that action should be taken at the lowest level of governance consistent with the subject matter and the objective to be attained. Where the EU has exclusive competence, the principle does not apply.

Although subsidiarity is a legal concept, assessment depends essentially on policy judgements.

Making the assessment

1. A preliminary Yes/No question must be considered: Does the proposal relate to an area of exclusive EU competence? By definition, the principle of subsidiarity cannot apply in the five areas of exclusive EU competence defined in broad terms in Article 3 TFEU or in relation to the making of international agreements in some circumstances. All other proposals for action are subject to the subsidiarity principle.
2. Two tests can be derived from the definition in Article 5 TEU:
 - i. A necessity test: Is action by the EU needed to achieve the objective? Can the objective of the proposed action only be achieved, or only achieved to a sufficient extent, at EU level?
 - ii. A greater benefits test: Would the objective be better achieved at EU level? Would action at EU level provide greater benefits than action by Member States? Would the whole be greater than the sum of the parts?

Source: From Great Britain, Parliament, n.d.

The jurisdiction of decision making and the jurisdiction of effects

While the principle of subsidiarity argues for actions to be taken by the lowest level of government practicable, theories of fiscal federalism focus on the importance of the jurisdiction of decision making corresponding to the jurisdiction of effects (Oates, 1999). This is a core component of the environmental economics literature as it allows for the impact of environmental decisions, both benefits and costs, to be captured within the jurisdiction, internalising any externalities or spillovers. When decision makers bear the consequences of their decisions, it provides an incentive and a discipline to consider all the relevant effects, resulting in a more optimal allocation or use of resources.

A key insight from this literature is that a suboptimal level of regulatory activity is likely to occur when there are spillover benefits which are not captured by the jurisdiction having to fund the regulatory activity. These cases may justify funding from central government (Kerr, Claridge and Milicich, 1998).

Box 6.2 Common types of externality or spillover effect

- **Where a harmful effect extends beyond the jurisdiction:** for example, where the allowable discharge into a river in one jurisdiction flows into another jurisdiction imposing clean-up costs, or where the social costs of alcohol-harm do not just impact locally but spill over at the national level

in costs to the health, justice and welfare systems. This leads to over-production of the activity creating the harm, because the wider costs are not borne by those creating the harm.

- **Where a benefit extends beyond a jurisdiction, but the costs are borne locally:** for example, the national benefit of protecting biodiversity. This leads to under-provision of the benefit because those incurring costs locally receive only part of the benefit, while others can 'free-ride' from their effort.
- **Where there are network effects:** for example, where telecommunications towers are sited on land in one jurisdiction to serve people in other jurisdictions but the network effect (everyone being connected) benefits everyone. Coordinating access through jurisdictions can be costly yet is necessary to obtain the beneficial network effect of everyone being able to access the network.
- **Standardisation has positive spillover benefits. It lowers costs for cross-jurisdictional operations, permits interoperability and underpins access to economies of scale:** for example, New Zealand's provincial governments regulated different rail gauges in the 1860s. A national standard was mandated in 1871; however, it took many years to rebuild the network to the new standard to enable a national rail system.

Source: Adapted from Kerr, Claridge and Milicich, 1998

There are trade-offs to be made

In the economics literature, allocating responsibilities centrally or locally is typically characterised as a basic trade-off between the benefits of centralisation—dealing with externalities or spillover effects, achieving scale economies, providing an integrated regulatory environment or equal access to a uniform level of service—against the loss of the benefits of decentralisation—local autonomy and the ability to tailor public services and policies to the specific needs, characteristics and preferences of local communities (Oates, 1999; Besley and Coate, 2003).

Alesina and Spolaore (2005), Mazzafero and Zanardi (2008) and others argue that these trade-offs are well suited to the tools of economic analysis. For example, the trade-off between the benefits of centralised policy making and the value of local preferences can be measured by the relative distance between the central policy and what would have been chosen by a local community.

The dominance of decentralisation over centralisation or vice versa is determined on the basis of the utility loss that each individual suffers in connection with the distance between his or her own most preferred level of public expenditure and that chosen by the national/supranational median voter. (Mazzafero and Zanardi, 2008)

The greater the differences between communities, the more individuals or regions will be dissatisfied with the central policy.²² Where the central policy requires a different allocation of resources than a local government might otherwise choose, there is little incentive for a local government to resource the optimal level of the regulatory activity from central government's point of view. Alesina and Spolaore (2005) argue that this may be a justification for funding or redistributive policies from central government. A general conclusion from this literature and the literature on fiscal federalism is that sources of funding should be considered alongside the decision of where best to allocate regulatory responsibility.

The incentives on and the competencies of institutions

Developing a framework for the allocation of regulatory responsibilities between levels of government also requires an assessment of the institutional arrangements available, and their incentives and competencies to deliver good regulation.

²² Alesina and Spolaore (2005), along with many other writers, make the simplifying assumption that people who live near each other have more similar policy preferences. This assumption is also regularly made by those that equate "communities of interest" with "local communities". However, in reality, this is the case for some policy issues, and not for others.

Oates, influential in both the fiscal federalism and environmental economics literatures, has written:

It is helpful... to go back to 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)

Some writers have focused on the incentives faced by different tiers of government in implementing regulation. It is argued that local governments have the incentive to differentiate themselves on the regulatory policies they implement, creating competition for businesses and people (Tiebout, 1956; Siebert and Koop, 1993).

Some have argued that competition between jurisdictions can lead to a 'race to the bottom' in regulatory standards, in order to attract businesses, although local jurisdictions have been known to implement higher standards (for example larger minimum residential section sizes or more stringent building standards) for the same reason. Oates (1999) raised the issue of overly stringent standards being designed at the centre—a 'race to the top'—although, as outlined earlier, there may be other explanations for differences between the regulatory standards chosen by communities and standards designed at the centre.

Other writers have focused on the dynamic efficiency advantages of competition for innovation and experimentation with different regulatory approaches. The advantage of experimentation, of course, accrues to those who can observe the successes and failures of others. Black (2005) observes that central governments are more constrained in their ability to experiment and innovate, although they are able to adopt successful practices trialled on a smaller scale by lower tiers of government.

Arcuri and Dari-Mattiacci (2010) think of the merits of centralised versus decentralised decision making in terms of risk. Centralisation pools expertise and is therefore less likely to result in erroneous decisions. However, if poor decisions are made, the consequences are more far-reaching. In contrast, in decentralised decision-making systems, poor decisions are more frequent but their consequences are locally confined.

Power (2007), on the other hand, focuses on institutional risk—that is, the risk that an organisation will not achieve its policy objective. Drawing on Power, Black (2012) argues that the management of institutional risk needs to be considered when designing regulations. This includes explicit recognition of the regulator's tolerance for institutional risk. However, Black also points out that the regulator's 'risk appetite' can be significantly modified when the political context shifts—this in turn can shift the regulator's 'political licence to operate' and therefore the manner in which regulatory functions are undertaken.

Recent developments in the literature have focused on the relative competencies of different tiers of government in undertaking different aspects of regulation. Van Zeben (2012a) argues that regulatory functions—standard setting, implementation and enforcement—should be allocated across different levels of governance according to the specific competencies required at each stage of the regulatory process.

Lin (2010) makes the case that the most efficient regulatory structure may involve delegation, with central government retaining the power to set the regulatory standard and delegating the power to make the remaining decisions to local governments. In many cases, higher tiers of government are better able to gather and assess the information about the wider implications of a regulatory policy and may have the technical expertise to set a regulatory standard, while decisions about how to achieve the standard are often better left to local governments who have greater knowledge of local preferences, conditions and costs. It is more usual to see higher tiers of government setting standards and giving discretion to lower tiers of government as to the means of achieving them, although there are cases where lower levels of government set the standard and the means to achieve it is left to the higher tier (Lin, 2003).

When aspects of the regulatory process are undertaken at different levels of government, it is important that there are interactions, specifically knowledge and information flows, between them (Mumford, 2011). Lin (2010) observes that the literature has been largely agnostic about the nature of the underlying contractual arrangements between levels of government. The problems likely to be encountered when regulatory responsibilities are allocated between different levels of government include a lack of clarity about roles and accountability for outputs, and problems in coordinating activity.

Finally, it is worth returning to the general conditions under which governments can make good decisions about the use of regulatory power. The decision about where to allocate regulatory roles may be constrained by the quality of the government structures available. Even where the benefits, costs and information requirements are well-aligned within the jurisdiction, regulatory policy making and implementation may still be poor if the government structure is inherently inefficient or lacks accountability (Kerr, Claridge and Milicich, 1998). In theory, local government decision making can be more closely monitored than a more distant central authority (Bailey, 1999; Bardhan and Mookherjee, 2011; Seabright, 1995), but central government agencies may have better internal monitoring and guidelines for conflicts of interest than local governments.

Application of the literature to allocation decisions

A few studies have attempted to develop a framework for applying insights from the theoretical literature to solve the allocation of regulatory responsibilities, or to evaluate actual allocations of responsibilities and their attendant problems. For example, in the United States, the Congressional Budget Office (1997) conducted two case studies which examined which level of government would most efficiently set standards, choose control methods and manage research for protecting drinking water and controlling ground level ozone. In the European context, van Zeven (2012b) investigated the allocation of regulatory responsibilities in the EU Emissions Trading Scheme. In New Zealand, Kerr, Claridge and Milicich (1998) addressed the allocation of regulatory responsibilities between central and local government under the Resource Management Act 1991 (RMA). A second paper (Claridge and Kerr, 1998) applied their framework to the protection of kiwi habitat.

There is a vast international literature on the allocation of roles and responsibilities between different levels of government. Some key insights from that literature have been presented in this section. However, New Zealand has its own constitutional, institutional, historical and cultural context and this will have a significant bearing on decisions about where regulatory responsibilities are allocated. The next section discusses some of the issues raised in the literature and what they might mean for allocating regulatory responsibilities in New Zealand. Figure 6.1 sets out some of the main New Zealand-specific considerations:

Figure 6.1 Allocation considerations in the New Zealand context



6.2 The New Zealand context

This section explores allocation considerations as they apply to the New Zealand context.

Subsidiarity

What does a principle that policies should be made by the level of government closest to the people most affected mean in a small country like New Zealand? There is a historic tradition of self-reliance in New Zealand that has its origins in small isolated communities, many days' travel from the seat of government, taking care of their own affairs. But today, New Zealanders are closer to central government than many people in other countries are to their local government. There are issues of size and materiality that need to be taken into consideration when applying the international literature to the New Zealand context.

New Zealand also has a very different history and set of circumstances than the conditions under which the EU adopted its principle of subsidiarity—essentially to protect the rights and capacity of the Member States to take action. What does the EU experience with applying the subsidiarity principle suggest for the allocation of regulatory responsibility between central and local government in New Zealand?

The EU is authorised to take the action if the objective sought cannot be achieved “due to the scale and effects of the proposed action” (Box 6.1). This is consistent with the fiscal federalism literature that has its origins in the United States (US) but it is relevant in the New Zealand context as it is in the European or US federal context. Can the objective of regulation be met by the policies made or standards set by each local authority? This will depend on whether the policy affects other communities of interest that are not within the jurisdiction making the regulatory policy (ie whether there are spillover effects).

The “greater benefits test” (Box 6.1) articulated by the United Kingdom House of Lords is also relevant in the New Zealand context. Would consistent policy making and implementation of regulation provide greater benefits to New Zealand overall than tailored application of the regulation by each local authority?

National interest and local interest

In New Zealand, the policies and decisions made by local authorities can have significant national impacts. In particular, the plans and policies that determine resource use have a clear impact on regional economic growth and ultimately on national economic growth. New Zealand's largest council's plans and policies impact on the living and working environment of over a third of New Zealand's population, with potential spillover effects for the rest of the country. It is for this reason that central government has a policy office working in Auckland (APO) to both provide an informed Auckland perspective in the development of central government policy, and identify Auckland policy initiatives that will have a significant impact on Auckland and national economic growth.

It is not just in matters of economic growth where there can be significant national interest in local authority issues. Issues that capture public attention, such as the mauling of a child by a roaming dog, can lead to central government action because of the wide public interest in such issues.

Central government will always ultimately be responsible for protection of the public interest; central government is the holder of residual risk. Local authorities have been given regulatory responsibilities and they are accountable in various ways for their performance. However, where local authorities become overwhelmed by the scale of an event (such as leaky buildings), it is very difficult for central government *not* to intervene in the public interest. Central government has strong incentives to put in place mechanisms to minimise the risk of things going wrong (such as an accreditation regime for building consent authorities) and limit central government liability for harm that does occur, but in the end central government as the residual risk holder may intervene in the public interest.

More generally, where it comes to local government implementing, administering and enforcing regulation designed at central government level, central government still has an interest in regulation being performed well by local authorities.

The jurisdiction of regulatory policy making and Māori

The jurisdiction in which regulatory policies are made is important to Māori. Māori are predominantly organised in regional groupings (iwi, hapū) but their Treaty relationship is with the Crown. Māori will have interests that cover the full spectrum of policy activity from formulating national direction and enacting legislation through to local implementation and administration. This highlights the dangers inherent in the simplifying assumptions often made in the academic literature that conflate the “community of interest” with “the local community”.

It is a generally accepted legal position that the Crown cannot delegate its Treaty duties when it delegates or devolves a function to another party (such as local authorities). Ensuring that Treaty duties are carried out effectively will be a matter of national interest, and will need to be reflected in any institutional arrangements when regulatory responsibilities are devolved or delegated by the Crown.

The RMA and the Local Government Act 2002 (LGA) impose specific statutory obligations on local authorities to include Māori or iwi in decision making (Chapter 9). When the Crown delegates regulatory responsibilities to local authorities, it needs to take an ongoing interest in the capability of local authorities to meet their statutory obligations to iwi. In some cases, capability gaps may limit the extent to which regulatory responsibilities can be delegated to local government, or specific capability building may be required at the local level to ensure that iwi are appropriately included in decision making.

Being clear about the nature of Māori interests is important for thinking about the allocation of regulatory responsibilities between central and local government. For example, while Māori have an interest in the RMA at a national or legislative level, kaitiakitanga over particular awa, maunga or other taonga will be very locally specific for some iwi or hapū. Enabling the effective exercise of kaitiakitanga will be a consideration in deciding at which level of government to allocate regulatory functions and responsibilities.

Economic integration

The EU has achieved a degree of economic integration through common policies across Member States with the aim of increasing productivity and prosperity. Closer economic integration with Australia is one potential source of improvement in New Zealand’s productivity, but the Productivity Commissions of both countries have argued that larger gains are likely to come from domestic policy and regulatory reforms (Australian Productivity Commission and New Zealand Productivity Commission, 2012).

Regulatory harmonisation is an important mechanism for promoting economic integration between countries. It is also likely to be important *within* New Zealand. Of the businesses surveyed for the inquiry, 30% had dealt with more than one council on regulatory issues. These businesses tended to be larger firms, with more than 20 employees. These firms are likely to face additional costs in working with different regulatory requirements and processes. What is not known is how many firms consider this cost to be a barrier to expanding their business into other local authority areas. However, it is also worth noting that there is a cost to standardisation. In transitioning from variability to uniformity of standards or processes, jurisdictions, firms and individuals must all adjust. At the very least, there is likely to be a one off change that will impact on the majority of firms in New Zealand that only deal with one council.

Funding

Local government in New Zealand has a smaller scope of responsibilities than local governments in many other countries. This is in part because many of the functions undertaken at the local level in other countries, such as health services and education, are funded centrally in New Zealand and provided through Crown entities. The smaller scope of activity shows up in local government expenditure as a percentage of Gross Domestic Product (GDP), which is small compared to other OECD countries (Slack, 2009). The smaller scope of responsibilities has contributed to the high degree of fiscal separation between levels of government in New Zealand. Local government receives almost no funding from central government (the exception is funding for roads). As a consequence there is a very high threshold for considering fiscal transfers from central government to local government for the exercise of regulatory responsibilities. Two specific circumstances, where central funding may be justified, are discussed below.

A key insight from the fiscal federalism literature is that where the benefits of a regulatory intervention are not captured within the jurisdiction funding the regulatory activity, there is likely to be a suboptimal level of the regulatory activity. One of the justifications for central funding, therefore, is to ensure the right level of regulatory activity is undertaken. Claridge and Kerr (1998) illustrate the problem in their case study of protecting kiwi habitat in the Far North:

Matching the jurisdictions of benefits and costs will lead to balanced decision making; mismatches will generate interjurisdictional externalities. If decision making and cost bearing were devolved to local level, the Far North would under-protect kiwi habitat since they will ignore the positive externalities generated by kiwis for the rest of the country. In contrast, if cost bearing is devolved to local level but decision making is retained centrally then kiwis will tend to be overproduced. The rest of New Zealand has incentives to overstate their preferences and demand more kiwis be saved since they bear none of the costs of their decisions. (Claridge and Kerr, 1998, p. 4)

The RMA requires local authorities to recognise and provide for the protection of areas of significant indigenous vegetation and significant habitats of indigenous fauna (referred to as Significant Natural Areas in section 6(c)). Claridge and Kerr explain that the lack of alignment between policy decisions and costs results in an “unfunded mandate”:

Central government determines a policy for the benefit of New Zealand and then requires local government to implement it and bear the costs. This analysis fits with a major complaint from the Far North: they have received a mandate from central government but there is no money flowing to assist them to carry it out. (Claridge and Kerr, 1998, p. 11)

The authors suggested that the problem could be solved by national policy making, national cost bearing and local implementation. Without fundamentally changing the RMA, they suggested that improvements could be made by clarifying what is intended in section 6(c) of the RMA through the publication of a National Policy Statement on Significant National Areas, which would establish what central government required and what is discretionary for local government.²³ Additionally, the authors suggested that central government could buy some additional kiwi habitat as conservation estates or partially compensate farmers to address the unfunded mandate problem. Resources could also be provided centrally to assist with implementation, such as the provision of technical expertise (Claridge and Kerr, p. 15).

The international literature also identifies that centrally determined regulatory standards will often be different from what a local government would choose. Sometimes standards are set for reasons of equity; however, achieving equity may require funding or other redistributive policies from central government.

New Zealand has adopted a number of national standards in the national interest, for example, for drinking water and air quality. There will be some areas where either the standard is above what the local community would choose, either because the opportunity cost is very high (there are other more important competing local preferences or priorities), or because the absolute cost of meeting the standard is very high. In this latter case, central government may choose to assist the local authority to meet the standard.

Assistance with funding achieves the objective of the regulation which is for people to be able to enjoy the same standard of air quality or drinking water regardless of where they live. It is essentially a redistributive policy, allowing every locality to enjoy the same standard regardless of the local ability to fund meeting the standard.

There are examples of such funding in the New Zealand context. For example, central government established a Drinking Water Assistance Programme which provided a fund for both technical assistance to drinking water suppliers and a capital assistance programme to fund capital works where necessary (Ministry of Health, 2005).

The types of assistance discussed in the two cases—protection of kiwi habitat and meeting drinking water standards—tie funding to a particular activity. They are used to promote policy objectives by supporting the provision of regulatory services that are crucial to achieving the regulatory outcome desired. These specific grants differ from general redistributive grants from central government to local government which are sometimes used in other countries (Bailey, 1999).

²³ Note there is now a proposal for a National Policy Statement on Indigenous Biodiversity (Ministry for the Environment, 2011c).

Capacity, capability and knowledge

The capacity and capability to undertake regulatory functions is an important consideration in New Zealand where some skills are scarce, at both central and local levels. Capability extends not just to the technical skills but also to competent leadership and governance.

Mumford (2011) identified capability issues—the different skills and capabilities required in implementing performance-based regulation—as contributing to New Zealand’s leaky building problem. Acquiring the necessary skills and capabilities is one issue, maintaining capability where skills are not honed frequently is another. However, centralisation is not the only potential solution to capability gaps (Chapter 7). Indeed, there is an issue of path dependency; if regulatory functions are shifted, capability goes as well. Local authorities expressed concern that a reallocation of some regulatory functions from local to central government would result in a loss of critical mass and thus the capacity to undertake remaining regulatory functions at the local government level.

The literature notes that the allocation of responsibilities will depend in part on where information and knowledge is located. A distinction is usually made between different types of knowledge –‘subjective’ knowledge, typically knowledge about local conditions and local preferences²⁴, and ‘objective’ scientific knowledge and expertise (Claridge and Kerr, 1998). However, the section on funding above referred to two examples where technical expertise from central government can be used to assist local government with implementation of regulation, without the necessity for implementation to be carried out centrally.

A key consideration will be whether or not capability and technical expertise can be maintained at the local level to ensure the ongoing effective administration of regulation.

Allocation of risk

A central tenet of good regulatory design is that risk should be allocated to parties capable of managing it through the actions they are able to take. A misallocation of risk can have costly consequences and those costs may fall on parties unable to mitigate them efficiently. This has received attention from central government agencies with respect to the regulatory roles of local government.

The Earthquake Commission (EQC) noted in its Briefing to the Incoming Minister in 2011 that the costs of natural disasters are largely determined by the development decisions that communities have made, rather than predetermined by natural forces (p. 23). EQC points to the “difficulty in aligning costs between those who make decisions on land use, particularly local government, and those who bear risks” (EQC, 2011, p. 29). The briefing concludes that:

A system that links a scientific understanding of hazard and land use decisions to EQC premiums and cover—such as through land zoning—would represent a significant change to the current system, and any changes to which parties bear costs and risks would need to be carefully considered. (EQC, 2011, p. 29)

The Commission has previously investigated the allocation of risk under the Building Act 2004. The Department of Building and Housing submission to the Housing Affordability inquiry noted:

Residential consumers and building consent authorities bear the brunt of the risk associated with building work that fails to perform, despite having the least control over the quality of that work. Building practitioners on the other hand are able to manage and mitigate risks through the quality of their work... and...while building consent authorities face high risk they do not realise any benefits from risk-taking within the context of a building project, thus creating incentives for building consent authorities to be risk averse. (Productivity Commission, 2012a, p. 159)

Many submitters to the Housing Affordability inquiry commented on the impact of risk on building consent authorities’ (BCAs) handling of building consents—the requirement for more information, more time taken and an increase in the number of inspections to manage risk, but which increase compliance costs for builders and homeowners (Productivity Commission, 2012a, p. 160).

²⁴ In New Zealand, ‘subjective’ local knowledge takes on an extra dimension when the knowledge comes from a connection with the environment through a whakapapa relationship (Chapter 9).

Reforms to the Building Act in 2010-11 have largely been an attempt to reallocate risks between industry participants. The Commission notes, however, that the allocation of risk that comes from the allocation of regulatory responsibilities to local government, and the incentives on local authorities in responding to risk in exercising their regulatory functions, have been given scant attention in the design of recent regulation.²⁵

It is also worth noting that where there is regulatory failure, the Crown ultimately bears the cost. This may include the cost of remediation or other interventions to assist harmed parties. For example, the Weathertight Homes Resolution Services Act 2006 offered both financial assistance and dispute resolution services to homeowners affected by leaky homes.

Allocating functions across tiers of government

The international literature acknowledges that problems are likely to be encountered when regulatory responsibilities are allocated between different levels of government. These include a lack of clarity about roles and accountability for outputs, and problems in coordinating activity.

Kerr, Claridge and Milicich (1998) point to a lack of clarity about roles and accountabilities in the implementation of the RMA. Similarly, Mumford (2011) argues that coordination problems, particularly sharing and disseminating information between the levels of government (the Building Industry Authority and building certifiers) responsible for regulating under the Building Act 1991, contributed to New Zealand's leaky building episode.

Clarity about roles and accountabilities is also important when making decisions to allocate different parts of the regulatory process to central and local government in the New Zealand context. The significance of ensuring clarity about respective roles and accountabilities is particularly important for the Crown's obligations to Māori under the Treaty of Waitangi, as outlined in the section on the jurisdiction of policy making above.

Who decides?

An important question to ask is who decides? Who makes the trade-off between the benefits of a central regulatory policy or a local one? For example, whether the same air quality is important irrespective of whether you live in Reefton or Auckland. Or whether for business, "the expense and uncertainty caused by ... variation outweighs any local benefit of that variation" (Electricity Networks Association, sub. 12, p. 3). Who makes the decision about who has the knowledge, the capability and the incentives to make good regulatory policies, and to implement and enforce regulation cost-effectively?

In New Zealand, it is Parliament that makes the decision. Ideally it does so based on a consideration of all the relevant factors, and on information and analysis about the advantages and disadvantages of various options, the costs and the benefits. Allocating regulatory responsibilities requires judgements to be made—there might be a trade-off to be made between the benefits of local community policy making against the benefits of a national policy—or it might come down to a decision that capability and knowledge is to be held centrally against a decision to boost capability locally. Application of an 'allocation framework', such as the one developed in this chapter, should capture the relevant considerations and what is known about them. It should help inform the judgements to be made.

A last word on subsidiarity

The Commission has given consideration to the place of a principle of subsidiarity—that responsibility for making policies or taking action should be allocated, where practicable, to the level of government closest to those affected. The allocation framework presented later in this chapter makes no *a priori* assumption about who should be responsible for determining the regulatory standard or policy or who should implement or administer it. The framework presents a range of relevant criteria and what information is

²⁵ A recent example is the Resource Management (National Environmental Standard for Assessing and Managing Contaminants in Soil to Protect Human Health) Regulations (2011), which took effect in January 2012. The Regulatory Impact Statement noted that the new requirements were legally binding on local government and that it would be necessary to bring territorial authorities up to speed with the new requirements and adjust their processes to manage their contaminated land adequately. No mention was made of how territorial authorities would respond with respect to the legally binding requirements. Local Government New Zealand (LGNZ) raised the issue of the risk of liability (if negligence is proved) if incorrect information about contaminants is added to Land Information Memoranda (LIMs) as required by the Local Government Official Information and Meetings Act 1987.

known in order for the allocation decision to be made. What if it is a 'line call', ie there is no clear answer to the question where the role should be allocated? Box and Claridge (2000) raise an additional consideration. Local identity and control is something that is valued by people in of itself:

In spite of the many arguments in favour of centralised decision making and implementation we may still bias toward devolving decision making to local communities if the social importance of local identity and control outweighs the social choice and efficiency benefits of more centralised control. (Box and Claridge, 2000, p. 70)

When it is not clear whether regulation would be best in the hands of central or local government, considerations of local identity and encouraging local communities to take responsibility for their own wellbeing, might tip the balance in favour of devolution of responsibility to local communities.

6.3 Issues in the allocation of roles: submissions and surveys

Submissions to the inquiry and the Commission's surveys of business and local government amply illustrate how the issues associated with the allocation of regulatory responsibilities play out in practice in the New Zealand context.

A mismatch between local and national preferences, priorities and costs

The literature highlighted what can be a large difference between a centrally determined policy and what would have been chosen by a local community.

Submissions to the inquiry highlighted many examples of mismatches between local and national interests, preferences and priorities. As Clutha District Council observed, "all too often local authorities end up caught in the crossfire between national and local needs" (Clutha District Council, sub. 32, p. 4).

Waitomo District Council noted that nationally consistent standards have uneven costs and impacts across the country:

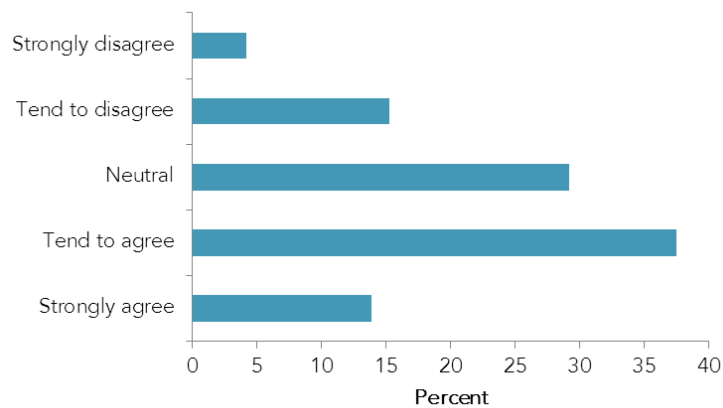
Even minimum standards need to be approached with caution. Adherence to any minimum standard has a cost implication. What might be quite an acceptable minimum standard (or cost) for one local authority, given the significance of failure (measured by number of people impacted and the potential for the problem to aggregate given close proximity), might be inordinately expensive for a small and widely dispersed community. (Waitomo District Council, sub. 9, p. 4)

A particular issue for local authorities has been the costs of meeting national drinking water quality standards. Local policy making may well have prioritised the required spending in a different way, according to the needs and preferences of their local population.

In order to meet the National Drinking Water Standards Council has already spent \$3.5m on plant upgrades and has a further \$2.5m of work programmed. This was an absolute requirement on Council, despite the fact that independent analysis showed a negative cost-benefit ratio for small-medium schemes such as ours. If Council had been able to make its own choices there could have been much better uses of \$6m (eg, road safety, where a similar investment would save many lives instead of simply reducing the incidence of stomach upsets). It is also quite possible that ratepayers themselves would have had other priorities for that money, whether through rates or retaining it themselves. (Clutha District Council, sub. 32, p. 1)

The Commission's survey of local authorities also suggests that there is conflict between the level of the regulatory activity needed to create nationally desired benefits, and the level appropriate for local priorities. Around half of the respondents tended to agree or strongly agree that local political pressures conflict with the regulatory objectives of central government regulations (Figure 6.2).

Figure 6.2 Percentage of local authorities who agreed or disagreed that local political pressures often conflict with the regulatory objectives of central government regulations



Source: Productivity Commission, 2012b.

There are costs in operating across multiple local authorities

One obvious consequence of councils regulating in accordance with the needs of their local communities is that there is likely to be variation between councils in their approach. This results in costs for businesses which operate across local authority jurisdictions and may be a barrier to businesses considering expanding into other local authority areas. Moreover, these costs may be invisible to those determining and implementing local regulatory policies.

The Electricity Networks Association reported significant issues as a result of distribution lines crossing multiple territorial and regional local authorities. The Association was particularly concerned about the costs involved in monitoring and submitting on proposed district and regional plan changes:

Given the sheer number of district and regional plans, this is a cost to the industry and to electricity customers as a whole, compounded by particular costs and issues for those infrastructure providers who deliver across multiple council boundaries. (Electricity Networks Association, sub. 12, pp. 1-3)

Businesses are not the only entities that potentially bear the cost and the frustration of regulatory variation across local jurisdictions.

Variation amongst local authorities' approaches to regulatory function is the source of endless frustration for iwi and hapū throughout Northland, and there have been long standing calls for better alignment of regulatory functions amongst agencies that have an influence on a particular resource. (Whangarei District Council, sub. 10, p. 4)

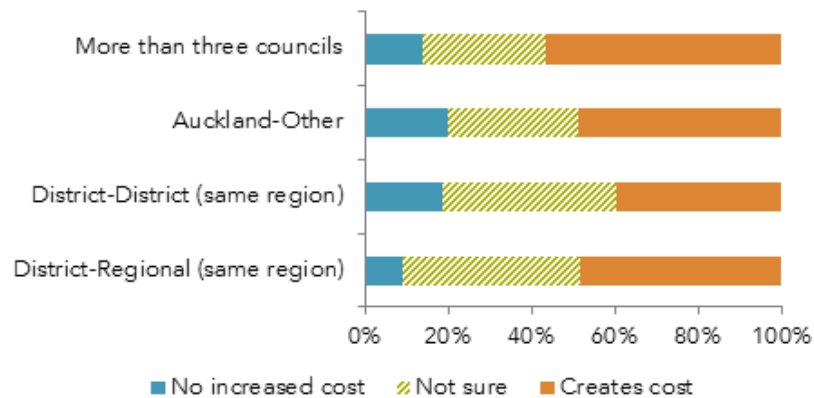
Some submissions expressed the view that the costs faced by businesses are significant and greater than the benefits of local variation in regulatory approach:

[...]in our view, a greater level of national guidance would far outweigh any benefits arising from total local flexibility in these matters, when the costs are considered [...] There is significant variation in the way local government implements RMA regulatory functions in regard to distribution infrastructure. In our view, the expense and uncertainty caused by such variation outweighs any local benefit of that variation. (Electricity Networks Association, sub. 12, pp. 1-3)

Where decentralisation is creating clear impediments to nationally-important business activity then there is a clear argument for considering centralisation of the regulatory function. For example, different rules on the location and acceptability of cell-phone towers are proving a hindrance to establishing the telecommunications network that New Zealand strives for. Similarly, with tourism a strong contributor to GDP, the fragmented approach to freedom camping rules may not be in the country's best interests. (Tauranga City Council, sub. 2, p. 8)

Respondents to the Commission's survey of business reported on whether or not inconsistencies in the way local authorities administered regulation generated unnecessary costs for their business.

Figure 6.3 Inconsistency across councils in administering regulations imposes unnecessary cost for my business



Source: Productivity Commission, 2012b.

Capability issues

The literature suggests that the allocation of regulatory competencies across different levels of government is important for the success of regulation, and that issues of capacity and capability are especially important in a small country like New Zealand.

Submissions from local authorities raised concerns about capability and capacity gaps in undertaking regulatory roles.

An example is the difficulty that rural local authorities are facing in attracting and employing suitably qualified building control officers to implement the new regulations that have come into effect. Often, new regulations impose extensive training requirements to improve the capability of the organisation in the new area... (Waitomo District Council, sub. 9, p. 6)

However, dealing with capability issues is not necessarily best solved by centralisation. Tasman District Council noted that regional councils collaborating to deal with the regulation of dams under the Building Act is an example of managing a high-risk/low-frequency regulatory function but this could equally have been a central government function (Tasman District Council, sub. 6, p. 5). As a more general point:

We agree that sufficient capability and capacity is an issue; the paper asserts that local government may have problems but in our experience so too does central government in many areas. (Tasman District Council, sub. 6, p. 5)

Queenstown Lakes District Council pointed out that dealing with increasing regulatory complexity or industry innovation is not always achieved through a more centralised approach, as the capability may well reside at local government level (Queenstown Lakes District Council, sub. 52, p. 6-7).

Managing risk in the face of potential liability

A number of submissions focused on the ability of local authorities to manage or mitigate risk associated with the exercise of their regulatory responsibilities. The Local Government New Zealand (LGNZ) submission points to this being an issue with the design of regulation in some instances.

In the allocation of functions due consideration also needs to be given to the allocation of liability. There are examples where local authorities assume unnecessary liability as they execute required functions. Sometimes this is a result of central government establishing policy and making it operative without full consideration of the consequences for delivery of the policy. (LGNZ, sub. 49, p. 5)

The ability of local authorities to manage risk gained prominence following leaky homes and the collapse of buildings in the Canterbury earthquakes. However, the risk of poor outcomes from the requirements on local authorities to manage natural hazards, hazardous substances and contaminated land under section 31(1)(b) of the RMA, are also of concern to local authorities. Submitters were of the view that insufficient attention has been given to the ability to manage risk in the allocation of regulatory roles.

Principles for allocating regulatory roles

The Commission sought comment from submitters on the factors that may be important in deciding where to allocate regulatory responsibilities. The range of views is presented in Box 6.3.

Box 6.3 Principles for allocating regulatory roles—views from submissions

Environment Canterbury summed up the view of many submitters to the inquiry:

We support the principle that regulatory functions should be performed closest to the community that is affected, unless there is valid reason to centralise. Ideally, costs and benefits of regulation should remain within the same jurisdiction. Exceptions to this will be where regulations can benefit from economies of scale, avoid duplication of effort, or where the capability to carry out these roles is limited. (Environment Canterbury, sub. DR 99, p. 1)

Waitomo District Council raised the distinction between local preferences and national standards:

The issues and priorities of communities can be quite specific and are best met by locally informed regulations. However, there are certain regulations [where] national standards or regulation setting could be beneficial where the implications of anything going wrong would be more or less uniform regardless of locality. (Waitomo District Council, sub. 9, p. 6)

The Institution of Professional Engineers New Zealand (IPENZ) submission focused on local judgements, clarity about respective national and local interests, and cost efficiency:

When deciding whether a regulatory function should be undertaken locally or centrally, the following issues need to be considered:

- Regulation should be designed nationally if there are health and safety issues involved
- Regulation should be designed locally if local value judgements are involved
- Regulatory design requires case by case decisions on whether community based regulations need to be made within national frameworks – this requires clarity and transparency on the respective national and local interests
- Decisions on delivery i.e. approvals, monitoring and enforcement, need to be based on cost efficiency grounds – economies of scale and scope, and good customer service.

Therefore the issues of who designs and who delivers regulation need to be considered separately for each form of regulation. (IPENZ, sub. 17, p. 3)

Waikato Regional Council pointed to competency being an important factor:

One factor for considering where a function should be undertaken is where the expertise in a particular issue lies, whether locally, regionally or nationally. New Zealand has limited human resources in some fields and these should be applied to best effect. (Waikato Regional Council, sub. 45, p.12)

Tasman District Council submitted that:

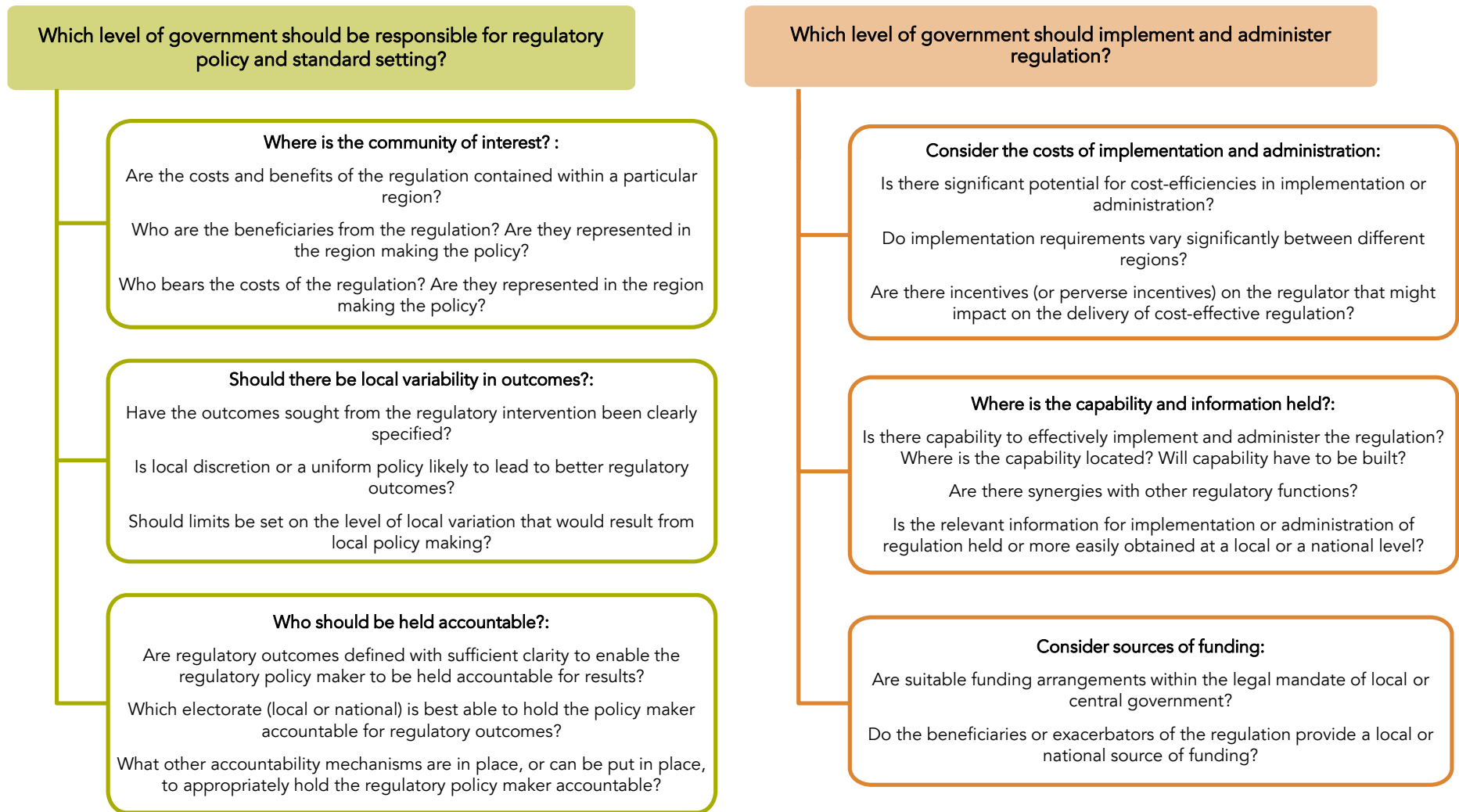
The Productivity Commission should develop principles around the assignment of regulatory functions that should be transparent; reflect the balance of national and local/regional interests in the outcomes sought; align governance and accountability arrangements and funding responsibilities with the extent of discretion conferred; in relation to local government functions, be consistent with the Local Government Act 2002 and other regulatory responsibilities; and fairly recognise risk, liability, transition and implementation issues..... [The factors influencing the assignment of roles] are not always unilateral and the optimum assignment is the interplay between factors. (Tasman District Council, sub. 6, p. 7)

6.4 A guiding framework

This section presents a simple but comprehensive framework to provide the relevant information to guide the allocation of regulatory roles. The section is organised as follows.

- Figure 6.4 presents the questions to be considered when allocating regulatory responsibilities.
- The questions are turned into 'principles to be applied' when considering the allocation of regulatory responsibilities between central and local government.
- The principles are summarised in Figure 6.6.
- An assessment is made of the strengths of the framework, how it should be used and where the framework could be adapted to other allocation decisions.
- To illustrate, the framework is applied to territorial authority regulatory responsibilities under the Gambling Act 2003 and territorial authority BCA responsibilities under the Building Act 2004.

Figure 6.4 Questions for allocating regulatory responsibilities locally or centrally



From questions to principles

The Terms of Reference require the Commission to develop principles to guide decisions on which regulatory functions are best undertaken by local or central government. This section takes each of the questions in Figure 6.4 and turns them into principles to be applied in making an allocation decision.

The distribution of costs and benefits

The costs and benefits of regulatory measures can be experienced well beyond the borders of any particular city or region. These impacts are often referred to as spillovers or externalities. When spillovers occur then local policy making is unlikely to lead to optimal outcomes. Local authorities have few incentives to consider impacts on parties located outside of their constituency, and will typically not have good information on those affected parties. Similarly, when the costs and benefits of regulation are confined to a single local authority, then a centrally determined standard is unlikely to take account of local preferences, priorities and conditions or the costs of delivery. A careful examination of the costs and benefits of regulation and where they fall is therefore important to identify where policy making responsibility should lie. It can be difficult in practice to definitively state where costs and benefits fall. In many cases, there will be some national interest in the most local of regulatory issues.

Questions to ask	Principles to apply
<ul style="list-style-type: none"> • Are the costs and benefits of the regulation contained within a particular region? • Who are the beneficiaries from the regulation? Are they represented in the region making the policy? • Who bears the costs of the regulation? Are they represented in the region making the policy? 	<ul style="list-style-type: none"> • When the costs and benefits of a regulatory outcome are contained locally, then local decision makers should have control over the regulatory policy. • When the costs and benefits of a particular outcome spill over outside local boundaries, then decision makers that cover the spillover should have control over the regulatory policy.

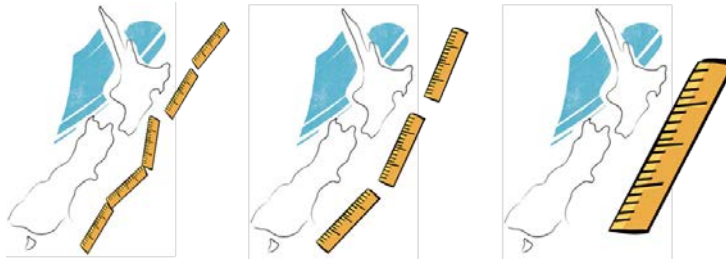
There are many examples where regulatory functions have been allocated according to these principles. Regional councils were designed to incorporate river catchments to align the policy maker with the parties that will bear the benefits and costs of regulation. There may be instances, however, where these political jurisdictional boundaries do not correspond with Māori tribal interests²⁶. Communities of interest should be considered, where relevant, in answering questions about who benefits from regulation and who bears the costs. Are they represented in the region making the policy?

Local variability in outcomes

The regulatory powers conferred on local government by Parliament can span a spectrum between substantial discretion and autonomy for local policy making and standard setting, through to delegated powers to implement regulation with little or no discretion. For example, the RMA devolves significant policy-making discretion to local authorities, (for example, to make district and regional plans) but at the other end of the spectrum, territorial authorities have no discretion when it comes to applying the Building Code. In the middle of the spectrum is a raft of regulations that have been conferred on local government because better regulatory outcomes are likely to be achieved when local authorities are able to tailor regulation, or specific aspects of the regulation, to the needs and preferences of diverse local communities.

Local discretion in policy making, however, is likely to lead to variability in approach across the country.

²⁶ This is important, because the most prominent Māori interest in environmental management will usually be awa (rivers), maunga (mountains), or other environmental features of significance.

Figure 6.5 More local discretion is likely to result in greater variability in standards

The questions and principles below allow for an explicit assessment of the pros and cons of local variation when discretion to make local regulatory policies is being considered.

Even when local policy making might achieve better regulatory outcomes, variation between local authorities may only be acceptable within a specific range. In these cases, national guidelines can allow local policy makers to reflect the particular circumstances of their region, while still working within national guidelines in the national interest.

Questions to ask	Principles to apply
<ul style="list-style-type: none"> • Have the outcomes sought from the regulatory intervention been clearly specified? • Is local discretion or a uniform policy likely to lead to better regulatory outcomes? • Should limits be set on the level of local variation that would result from local policy making? 	<ul style="list-style-type: none"> • The regulatory outcomes sought should be specified as clearly as possible. • Local policy making should occur when local variability for a specific regulatory outcome is likely to lead to better regulatory outcomes. • National limits and bottom-lines should be specified when a more limited range of variability is in the national interest.

Where local input and policy making is considered desirable, the challenge is to allocate regulatory responsibilities in a way that local authorities are able to actually make decisions that give effect to local preferences and can be held accountable for them.

Accountability

To be held accountable for results, regulators need to be responsible for outcomes and have the autonomy to make policy decisions that influence those outcomes. It is also important that there are mechanisms for holding the regulator to account for the policy decisions made.

The primary way to hold elected decision makers accountable for their policies is through the democratic process. For example, councils are required to prepare district and regional plans; in doing so, they are required to consult, reflect and reconcile different community interests and reach a policy decision. How well councils do so may ultimately be reflected in the outcome of local authority elections. However, the democratic process can be very indirect.

There are other mechanisms for holding regulators to account such as judicial review, and appeals through the court process. For some regulatory activities, where the amount or type of discretion to make regulatory policies is more limited, it can be difficult for the regulator to influence the outcomes, and there may also be fewer mechanisms for citizens to hold the regulator to account.

How the regulator can be held to account and by whom, and what influence the policy maker has over outcomes, are difficult questions to address. They are, however, crucially important in deciding where to allocate responsibility for regulatory policy making.

Questions to ask	Principles to apply
<ul style="list-style-type: none"> • Are regulatory outcomes defined with sufficient clarity to enable the regulatory policy maker to be held accountable for results? • Which electorate (local or national) is best able to hold the policy maker accountable for regulatory outcomes? • What other accountability mechanisms are in place, or can be put in place, to appropriately hold the regulatory policy maker accountable? 	<ul style="list-style-type: none"> • Regulators should be responsible for outcomes and have the autonomy to make policy decisions that influence those outcomes. • Policy-making responsibility should be given to the level of government where the electorate has the most interest (and ability) to hold the regulator to account for the policies made. • Regulatory regimes should be designed with the appropriate accountability mechanisms, to enable the regulatory policy maker to be held to account.

Cost

In some cases, significant cost efficiencies can be achieved by aggregating delivery functions into a single body or fewer bodies. One example is where regulatory functions are low frequency, but high risk—such as dam safety and casino approvals. Local authorities are unlikely to be able to efficiently develop and maintain these functions because the skills and processes will only be rarely used. Scale efficiencies can also be achieved with high volume, geographically independent processes, such as issuing or renewing passports and driver licenses. The potential to achieve economies of scale can also come about through changes in technology.

In other cases, centralised processes may not reduce cost. Rules that relate to maintaining local character, such as requirements on the design of new buildings in heritage areas, for example, may require local knowledge to properly identify any breaches and enforce the relevant regulations. In these cases, there would be no benefit to assigning responsibility to a national assessment body that would likely have to defer to local knowledge in any case.

It is important to consider the incentives on the regulator for cost-effective implementation and administration of regulation. When responsibilities are allocated to a regulatory authority, so too are the risks that come with failure to adequately undertake a statutory duty. It will be important to assess how the regulator will manage risk. If they are unable to mitigate risk effectively, they are likely to impose additional costs through the regulatory system.

Questions to ask	Principles to apply
<ul style="list-style-type: none"> • Is there significant potential for cost efficiencies in implementation or administration? • Do implementation requirements vary significantly between different regions? • Are there incentives (or perverse incentives) on the regulator that might impact on the delivery of cost-effective regulation? 	<ul style="list-style-type: none"> • Implementation and administration of regulation should be consolidated when there are significant cost efficiencies to be gained. • When implementation requirements vary significantly between jurisdictions, locally specific implementation is appropriate. • Allocate responsibility where there is an alignment of incentives for cost-effective delivery.

The capability and the information needed for effective delivery

New or revised regulatory functions might require new skills and competencies. If the regulator is unable to build the required capability, then they might develop other (potentially costly) strategies for dealing with the risk of being unable to adequately undertake a statutory duty conferred upon them.

New regulatory functions might have synergies with other regulatory functions undertaken at the same level of government. For example, inspectors conduct multiple checks on bars and restaurants under liquor,

food, gambling and building regulation requirements. Synergies are likely to create cost efficiencies (addressed above), but may also help to ensure that sufficient capacity exists to implement and administer the regulation.

Which level of government is best able to access and share the information needed to effectively implement and administer regulation should also be taken into account when allocating regulatory responsibilities. There are likely to be efficiencies from centralised technical expertise, but centralisation is unlikely to confer advantages when the administration of regulation requires highly local knowledge (discussed above). Where information is held at different levels of government, and access to information at both levels is needed for the effective implementation and administration of regulation, mechanisms to share information between levels of government will be needed.

Questions to ask	Principles to apply
<ul style="list-style-type: none"> Is there capability to effectively implement and administer the regulation? Where is the capability located? Will capability have to be built? Are there synergies with other regulatory functions? Is the relevant information for implementation or administration of regulation held or more easily obtained at a local or a national level? 	<ul style="list-style-type: none"> The implementation and administration of regulation should be located where there is the capability to undertake the task, or where the capability can be built. Existing implementation capacity should be assessed and considered, with a view to achieving synergies in the administration of regulatory functions of a similar nature. Regulatory implementation should be aligned close to the source of the required information.

Funding

Each level of government has different funding sources, and a different range of mechanisms that can be used to raise the funds needed to carry out regulatory activities. Local authorities are able to fund regulation through user charges or fees on terms set out in section 101(3) of the LGA or through rates. Central government can also fund regulation from user chargers or fees or through taxation.

In general, the funding source should be aligned with the jurisdiction implementing and administering the regulation. Where some of the benefits of regulation accrue to those outside the jurisdiction, there may be a case for national funding, as outlined in the example of kiwi habitat protection. Where central government sets a standard that is to apply equally across the country for equity reasons, there may be a case for funding implementation in areas where the cost is unable to be met locally.

Questions to ask	Principles to apply
<ul style="list-style-type: none"> Are suitable funding arrangements within the legal mandate of local or central government? Do the beneficiaries or exacerbators of the regulation provide a local or national source of funding? 	<ul style="list-style-type: none"> Match the service delivery funding base with the regulatory benefit distribution as closely as possible. Where there is a mismatch between service delivery funding and benefit distribution, explicitly consider whether a fiscal transfer between jurisdictions is needed to achieve the objective of the regulation.

Figure 6.6 Summary of principles for allocating regulatory roles

Principles for allocating the regulatory policy and standard setting role

Consider the distribution of costs and benefits:

When the costs and benefits of a regulatory outcome are contained locally, then local decision makers should have control over the regulatory policy.

When the costs and benefits of a particular outcome spill over outside local boundaries, then decision makers that cover the spillover should have control over the regulatory policy.

Consider the desirability of local variability in outcomes:

The regulatory outcomes sought should be specified as clearly as possible.

Local policy making should occur when local variability for a specific regulatory outcome is likely to lead to better regulatory outcomes.

National limits and bottom-lines should be specified when a more limited range of variability is in the national interest.

Consider who can be held accountable:

Regulators should be responsible for outcomes and have the autonomy to make policy decisions that influence those outcomes.

Policy-making responsibility should be given to the level of government where the electorate has the most interest (and ability) to hold the regulator to account for the policies made.

Regulatory regimes should be designed with the appropriate accountability mechanisms, to enable the regulatory policy maker to be held to account.

Principles for allocating the implementation and administration role

Consider cost:

Implementation and administration of regulation should be consolidated when there are significant cost-efficiencies to be gained.

When implementation requirements vary significantly between jurisdictions, locally specific implementation is appropriate.

Allocate responsibility where there is an alignment of incentives for cost-effective delivery.

Consider where capability and information is held:

The implementation and administration of regulation should be located where there is the capability to undertake the task, or where the capability can be built.

Existing implementation capacity should be assessed and considered, with a view to achieving synergies in the administration of regulatory functions of a similar nature.

Regulatory implementation should be aligned close to the source of the required information.

Consider sources of funding:

Match the service delivery funding base with the regulatory benefit distribution as closely as possible.

Where there is a mismatch between service delivery funding and benefit distribution, explicitly consider whether a fiscal transfer between jurisdictions is needed to achieve the objective of the regulation.

Strengths of the framework

The Terms of Reference ask the Commission to identify ways in which the allocation of functions between central and local government could be improved.

The framework presented in this chapter has three key strengths. It has been designed to:

- specifically inform the allocation of regulatory responsibilities between central and local government;
- capture the relevant criteria for making an assessment of where regulatory roles should be allocated; and
- provide a guide to the information that should be assembled and analysed by central government agencies in recommending new or amended regulatory responsibilities be allocated to local government.

The framework could be adapted and applied more broadly—to consider the allocation of regulatory responsibilities between territorial and regional authorities, or between local authorities and other agencies that operate at the local level (such as district health boards) or when trans-national regulatory arrangements may have merit.

A careful application is required

While the framework will guide an analysis of the relevant factors in making an allocation decision, the quality of the recommendations made will depend on the quality of the analysis undertaken. Following the framework is not a substitute for the work required in:

- proper framing of the questions relevant to the proposal, as the assessment made will depend crucially on the questions asked. The framework provides general questions which should be turned into questions specific to the proposal under consideration;
- the information gathering that would be required to make an assessment of, for example, the existing capabilities at each level of government; and
- how the principles should be applied to the specific proposal.

Following the analysis, an 'on balance' assessment of where responsibility for regulatory policy making and administration of the regulation may be able to be made. However, in many cases the analysis will not lead to a clear answer about which level of government should be given responsibility for policy making, or which level of government should implement and administer the regulation. The framework does not weight the principles; indeed the weighting Parliament might give to various aspects of the proposal will likely vary according to the specific circumstances. The value of the framework, carefully applied, is in assisting the decision maker to make a sound judgement about where responsibilities should be allocated.

As an illustration of how the questions and principles can be used to 'flush out' the key questions and issues to be considered, the framework is applied to territorial authority functions under the Gambling Act 2003 and to territorial authority BCA functions under the Building Act 2004.

Application of the framework to territorial authority responsibilities under the Gambling Act 2003

The Gambling Act 2003 attempted to provide local authorities with more input into the siting of certain types of gambling venues in their communities. The Act requires territorial authorities to adopt a policy on what the Act calls “class 4” gambling (gambling involving gaming machines or “pokies”). The policy must specify whether or not pokies can be established in the district and, if so, where they may be located and the maximum number at each venue. Territorial authorities must apply their policy when considering whether to give its consent to applications for a new class 4 gambling venue or applications to increase the number of machines at an existing venue. If the territorial authority consents, it is then left to the Secretary for Internal Affairs to grant operator and venue licences for class 4 gambling. Table 6.1 applies the framework to the allocation of responsibilities for policy making and administration of regulation of class 4 gambling.

Table 6.1 raises questions and considerations that are relevant to the allocation decision and compares these with the actual decisions made.²⁷ A desktop assessment such as this can identify key issues or trade-offs that warrant further consideration.

In this case, the framework raises issues with the accountability for local outcomes under the current legislation and with the allocation of responsibility for the monitoring and enforcement of gambling venues.

²⁷ As an *ex post* analysis, it has drawn on information that may not have been available to the original policy makers.

Table 6.1 Gambling Act 2003—Allocation of responsibility between local and central government

Key questions	Principles	Relevant factors	Assessment using the principles	Comparison with responsibilities under the Act
<p>Community of interest</p> <p>Distribution of costs and benefits</p> <ul style="list-style-type: none"> • What is the national and local interest in gambling? 	<ul style="list-style-type: none"> • When the costs and benefits of a regulatory outcome are contained locally, then local decision makers should have control over the regulatory policy. • When the costs and benefits of a particular outcome spill over outside local boundaries, then decision makers that cover the spillover should have control over the regulatory policy. 	<ul style="list-style-type: none"> • Central governments have an interest in an overall policy on gambling—ie how much and what type of gambling should be allowed. Problem gambling imposes costs on the health and welfare systems. Central government will be concerned to monitor potential large scale crime associated with gambling. Gambling also brings in tourist revenue. • Local communities will be sensitive about the proximity of gambling activity to locations such as schools and childcare centres. They will also be sensitive about the impact of gambling in their localities and may want to control the number and location of sites. Gambling harm may be more prevalent in economically depressed areas. Individuals and site operators benefit from gambling activity. 	<ul style="list-style-type: none"> • There are separate but important national and local interests in gambling regulation, suggesting that there are separate roles for local and central government to manage the costs and benefits that accrue to national and local communities. 	<ul style="list-style-type: none"> • Central government sets overall regulation on what gambling is permissible, with a more limited policy role for local authorities to determine zones or areas in their localities where certain types of gambling can occur (this may not address any expectations about reducing gambling harm).
<p>Local variability of outcomes</p> <ul style="list-style-type: none"> • In what ways could local communities be given discretion over gambling activity in their localities? • Are there reasons to set limits on the level of local variation that would result from local 	<ul style="list-style-type: none"> • The regulatory outcomes sought should be specified as clearly as possible. • Local policy making should occur when local variability for a specific regulatory outcome is likely to lead to better regulatory outcomes. 	<ul style="list-style-type: none"> • Local authorities could be given discretion to determine the number or location of particular types of gambling venues in their localities. • Variation between local authorities as to the permissibility of large scale gambling (such as casinos) could lead to a 'race to the bottom'. 	<ul style="list-style-type: none"> • Local authorities should have the regulatory tools to address sensitivities about where and how much gambling occurs. • Local authorities should have the tools to manage gambling where there are concerns about gambling harm in their locality. 	<ul style="list-style-type: none"> • Local authorities can determine whether or not 'pokies' can be established in the district and, if so, where they may be located and the maximum number at each venue. • Local authorities cannot cap the total number of venues within their district. • Central government identified certain venues as unsuitable to be a

Key questions	Principles	Relevant factors	Assessment using the principles	Comparison with responsibilities under the Act
<p>policy making?</p>	<ul style="list-style-type: none"> National limits and bottom-lines should be specified when a more limited range of variability is in the national interest. 			<p>class 4 venue (cl 4 of the Gambling (Harm Minimisation) Regulations 2004).</p> <ul style="list-style-type: none"> Central government agency investigates and determines applications for class 4 operator and venue licences.
<p>Accountability</p> <ul style="list-style-type: none"> Can central government be held accountable for national gambling policy? Can local authorities be held accountable for local policies about gambling venues? 	<ul style="list-style-type: none"> Regulators should be responsible for outcomes and have the autonomy to make policy decisions that influence those outcomes. Policy making responsibility should be given to the level of government where the electorate has the most interest (and ability) to hold the regulator to account for the policies made. Regulatory regimes should be designed with the appropriate accountability mechanisms, to enable the regulatory policy maker to be held to 	<ul style="list-style-type: none"> Central government can be held accountable for overall policy relating to gambling and New Zealanders' preferences about this issue. Local authorities cannot have accountability for gambling outcomes in general—either in terms of fraud and national policing, or in terms of the overall impact on health and welfare agencies from individual problem gambling addictions. Local communities can have expectations that local authorities will 'do something' about problem gambling. Local authority accountability arrangements are suitable for accountability to their community about managing sensitivity in the location of gambling venues and the extent of gambling within those venues. 	<ul style="list-style-type: none"> Unclear specification of outcomes and accountabilities would result in the expense of a multitude of policies being developed at the local level for very little change. 	<ul style="list-style-type: none"> Local authorities' policies on class 4 venues had no retroactive effect. The policy was to be applied only to applications for new class 4 venues or applications to increase the number of machines at existing venues. Existing venues held their licence in perpetuity. This meant that local authorities were required to determine a policy that had little direct effect (at least in the near to medium term) on outcomes in their area. Although local authorities had a role in reducing gambling harm, the regulatory tools available were insufficient to reduce or manage the amount of gambling occurring. Local authorities lacked the ability to deliver on those accountabilities. Under current arrangements, local authorities have no ability to control the existing venues (apart from

Key questions	Principles	Relevant factors	Assessment using the principles	Comparison with responsibilities under the Act
	account.			where an existing venue applies to increase their number of machines) because licences were granted in perpetuity and the local authorities' class 4 policy was not retroactive.
<p>Cost</p> <ul style="list-style-type: none"> Is there significant potential for cost efficiencies in implementation or administration? 	<ul style="list-style-type: none"> Implementation and administration of regulation should be consolidated when there are significant cost efficiencies to be gained. When implementation requirements vary significantly between jurisdictions, locally-specific implementation is appropriate. Allocate responsibility where there is an alignment of incentives for cost-effective delivery. 	<ul style="list-style-type: none"> Casino approvals are low frequency but high risk. Local authorities are unlikely to be able to efficiently develop and maintain the relevant capabilities because the skills and processes will only be rarely used. Local policies regarding the location of gambling premises are more likely to be cost-effectively administered locally. 	<ul style="list-style-type: none"> Administration is consolidated for low frequency approvals. Monitoring and enforcement could be carried out at the same time as Environmental Health inspections. This might produce economies of scope for local authorities and reduced compliance costs for businesses. 	<ul style="list-style-type: none"> Monitoring and enforcement is carried out by Department of Internal Affairs (DIA), rather than local authorities, despite potential synergies for local government and business.
<p>Capability and information needed</p> <ul style="list-style-type: none"> Are there synergies with other regulatory functions? 	<ul style="list-style-type: none"> The implementation and administration of regulation should be located where there is the capability to undertake the task, or 	<ul style="list-style-type: none"> There are synergies with monitoring and enforcing local alcohol policies and with food safety inspections. Local authorities hold the best information on site location characteristics and proximity to 	<ul style="list-style-type: none"> Regulatory implementation at the local level is close to the information required. Centralising inspection capability may help 	<ul style="list-style-type: none"> Monitoring and enforcement of class 4 gambling venues (venues with 'pokie' machines) is done centrally by DIA.

Key questions	Principles	Relevant factors	Assessment using the principles	Comparison with responsibilities under the Act
<ul style="list-style-type: none"> Is the relevant information for implementation or administration of gambling regulation held at a local or a national level? 	<p>where the capability can be built.</p> <ul style="list-style-type: none"> Implementation capacity should be assessed and considered, with a view to achieving synergies in the administration of regulatory functions of a similar nature. Regulatory implementation should be aligned close to the source of the required information. 	<p>other facilities (such as schools). They also have good information on impacts on other businesses and households in the community.</p>	<p>manage capability.</p>	
<p>Funding</p> <ul style="list-style-type: none"> Are suitable arrangements for funding regulation of gambling activity within the legal mandate of local or central government? 	<ul style="list-style-type: none"> Match the service delivery funding base with the regulatory benefit distribution as closely as possible. Where there is a mismatch between service delivery funding and benefit distribution, consider whether a fiscal transfer between jurisdictions is needed to achieve the objective of the regulation. 	<ul style="list-style-type: none"> Both local and central government have the ability to charge fees for regulating under the Gambling Act. Local authorities are not able to recover the cost of policy formulation. This comes from rates funding. 	<ul style="list-style-type: none"> The component of local funding for the policy would be for managing community sensitivities, which is an aspect of local democracy and a purpose of local government. Local funding for the policy through rates is an appropriate mechanism. 	<ul style="list-style-type: none"> No central funding provided.

Application of the framework to territorial authority BCA responsibilities under the Building Act

The Building Act 2004 (section 3) provides for the setting of performance standards for buildings, to ensure that:

- people who use buildings can do so safely and without endangering their health;
- buildings have attributes that contribute to the health, physical independence and well-being of the people who use them;
- people who use a building can escape from the building if it is on fire; and
- buildings are designed, constructed and able to be used in ways that promote sustainable development.

Section 17 of the Building Act requires that all building work must comply with the Building Code. The Building Code is a schedule to the Building Regulations²⁸ and prescribes the functional requirements for buildings and the performance criteria with which they must comply. The regulatory regime is performance-based, rather than prescriptive. That means that the Building Code generally describes the characteristics that buildings need to have, rather than specifying the precise standards that building inputs need to meet.

The Building Code is a single, national code that aims to provide a minimum consistent set of building controls throughout the country. However, within the Code, functional and performance requirements will be specified according to the characteristics of the building, its intended use and its site. The requirements for foundations vary depending on soil type and seismic risk, and the amount and type of bracing required will depend on the building's exposure to wind. Buildings with different uses, such as commercial buildings, have different requirements than residential buildings.

Compliance with the Building Code is administered locally by territorial authorities, which are required to register as BCAs. Private building inspectors are also able to register as BCAs, although no private BCAs are currently registered. BCAs issue building consents if they are satisfied on reasonable grounds that the building complies with the Building Code.

The problem of leaky buildings highlighted major weaknesses in both the central design and local implementation of the Building Act. Subsequent reforms have retained the performance-based philosophy of the Building Act, but have strengthened consumer protections. For example, some building tasks are now reserved for licensed building practitioners, and information on building product guarantees must now conform to particular standards. These reforms have also introduced accreditation requirements for BCAs, which require procedures to be clearly documented and regularly audited.

Central government officials have also been progressing further Building Act reforms. A review of the Building Act carried out in 2010 identified that either regional or central administration of building consenting and inspection functions might improve the effectiveness and efficiency of how the system operates (Department of Building and Housing, 2010; Office of the Minister of Building and Construction, 2010). This work identified a number of desirable attributes for the system of administering the Building Act (many of these attributes are reflected in the Commission's allocation framework). Table 6.2 sets out key questions, the principles and factors relevant to the allocation decision.

²⁸ The Building Code is a schedule to the old Building Regulations 1992. The only part of the 1992 regulations continuing in force is Schedule 1 which contains the Building Code.

Table 6.2 Building Act 2004—Allocation of responsibility between local and central government

Key questions	Principles	Relevant factors	Assessment using the principles
<p>Community of interest.</p> <p>Distribution of costs and benefits</p> <ul style="list-style-type: none"> • What is the national and local interest in buildings? 	<ul style="list-style-type: none"> • When the costs and benefits of a regulatory outcome are contained locally, then local decision makers should have control over the regulatory policy. • When the costs and benefits of a particular outcome spill over outside local boundaries, then decision makers that cover the spillover should have control over the regulatory policy. 	<ul style="list-style-type: none"> • Central government has a clear interest in ensuring that buildings throughout the country meet minimum standards of quality. Poor quality buildings impose threats to health and safety which is of national interest. Direct costs from unsafe buildings fall on centrally-funded agencies (hospitals and ACC) that are met from general taxation. • Local communities are also interested in having good quality buildings within their area. The impact of poor quality or unsafe buildings will be felt locally. Low quality buildings create local costs and lower the value of properties in the community. 	<ul style="list-style-type: none"> • There is both a national interest and local interest in having quality buildings. However, the national importance of having a national minimum standard for the safety of buildings, and the potential costs of poor quality buildings, creates the need for nationally determined standards for the performance of buildings.
<p>Local variability of outcomes</p> <ul style="list-style-type: none"> • Should there be local variability in the minimum standard for building safety and quality? 	<ul style="list-style-type: none"> • The regulatory outcomes sought should be specified as clearly as possible. • Local policy making should occur when local variability for a specific regulatory outcome is likely to lead to better regulatory outcomes. • National limits and bottom-lines should be specified when a more limited range of variability is in the national interest. 	<ul style="list-style-type: none"> • There is no rationale for variable building standards in different locations. In fact, building regulation essentially requires uniformity of decision making when presented with the same circumstances and risks. (The different risks from climate, geography and natural disasters are reflected in performance standards to be met in the Building Code.) • The consumer protection rationale of the Building Act applies equally throughout the country. 	<ul style="list-style-type: none"> • The minimum standards set in the Building Act should be the same for all buildings throughout the country. The standards accommodate location-specific risks, the siting of buildings and their intended use. The objective of building regulation should be to ensure consistent decision making.
<p>Accountability</p> <ul style="list-style-type: none"> • Can central government be held accountable for national building standards? 	<ul style="list-style-type: none"> • Regulators should be responsible for outcomes and have the autonomy to make policy decisions that influence those outcomes. • Policy-making responsibility should be given to the level of government where 	<ul style="list-style-type: none"> • Central government has the accountability for overall policy relating to building quality and New Zealanders' preferences about this issue. Large-scale building failures across multiple local authorities (such as leaky buildings) are of national concern. • Widespread failures within a particular region will also be 	<ul style="list-style-type: none"> • Accountability for setting policy on building standards is best held centrally. • Local authorities are accountable for administering national building standards, but the process for holding local authorities to account is a costly one for all

Key questions	Principles	Relevant factors	Assessment using the principles
<ul style="list-style-type: none"> Can local government be held to account for administering national building standards? 	<p>the electorate has the most interest (and ability) to hold the regulator to account for the policies made.</p> <ul style="list-style-type: none"> Regulatory regimes should be designed with the appropriate accountability mechanisms, to enable the regulatory policy maker to be held to account. 	<p>relevant for local government accountability where local government administers national building standards.</p>	<p>parties (Productivity Commission, 2012a).</p> <ul style="list-style-type: none"> When the scale of the leaky buildings problem became apparent across multiple local authorities, the public called for central government action. This was appropriate, because the scale of the problem suggested a systemic failure. This indicates that the accountabilities are well aligned to those best placed to address problems in the system.
<p>Cost</p> <ul style="list-style-type: none"> Is there significant potential for cost efficiencies in implementation or administration? 	<ul style="list-style-type: none"> Implementation and administration of regulation should be consolidated when there are significant cost efficiencies to be gained. When implementation requirements vary significantly between jurisdictions, locally specific implementation is appropriate. Allocate responsibility where there is an alignment of incentives for cost-effective delivery. 	<p>Earlier work by the Department of Building and Housing (2010) suggested that consolidation of BCA functions would have significantly lower costs than local administration.</p> <ul style="list-style-type: none"> Economies of scale are possible through the increased utilisation of staff time processing more consent applications and through use of technology to streamline consenting processes. Consolidation could provide better visibility of the cost of processing building consents in different parts of the country, providing incentives to reduce costs in some areas. Consolidation of BCA functions could result in less duplication of effort (for example, in approving alternative solutions or understanding new building methods). A local presence will be required for inspection services. This could continue to be undertaken by local authorities or through local offices of a national body. 	<ul style="list-style-type: none"> The costs of administering the Building Code could be considerably lower with central administration of consenting services due to economies of scale, use of technology and less duplication of effort. A local presence will still be required for building inspections.

Key questions	Principles	Relevant factors	Assessment using the principles
<p>Capability and information needed</p> <ul style="list-style-type: none"> • What is the current level of capability required to administer the Building Act? • Can the capability required be sustained at the local level? • Are there synergies with other regulatory functions? • Is the relevant information for implementation or administration of building regulation held at a local or a national level? 	<ul style="list-style-type: none"> • The implementation and administration of regulation should be located where there is capability to undertake the task, or where capability can be built. • Existing implementation capacity should be assessed and considered, with a view to achieving synergies in the administration of regulatory functions of a similar nature. • Regulatory implementation should be aligned close to the source of the required information. 	<ul style="list-style-type: none"> • Central administration would provide national consistency in the training of building inspectors and consenting staff. These staff would also be better able to share learning and transfer knowledge more rapidly across different parts of the country (creating feed-back loops and better integration of lessons learned). • There is capacity at the local level because experienced building inspectors and consenting staff are already employed by local authorities. Local presence may ensure a more timely response to applications (at least in some areas). • Local administration enables local authorities to gain economies of scope by leveraging expertise in building inspection and consenting into other areas of local regulation (such as resource management consenting). Local authorities are also directly responsible for other functions under the Building Act (other than consenting functions), such as for building warrant of fitness work and earthquake strengthening. Local authorities are the holder of land records, and have the best information on any links between buildings and local district plans. 	<ul style="list-style-type: none"> • A centralised agency would be better able to share information and learning within a single organisation to improve capability (while still maintaining a local presence for inspection services) and would be better able to ensure that all building certifiers are trained to the same standard. • Local authorities hold relevant information, making it important to effectively use local information on building performance and regulatory compliance.
<p>Funding</p> <ul style="list-style-type: none"> • Are suitable arrangements for funding of building regulation within the legal mandate of local or central government? 	<ul style="list-style-type: none"> • Match the service delivery funding base with the regulatory benefit. • Consider whether a fiscal transfer between jurisdictions is needed to achieve the objective of the regulation. 	<ul style="list-style-type: none"> • Both local and central government have the ability to charge fees for regulating under the Building Act. Local administration involves different charges throughout the country for the same building consents. 	<ul style="list-style-type: none"> • Fiscal transfers between levels of government are not required to achieve the objective of the regulation.

What does application of the framework suggest for the allocation of regulatory roles?

- **Regulatory decision making:** There is a national interest in having a national standard for building performance and no rationale for local variation in building outcomes. In fact, building regulation aims to deliver consistent decisions throughout the country when presented with the same circumstances and building risks.
- **Regulatory implementation and administration:** There are high direct and indirect costs involved for building owners and local authorities when BCAs are accountable for administering building regulation. The costs of administering the Building Code could be considerably lower with more centralised administration, due to economies of scale, use of technology and less duplication of effort. A centralised agency would also be better able to share information and learning within a single organisation to improve capability (while still maintaining a local presence for inspection services), and would be better able to ensure that all building certifiers are trained to the same standard.

There are nuances to the operation of the Building Act which mean that any reform in this area needs to be carefully considered, with a clear transition path set out for any transfer of functions. The tasks under the Building Act can be analysed along different dimensions, which can help to direct further work in assessing the value of any rebalancing of functions between local and central government.

Features with greater central rationale	Features with greater local rationale
Consenting. This function requires assessing the information obtained on the building against the standards set out in the Building Code.	Building inspection. Inspection services need an “on the ground” presence. It may be efficient to retain staff for this function at a local level, and standardise their reporting to a central consenting decision maker.
Commercial buildings. Larger buildings are constructed less frequently, and require a specialist skill set that is not found in many councils.	Residential buildings. All councils have a reasonable number of residential buildings requiring inspection and consenting in any year (although 17 councils processed less than 500 consents in 2008/2009). The skills required to understand construction methods in these buildings are held widely.
Complex structures. More technically challenging buildings and practices require specialist skills, and are more likely to be subject to central determinations (appeals).	Simple structures. Most buildings are straightforward to inspect against the requirements of the Code and to issue consents for compliance. These buildings are less likely to require any additional processes to administer, such as appeals.

Any reallocation of responsibilities under the Building Act will be challenging. Close attention needs to be paid to the transition of responsibilities, ensuring that all parties understand their role and how information will flow between central and local agencies. It is also important to acknowledge that local government will always have some responsibilities for buildings in their area—so any reform will need to ensure that central government understands those roles and how they interact with building consenting and inspection functions.

6.5 Codifying the framework

New or amended regulation when local government has a regulatory role

The framework could inform analysis in the preparation of Cabinet papers and Regulatory Impact Statements prepared by departments and ministries. This could be achieved by updating the RIA Handbook and the Cabinet Office Manual. The intent is for Parliament to have the information available to it to be able to make a decision for each area of regulation, about which functions are best undertaken by

local or central government. Agreement to use the framework could be part of the protocol, between local and central government, proposed by the Commission (Chapter 5).

R6.1

The allocation framework should be used by central government agencies when recommending new regulation or amendments to regulation where local government is involved. This would be achieved through updating the Regulatory Impact Analysis Handbook and the requirements in the Cabinet Office Manual.

R6.2

Agreement to use the allocation framework should be part of the proposed regulatory protocol between local and central government.

Reviewing existing regulation

There are some obvious points where the framework could be applied to existing regulation. These include:

- when an existing regulation is to be evaluated or reviewed as a statutory requirement;
- when regulations are nominated for review as part of government agencies' regulatory review programmes;
- where the regulation is very old or where circumstances have changed, such as the formation of new institutions that could potentially undertake the regulatory role (for example, the Health Act 1956 and the regulatory roles conferred on local authorities pre-date the New Zealand Public Health and Disability Act 2000 which created district health boards);
- where opportunities for integration of the regulatory environment facing businesses are being explored, or where changes in technology have the potential to yield scale advantages through centralisation;
- when the balance of the community of interest in the regulatory outcome has changed (for example, potentially through an increased risk to the Crown);
- when there is a change to the legal framework that could affect the implementation of regulation, such as a potential change to joint and several liability, or a legal decision that sets a precedent for legal action against the regulator;
- when the skills and capabilities required have changed or there are changes in the technology or complexity of the activity being regulated; and
- where a regulatory failure or problem has been identified.

R6.3

The allocation framework should be used to review existing regulation, such as reviews undertaken as part of government agencies' regulatory review programmes. The framework should also be used where there are issues with capability or there is evidence of poor regulatory outcomes.

7 Improving local government's regulatory capability

Key points

- The local government sector needs to be the driving force behind improving its own capability.
- The challenge is to find an approach in which both levels of government perform roles that complement each other, without undermining the underlying responsibility of local government for building its own capability.
- The Government should use existing forums, or develop new ones, to:
 - ensure that both levels of government understand the regulatory outcomes that central government is seeking and their relative importance; and
 - identify resource and capability gaps that may prevent councils from achieving these outcomes, and determine how they will be addressed.
- Coordination between councils or contracting with third parties for regulatory services can lead to improved performance through utilisation of better capability. However, coordination and contracting is more likely to be successful where councils have information on ways to cooperate and contract, sufficient time to consider implementation options when new regulatory tasks are introduced, and clear guidance on regulatory tasks.
- Improving the capability of local government requires a multi-faceted approach undertaken cooperatively by both levels of government; however, current organisational arrangements do not appear to be building momentum to lift the capabilities of local government.

Capability has been defined as “what an organisation needs in terms of access to leadership, people, culture, relationships, processes and technology, physical assets and structures to efficiently deliver” the services sought by government policy or by statute (New Zealand Treasury, 2012). The capability of local government as a regulator is a key determinant of regulatory outcomes. This chapter focuses largely, but not exclusively, on the competencies of the workforce. The evidence presented in chapter 4 demonstrates that there is scope to improve capability and this chapter considers ways to do this.

7.1 Characteristics of the workforce

The characteristics of the local government workforce can provide insights into its regulatory capabilities. However, there is little indication in published data about the number of people performing regulatory roles or their skills.

- Local government administration employed 13 584 people in 2006, of whom 2 049 (15.1%) were managers and 4 062 (29.9%) were professionals (Statistics New Zealand, 2006). The data are further disaggregated, but not on the basis of regulatory roles. Some health professionals (197 in 2006) and skilled animal and horticultural workers (255 in 2006) are likely to have been involved in regulation, although this is not certain.
- Membership of regulators' professional associations is a potential source of information. For example, in 2009 the New Zealand Institute of Liquor Licensing Inspectors had 125 members. However, similar data are not published for all professional associations, and, in any event, their membership may be drawn from central as well as local government, and sometimes from the private sector.

While official data do not indicate the size or other features—such as qualification levels—of local government’s regulatory workforce, surveys run by the Society of Local Government Managers (SOLGM) and by the Commission provide additional information.

SOLGM surveyed councils in 2009 as part of its Workforce Planning Project, which is aimed at increasing the ability of local authorities to fulfil their workforce requirements. This survey found that at that time:

- the workforce was well represented across age groups;
- the sector was filling positions relatively easily and turnover rates were down due to the global recession;
- there were 110 job vacancies for regulatory positions, with most vacancies for building control officers. It took 2 months to fill these positions in 2009;
- senior executive regulatory positions (3.1 months) and senior environmental consents officer positions (4.8 months) were most difficult to fill;
- the number of building control positions was expected to increase and may become more difficult to fill;
- location was a big factor in recruiting staff and smaller, rural councils found it more difficult to fill positions than was the case elsewhere; and
- the three most important contributors to difficulties in recruiting staff were the limited availability of suitably skilled and qualified applicants, remuneration and location of the local authority (SOLGM, 2010a, pp. 1-4).

The Commission’s more recent survey suggests that councils may have experienced more difficulty attracting qualified regulatory staff in 2012, but the evidence is not clear-cut. Just over half of respondents had difficulty attracting qualified staff, and more than 60% of survey respondents considered that financial cost was a barrier to employing qualified and experienced staff. On the other hand, more than 60% of councils stated that on average they filled regulatory positions in less than two months in 2012, which suggests that they were not experiencing major difficulties in attracting staff. Regional and smaller councils, however, filled positions less quickly.

Overall, in 2012 councils found it more difficult to fill regulatory positions in two of their most significant areas (planning, land use and water consents; and building and construction consents). These are the areas in which the Commission’s survey suggested that there is most business dissatisfaction about councils’ performance, which raises the possibility that capability gaps may have contributed to this result. Regional councils cited water quality and monitoring as the hardest area in which to fill positions, while coastal management and planning land use or water consents were the most difficult areas for unitary authorities.

7.2 Current approaches for improving regulatory capability

Local government regulatory capability can be improved through measures such as training programmes, research, investment in, for example, information technology, and the diffusion of good practice across the sector. Providing effective guidance material can boost capability by assisting regulators to interpret regulations, and accreditation can lift standards. All of these approaches are used in New Zealand.

Training

Training is available from several sources.

- Government departments sometimes provide training when new regulations are implemented. Horowhenua District Council believes central government has a significant role at such times.

Local government is often required to interpret new legislation, prepare administrative systems to manage legislation, and to fund training and education. We do not believe it is the role of local government to engage in these activities without the assistance of central government and would

strongly promote the idea of education and training assistance both in the form of central government personnel and reasonable funding to assist in these activities. (sub. DR 91, p. 1)

SOLGM, however, suggested that the quality of central government involvement varies both between departments and within departments over time:

One of the sector's main sources of frustration with policy processes is the lack of support for implementation needs. We can cite examples where central government has worked with the sector on training needs (the work the Ministry of Justice is doing with ourselves and LGNZ to train members and staff on changes to liquor legislation is a good current example). But some other equally important legislation has been untouched—a good example is long-term planning where smaller local authorities operated for three years without clear guidance on what the expectations were. (sub. DR 83, p. 5)

- Local Government New Zealand (LGNZ) trains elected officials. Topics covered include newly elected members' workshops; public consultation; media and presentation; decision making; asset management; the Resources Management Act; and financial governance (see www.lgnz.co.nz/knowhow/).
- SOLGM provides training to support its guidance material. It also runs courses for local government officials. Its annual Local Government for Central Government Course provides officials with an understanding of the sector's role, functions, funding and structure, together with case studies of successful planning, regulation, joined up governance and service delivery. Its other courses and events are generally open to officials, although there has been a 'marked decline' in attendance over recent years (sub. DR 83, p. 5). The SOLGM Opus Business School held 31 events in 2010/2011, down from 45 in the previous year. Attendance at these events (1,234) was one-third (32.4%) less than in 2009-10. SOLGM's President's report for 2010-11 commented that:

... what must be of concern is the steady decline in attendance at events that can be considered 'core' to local government. ... Attendances at a number of these events are fast reaching a point where it will be no longer financially viable to hold them, yet it is impossible to believe that they have no relevance or usefulness to the sector – positive evaluations point to the contrary (SOLGM, 2011, p. 14).
- The Ombudsman's office provides training on request about its role and functions and the requirements of the Ombudsman Act and Official Information legislation (Office of the Ombudsman, 2013).
- Professional organisations offer training programs for their members (Box 7.1).

Box 7.1 Professional organisations' involvement in training regulators

The New Zealand Institute of Environmental Health represents those engaged in the environment and health protection. One objective is to arrange opportunities and facilities for members to meet and interchange knowledge and information.

The Building Officials Institute of New Zealand has represented Building Control Officials in New Zealand since 1967. Its goal is to improve their competency. Through its Diploma and Continuous Professional Development based courses, the Institute provides training for the Diploma in Building Control Surveying and beyond, to enable those in the profession to maintain, upgrade and update their skills throughout their working life.

The New Zealand Institute of Animal Control Officers is an incorporated society consisting of practising animal control officers from throughout New Zealand, who elect an executive to administer their affairs and organise annual training conferences.

The objectives of the New Zealand Parking Association (Inc.) include ensuring that enforcement officers are trained to the highest possible standard nationwide, and to collect and disseminate information that will keep member authorities and individuals well informed.

Sources: New Zealand Institute of Environmental Health website, www.nzieh.org.nz; Building Officials Institute of New Zealand website www.boinz.org.nz; The New Zealand Institute of Animal Control Officers website, www.animalcontrol.org.nz; The New Zealand Parking Association (Inc.) website, www.nzparking.com.

The Commission has not assessed the quality of these training programmes. However, there are warning signs. The programmes appear to cover specific regulatory competencies more fully than general regulatory skills such as policy development, analytical thinking, strategic thinking and communication (although SOLGM's risk management programme is an exception). This variable coverage of topics, combined with the declining attendance at SOLGM's courses and the patchy level of central government support when new legislation is introduced, indicate that a review of training effort may be useful.

Moreover, a large number of organisations within the local government sector are involved in training. The question that this raises is whether rationalisation would permit the delivery of a broader, more attractive and better coordinated range of courses at lower cost, through reduced overhead costs.

Diffusion of good practice

Forums provided by professional organisations and by SOLGM help to transfer good practices. In addition to these forums, Local Government Online Limited (LGOL) provides an online facility for sharing good practice.

LGOL was established in September 1997 under a joint initiative of SOLGM and the Association of Local Government Information Management (ALGIM). LGNZ and Civic Assurance joined as shareholders more recently, making LGOL a company that is owned and supported by the key local government organisations in New Zealand. LGOL's mission is that it will be the pre-eminent forum for communication and source of shared knowledge for and about local government.

LGOL operates group mailing lists, which provide a closed forum for local government personnel, to enable them to communicate on good practice and seek responses to general inquiries. LGOL's website reports that these mailing lists consistently generate over 250,000 emails per month. There is no cost to subscribers who join a list, as they are funded from annual subscriptions paid by councils. LGNZ also runs webinars for its members.

Guidance material

Guidance material can:

- indicate central government's priorities and intentions about what it wants achieved through a particular piece of legislation;
- provide advice about how to implement good processes; and
- indicate how to implement specific regulations.

Good guidance material can help to develop consistently high quality processes across a sector. It is particularly important when new responsibilities are delegated to local authorities, who are often expected to adopt good regulatory process in new areas immediately.

Technical guidance documents published by the Ministry of Business, Innovation, and Employment (MBIE) are an example of specific guidance. These documents help building practitioners, building officials and industry to consider a wider range of options for complying with the Building Code than are provided by compliance documents. Enabling all councils to use the same guidance material should also promote a consistent approach to establishing compliance across New Zealand (MBIE, n.d.). Similarly, the Ministry for the Environment (MfE) provides a guidance manual for local government that, amongst other things, demonstrates how to incorporate climate risk assessment into local government regulatory processes (MfE, 2008b).

Poor guidance material increases the chance of differing interpretations of standards, as Auckland Council contends has happened in the case of the National Environmental Standard for managing soil contaminants.

Despite close collaboration between a number of local authorities the lack of adequate centrally-driven guidance, and the quality of the original drafting, has meant that differing interpretations as to how the standard should be applied are still common. (sub. DR 97, p.5).

Other organisations also provide guidance material. SOLGM, for example, provides guidance modules through its risk management/legal compliance programme, to assist local authority managers to gain assurance that their processes comply with legal obligations. Issues covered include dog control, resource consents, liquor licensing, health and safety and building control. The programme:

... is based on a cooperative approach to developing "good practice" legal compliance processes and procedures across a range of local government activities, utilising the existing knowledge base within local government and sharing the costs. The objective of the programme is to assist local authorities in identifying and meeting their legal obligations through:

- developing and maintaining a legal compliance framework for local authorities, upon which specific legal compliance can be developed; and
- developing a series of specific legal compliance programmes across the range of local government activity (SOLGM, 2013a).

The Ombudsman provides 'good administration guides', which are available for all government agencies, including local government (Office of the Ombudsman, n.d.).

Accreditation

Accreditation is another way in which central government can maintain or improve the skills of local government regulators. This would normally require employees to register before undertaking a regulatory function with a relevant central government department, which would assess the applicant's skills or qualifications (Australian Productivity Commission [APC], 2012, p. 173). Accreditation is used, for example, in the building sector in New Zealand.

7.3 Implications

Regulatory capability is determined by workplace skills and by factors such as networked databases of information, the quality of internal review and assurance processes, the quality of council relationships with key regulated parties and the clarity of business processes used by regulators.

There are concerns about the regulatory capabilities of local government. While it is difficult to assess how significant they are, the sector itself recognises that there are issues to be addressed. Official workforce statistics reveal little about the capabilities of the workforce and surveys to supplement this information are infrequent. There is a reasonably active training and support programme, but councils consider that central government support is patchy, participation in training courses provided by the sector is falling sharply; and training is provided in a fragmented way.

There seems to be some basis for Federated Farmers' contention that there is a lack of incentives to take into account the varying capacities of councils to meet the requirements of legislation (sub. DR 111, p. 3).

Administering and enforcing regulation is likely to become more challenging as central government delegates more tasks; as the community becomes more demanding about the standards that it expects; and as businesses continue to face intense competitive pressures. The adequacy of their regulatory skills is so fundamental to the capability of local government to achieve regulatory outcomes without imposing unnecessary burdens on those who are regulated, that it is important to seek opportunities to improve these skills in a cost-effective way. As SOLGM pointed out:

Without staff who are well led, committed and provided with appropriate training and planning opportunities it is impossible to deliver the services our communities expect. Simply put, recruiting and retaining the right people is the most important job facing leaders in local government today. (SOLGM 2010a, p. 1)

7.4 Ways to improve regulatory capabilities

Earlier chapters have explained that central government does not relieve itself of responsibility for the quality of regulation when it delegates responsibility for administering it to local government. It has a part to play in directly or indirectly improving the capabilities of local government to administer regulation. This

section explores ways in which the two levels of government separately or cooperatively could improve local government's regulatory capabilities.

The sector itself needs to be the driving force behind improvements in its own capability. The policy challenge is to find an approach in which both levels of government perform roles that complement each other, without undermining the underlying accountability of local government for building its own capability.

Options fall into six categories:

- strengthening the incentives of both levels of government to improve local government's regulatory capabilities;
- improving the information base;
- filling gaps in training opportunities;
- increasing the involvement of central government in developing local government's regulatory capability;
- cooperation and contracting between councils; and
- strengthening relevant institutions.

Strengthening incentives to improve capabilities

Both councils and their employees have incentives to improve capabilities. Councils will be better able to fulfil their statutory obligations if they have effective capabilities in areas such as regulatory processes and recording and managing information, and if their employees are well trained. Employees have incentives to seek training where they can expect it to lead to higher salaries. These incentives can be weakened if, for example, investment in training is not rewarded.

Strengthening the Regulatory Impact Statement process

One way to strengthen incentives to build capability may be to impose a more explicit obligation on departments sponsoring new regulation that is to be administered and enforced by local government. This obligation would require the department—in the regulatory impact statement (RIS) supporting the regulation—to assess local government's capability to implement the regulation and, if that capacity is not acceptable, to identify how it could be increased to an acceptable level. The obligation could also specify that the assessment must be based on consultation with local government that is reasonable, having regard for issues such as the size of the impacts of the regulation, its complexity and the urgency of the issue.

This would have at least three benefits. It would:

- indicate whether the cost of improving capability is a cost that needs to be factored into the proposal and, by so doing, enable a more complete assessment of its cost and benefits;
- lead to consultation between the two levels of government that would most likely spill over into other areas, such as the design of the regulation itself. For example, regulation that avoids unnecessary capability is likely to be easier to apply, requiring less capability development. Once a capability gap has been identified, attention is likely to turn to whether it is possible to simplify the regulation without undermining the achievement of regulatory objectives, so that the cost of increasing capability can be avoided. As South Taranaki District Council argued, consultation about the implementation of regulation will 'improve the success of current and new regulation' (sub. DR 68, p. 3); and
- begin a discussion about how capability can be improved.

The additional consultation with local government required by this proposal would increase the cost of preparing RISs. This cost could be contained by specifying that the amount of consultation needs to be 'reasonable'.

R7.1

The guidelines for preparing Regulatory Impact Statements should be amended, to require departments sponsoring regulation that will be delegated to local government to include in their statements—following reasonable consultation with local government—the costs of improving to an acceptable level the capabilities in local government to administer and enforce the regulation.

Improving the information base

The limited information available about local government's regulatory capability means that little is known about:

- skill levels across regulators as a whole and within particular professional areas;
- how skill levels are changing over time;
- broader regulatory capabilities in areas such as information technology; and
- gaps in particular areas and their causes.

Collecting more information—perhaps through an online survey—could assist workforce planning. As SOLGM points out:

... Sound workforce planning will be made easier for local authorities if there is nationwide workforce data that is collected on a regular basis. (SOLGM, 2010a, p. 5)

A survey could build on SOLGM's survey, described above. The APC's survey of councils (APC, 2012, appendix M) would also provide a useful starting point. Questions in that survey would generate information on:

- the percentage of total expenditure devoted to regulation, classified by professional area;
- the number of employees by qualification, by professional area;
- starting salaries for graduates; and
- whether local government has sufficient resources to employ the professionals it needs and, if not, how they determine priorities.

In addition to the costs of designing a survey and analysing the responses, providing this information would impose costs on councils, which could initially be large if they need to reorganise their information to make it consistent with the survey requirements. If such information is not available, qualitative questions could be used as an alternative, but are less likely to generate useful information.

As pointed out above, SOLGM collected useful information through a survey in 2009. If central government decided to collect additional information about competencies, it should consult closely with the local government sector.

Awareness of the business perspective

Chapter 5 made the case for secondments of staff between the two levels of government, to help people in in each level to appreciate the pressures that the other faces, and to understand their respective processes. Secondments between local government and the business sectors would also be worthwhile. Local government regulators who spend some time in the business sector are likely to develop a more practical understanding of the impacts of regulation and of effective approaches to enforcement.

The value of secondments has been recognised in the United Kingdom, where the Local Better Regulation Office had a programme called Trading Places, which arranged short term placements of local government staff in the private sector.

Such secondments could already be arranged by individual authorities. However, the costs involved in establishing an effective programme include setting up a register of suitable private sector partners that would be willing to take on a council employee for a limited time, and providing them with a worthwhile learning experience. LGNZ and SOLGM are in the best position to assess the costs and benefits of further promotion of secondments between local government and the business sector, and indeed for other sectors as well, such as the community and voluntary sector that has an interest in regulatory outcomes.

Increasing central government's contribution to developing local government capabilities

Given the national interest in achieving good regulatory outcomes without imposing unnecessary regulatory burdens, central government has an interest in enabling local government to develop the capabilities to administer regulation. It can also enhance the capability of local government, by:

- being clear about its own priorities, which can help local government to target its capability development;
- providing better guidance material, to make local government's task in enforcing regulation easier, and to encourage consistency;
- improving its training programmes, particularly when it requires local government to implement a new regulation;
- implementing initiatives to address specific skill shortages;
- making 'tools' for assessing or implementing regulation that it has developed available to local government;
- supporting research into ways to raise capability that have a sector-wide impact;
- sponsoring reviews of councils' regulatory performance, in order to spread good practice; and
- undertaking reviews of particular areas of regulation.

The rest of this section discusses each of these options.

Setting regulatory priorities

Capability development will be better focused when councils can combine information about gaps in the sector's capabilities—perhaps gathered through surveys such as the ones described above—with information about expected regulatory priorities. While individual councils will determine their own priorities in the light of local conditions, central government may also have views about national priorities in some areas regulated by local governments. The views of the two levels of government may differ (Chapter 6). As the Department of Internal Affairs (DIA) briefing to the incoming Minister of Local Government explains:

Local authorities are also charged with helping central government to achieve national priorities and implement national regulatory regimes.... Reconciling and delivering on both local preferences and national priorities can be challenging. (DIA, 2013a, pp. 4-5)

Councils have a responsibility to enforce the laws and regulations they are administering, but they can prioritise their efforts. There will be times when either central or local government sees a need to devote additional effort to an area in order to address a particular problem. Auckland Council pointed out that 'where local preferences do not vary, clear central direction is often appropriate' (sub. DR 97, p. 5). The Property Council considers that central government should play a greater role in providing strategic direction to councils and ensuring national consistency in approach, where appropriate (sub. DR 90, p. 3).

There are some ways that central government can do this already within particular areas, although they may not work well and they do not indicate priorities between areas of regulation. In the case of environmental regulation, central government can give guidance on environmental issues that it considers to be nationally

significant, through national policy statements and national environmental standards. Central government's view is that it:

... should play a key role in decisions or should provide very clear direction for matters that are nationally important, where decisions reconcile nationally significant values, or where consistency outweighs the value of local specificity. (New Zealand Government, 2013, p. 13)

However, the Government feels that current arrangements are not working well because there is:

... a lack of clear, up-to-date national guidance on matters of national importance leaving such issues to be resolved at local levels coupled with a highly devolved decision-making system that has led to tension between national and local objectives and the development of inconsistent approaches to these matters across the country. (New Zealand Government, 2013, p. 16)

Other jurisdictions use different approaches to identify the priorities of higher levels of government between areas regulated by local government.

- In 2007, the United Kingdom government commissioned a review to develop a shortlist of national enforcement priorities for local authorities. The aim was to ensure that sufficient resources were devoted to regulating areas where a coordinated, cohesive and consistent local approach was needed to achieve national objectives. To prioritise national policy areas enforced by local authorities, the review used an evidence-based approach to evaluate the risks that national policies aimed to control and the effectiveness of actions taken by local authorities (APC, 2012, p. 552).
- The Victorian Government has accepted in principle a recommendation, made by the Victorian Competition and Efficiency Commission (VCEC), that the State Government should identify annually any changes in its priorities or new obligations that need to be considered by councils (VCEC, 2010, pp. 290-291). The Government has indicated that it will implement this recommendation through active consultation with councils where State legislation or policies impact on the sector, including through the Local Government Minister-Mayors Advisory Panel that has been set up for this purpose (Department of Treasury and Finance, Victoria, 2012).

An approach to discussing priorities like the one used in the United Kingdom would be thorough but expensive, and central government may be concerned that it would undermine its autonomy. At the other extreme, central government could simply inform local government about its priorities, perhaps through letters of intent, as it does in relation to Crown entities. Local government, however, may see this as eroding its autonomy. Another option would be to establish a forum of local government organisations and officials from the relevant government departments. Using an existing consultative forum to discuss priorities, as is proposed in Victoria, could be effective, if there was representation from across central government portfolios. Chapter 12 proposes formation of a new inter-governmental organisation, which could take this on as one of its responsibilities. Alternatively, the Central Government-Local Government Forum and the Central Government-Local Government Chief Executives Forum could be used for this purpose.

R7.2

The Government should use existing forums, or develop new ones, to:

- ensure that both levels of government understand the regulatory outcomes that central government is seeking and their relative importance; and
- identify resource and capability gaps that may prevent councils from achieving these outcomes, and determine how they will be addressed.

Guidance

There seems to be agreement that guidance is important, but different views on its effectiveness. Tararua District Council's view is that:

Best practice guidance for officials in local and central government is important and is already carried out successfully across local government. Lack of capability in some councils is not caused by lack of guidance; it is usually driven by a lack of resource or experience. (sub. DR 74, p. 3)

South Taranaki District Council suggested that:

There is also a need for Central Government to actively support Local Government when regulations are created and to be implemented. This support and liaison can reduce variability and increase the success of regulations. An example could be with functions under the Building Act, when MBIE could provide more guidance on best practice. (sub. DR 68, p. 3)

LGNZ also supports the use of guidance material:

Best practice guidance for officials in local and central government is important. The local government sector actively supported the Department of Internal Affairs guidelines that sought to inform the development of local government specific regulations. We would like to see those guidelines updated, enhanced and given greater status. Current requests for guidance on Development Contributions are seen as a positive move. (sub. DR 109, p. 10)

The Commission's survey of councils found that only 15% of respondents consider that guidance material provided by central government agencies is helpful when implementing delegated regulations, and only 27% considered that enough material is being provided.

The Property Council (sub. DR 93) suggested that central government should provide more guidance. McDermott considered that seeking additional national guidelines and exchanging good practice should help achieve higher standards through councils adopting continuous improvement practices, but he also cautioned that best practice guidance is a:

... useful resource but nothing more. Development of and access to such material should be seen as part of a wider commitment to quality improvement and not as something which will in itself change the quality of policy making and regulation. (sub. DR 67, p. 10)

Developing guidance material can be expensive. For example, it typically takes three to seven years to develop a national policy statement under the Resource Management Act (New Zealand Government, 2013, p. 21.) While this is an extreme case, the costs of developing guidance material need to be factored into any assessment of whether to develop guidelines.

The Commission considers that discussion between portfolio departments and local government is the most constructive way to identify gaps in guidance material and assess how to fill them. Such discussions should identify the costs of developing additional guidance material, and should not assume that central government should be responsible for developing this material. For example, Hawke's Bay Regional Council pointed out that regional councils are cooperating with territorial authorities to develop a toolkit to bring together best practice in non-statutory programmes (sub. DR 67, p. 6)

R7.3

Relevant departments should consult with local government about the adequacy of guidance material and the potential benefits and costs of options for improving it.

Training

As described earlier, central government already trains local government regulators on a portfolio basis, although the experience seems to be variable. One benefit of a mutual priority setting process, such as that described above, is that it would help to identify areas where more central government training would be useful.

Governments can develop initiatives to help councils overcome specific skill shortages. In Victoria, Australia, for example, the State Government used a professional development and training programme for planning professionals, flying squads of experts who provide short term help to council with skill gaps, planning internships and traineeships and courses in planning (APC, 2012, p. 175).

Making 'tools' available to local government

Northland Regional Council indicated that the then Ministry for Economic Development had not given it access to the Business Cost Calculator.

A useful recommendation of the report would be for some tools to be made available to local government to assess the cost impact of regulations. For example, we tried in early 2012 to contact the then Ministry of Economic Development about their Business Cost Calculator which helps calculate the compliance costs of regulatory proposals on business, and can be used to measure, monitor and report on compliance costs over time. Apparently it is accessible only to employees of New Zealand government agencies through the Public Sector Intranet. Unfortunately we received no response from Ministry of Economic Development. If this tool works at the central government level and has proved useful, perhaps it should be made available to local government too as part of package of tools to achieve better regulation. (sub. DR 77, p. 5)

While the Commission has not investigated the merits of this particular example, if the Government possesses tools or techniques that could help local government to be an effective regulator, it makes sense to consider making them available.

Reviews of local authorities' regulatory performance

Reviews of the regulatory performance of particular councils can spread good practice, by identifying leading and/or noteworthy practice and areas for potential improvement. The reviews need to be made publically available upon completion to enable other councils to benefit from the relevant findings.

The Commission's review of local government's decision-making processes concluded that constructive reviews of the quality of local government regulatory processes would be valuable. There are a number of ways in which such reviews could be undertaken. They are more likely to be effective if the sector itself is the driving force behind them, as this will make it more likely that individual councils will take on 'ownership' for the outcomes of such reviews and implement their findings.

The Government is currently considering options for reviewing the performance of local authorities. The second phase of the Better Local Government Programme includes options for a local government performance monitoring and improvement regime, including consideration of ways to improve performance and efficiency.

One option is to adopt a framework that is similar to the Performance Improvement Framework (PIF) that operates for central government agencies. A PIF is a review of an agency's fitness for purpose today and for the future. It looks at the current state of an agency, how well placed it is to deal with medium term issues, and areas where the agency needs to do the most work to make itself fit for purpose (State Services Commission, the Treasury and the Department of the Prime Minister and Cabinet, 2013a).

LGNZ considers that the PIF would not be a proportionate approach or better than possible alternatives:

For a large number of councils the cost of a PIF style approach would be excessive and seriously outweigh the benefits. Through OAG and performance measures used in the Long Term Plan and Annual Plan, there is already a mechanism for monitoring performance. A number of councils use external quality control methodologies, such as ISO9000, Baldrige and Business Excellence, to provide independent surety about capability, assessment and performance improvement. This could be encouraged. (sub. DR 109, p. 17.)

Moreover, if the PIF approach were managed by central government, it may not secure the support of local government.

SOLGM could see some benefits in reviewing councils' regulatory performance and, like LGNZ, suggested that the Office of the Auditor-General (OAG) could be involved.

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

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

SOLGM has previously developed health checks around a local authority's capability in, and readiness for the long-term plan. SOLGM's legal compliance modules, while not universal in their coverage of regulatory functions may also help in the development of a programme of health checks in many areas. (sub. DR 83, p. 7)

Palmerston North City Council (sub. DR 79) sounded a warning about assessing councils' performance through benchmarking, which it felt could lead to an increase in levels of service and hence increased cost for councils, because no council will want to see itself at the bottom of a 'league table' (see Box 11.3, Chapter 11).

Another option could be based on the Promoting Better Practice Reviews programme in New South Wales. While the coverage is broader than regulation, its key features are that it is aimed at spreading good practice, involves some self-assessment by councils and the final report is published. With more than 100 reports published, there is a large body of evidence of good practice that is available to all (Box 7.2).

Box 7.2 The Better Practice Reviews Programme in New South Wales

This programme, administered by the Division of Local Government within the Department of Premier and Cabinet, aims to improve the viability and sustainability of councils. It has a number of objectives, to:

- generate momentum for a culture of continuous improvement and greater compliance across local government;
- provide an 'early intervention' option for councils experiencing operating problems;
- promote good governance and ethical conduct principles; and
- identify and share innovation and good practice in local government.

Review teams evaluate the effectiveness and efficiency of key aspects of council operations and giving feedback. This will involve assessing a council's overall strategic direction, checking compliance, examining appropriate practices and ensuring that the council has frameworks in place to monitor its performance. A review may focus on specific areas of council activities that have been identified as a result of an analysis of council's information and data.

Councils being reviewed complete a self-assessment of their strategic management and operating practices. The review team analyses this self-assessment and, after conducting an on-site review, prepares a report and sends it to council as a confidential draft for comment. The report includes what is working well as well as challenges for improvement. Council's comments are incorporated into the final report, which is issued to council, the Minister and the Director-General. Councils are requested to table the report so that it becomes a public document.

The Division of Local Government monitors how councils respond to the report, to ensure that recommendations are implemented. More than 100 reviews have been published on the website of the Division of Local Government.

Source: Division of Local Government, Department of Premier and Cabinet, (n.d.).

The Government's current consideration of options for reviewing the performance of local authorities provides a useful opportunity to consider how reviews of councils can identify good regulatory practices and encourage their diffusion across the sector. It would not be appropriate for central government to impose or control a review process. Such an approach would not recognise the autonomy of local government and would not be consistent with the need to build constructive engagement between the two levels of government. Processes that are voluntary, involve a degree of self-assessment by councils and publication of their findings, are more likely to be effective than legalistic, centrally-driven processes. The Commission therefore supports including such options amongst those that are being assessed as the Government considers how to give effect to reviews of local authorities.

It is important that reviews of councils support rather than cut across review processes already undertaken within the sector. Wellington City Council points out that it already reviews its regulatory services.

By way of example, we include case study audits as part of our building consent process to determine the quality of consent applications so they can analyse the feedback and make improvements. This programme ensures we are able to tailor advice to clients in the early stages when consent applications are being made to reduce consenting timeframes and improve the customer experience. (sub. DR 69, p. 9)

R7.4

The Government should work with local government to develop a process for reviewing the regulatory practices of local government that is voluntary, and involves self-assessment and publication of findings.

Chapter 11 provides further consideration of how to improve performance assessment across the whole regulatory system.

Reviews of areas of regulation

Reviews of areas of regulation, such as the review of liquor licensing undertaken by the OAG (OAG, 2007a), can highlight capability gaps within an area.

If the Government decides to review a particular area of regulation, the Terms of Reference for such reviews should include an assessment of any capability gaps and require recommendations for improving them. This is likely to involve little additional cost, since most reviews of how well an area is being regulated are already likely to consider capability issues.

Research

Research could identify many possible options for improving regulatory practice across the local government sector. Box 7.3 provides examples of sector-wide research projects from the United Kingdom. While they are not necessarily high priority projects for New Zealand, they give an impression of the scope of possibilities.

Box 7.3 Research ideas from the United Kingdom

Initiatives that were considered by the Local Better Regulation Office:

- Creation of a common framework for excellence, agreed and shared by local authorities, which aims to simplify and reduce the burden on local regulatory services of reporting performance and promoting excellence.
- Research into the impacts and outcomes of local authority regulatory services activity, to improve outcomes through better knowledge of where regulatory services can have an impact.
- Systematic mapping of the flows of data across the local authority regulatory system to reduce the burden of data requests, improve efficiency and service quality and foster cooperation between national regulators, central government departments and local authorities.
- Creating a national enforcement actions data base, on which local authorities can record details of formal enforcement action they have taken, to provide information that will enable the authorities to improve risk-based decision making, promote consistency and inform policy development, by providing evidence about whether legislation is effective in tackling the problems it was designed to address.
- Developing a common risk assessment framework, to reduce duplication and encourage consistency in how local authorities undertake risk assessments of businesses.
- Developing a common competency framework for regulators to increase local authorities'

awareness of competency gaps and assist in skill development plans.

Source: Preece, 2010.

Given that such proposals cut across the sector as a whole, they are unlikely to be initiated by an individual council. It is more likely to be undertaken by central government, or on a partnership basis with local government, as happened with the Councils Reforming Business programme in Victoria (Box 7.4).

Box 7.4 Councils Reforming Business (CRB) program, Victoria

The Victorian Department of Planning and Community Development (DPCD), in partnership with the Municipal Association of Victoria, developed the CRB program to identify opportunities to improve services in the local government sector, while decreasing costs and reducing red tape for businesses working with councils.

For example, research was undertaken into ways to reduce the time, cost and complexity of regulatory services in the building and construction sector. The research confirmed the variance and inconsistency of building site management across municipalities, which imposes significant administrative and compliance burdens on industry. Such inconsistency reduced productivity and increased costs to businesses, particularly for those operating in more than one municipality, and led to increased housing and construction costs.

Funds were made available to lead the development and implementation of a Better Practice Building Site Management Code of Practice aimed at integrating and streamlining Victorian and local government regulation, ensuring a consistent understanding of building site management requirements. This program was supported by a comprehensive training package to enhance council and industry knowledge, increase compliance and reduce the regulatory burden on businesses.

The Victorian Government also developed EasyBiz, a program of online SmartForms available for various local government licences, permits and registrations. Users can complete and submit any of 18 standardised online SmartForms in the areas of planning, building, Local Laws and environmental health. The online SmartForms offer greater consistency for businesses through the use of one common form across councils, particularly for businesses dealing with multiple councils and Victorian Government agencies. The forms are dynamic, enabling the fields to change depending on the information provided and, once fields are completed, the information can be retained for future use. The SmartForm technology allows users to complete and submit applications online at any time, eliminating the need to visit council during working hours, thereby speeding up the application process.

Source: DPCD, Victoria, 2010.

There is a small research programme within DIA, but research into local government capability issues does not appear to have been given high priority by central government.

Enhancing capabilities through coordination and contracting

Many of the capabilities embodied in people, processes, technology and assets are transferable, so an important option available to councils to address capability gaps in delivering regulatory functions is coordinating with other councils, or contracting with third parties such as independent contractors.

Council coordination on regulatory matters can be formal or informal. Informal coordination includes sharing information and leading practices, while formal coordination can occur through shared staff, contracts between councils for regulatory services, joint procurement of professional services and alignment of regulations. Contracting with third parties is an alternative to contracting with another council.

In the Commission's survey, 89% of councils responded that they coordinate/collaborate with other councils on regulatory functions in some way. Cooperation around consents for building and construction, followed by planning, land use and water consents, and food safety are the main areas of regulatory cooperation. Councils are generally satisfied with the outcomes of cooperation and open to it across the range of their regulatory functions.

F7.1

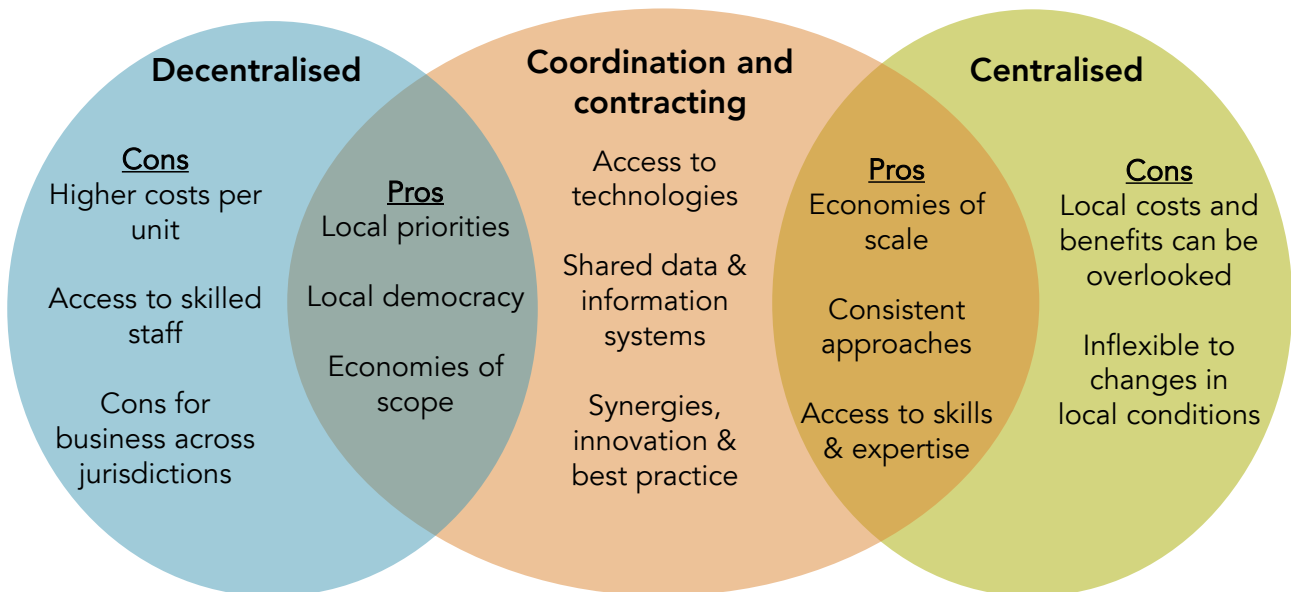
Responses to the Commission's survey of councils indicate that, while there may be room for improvement and reprioritisation of effort, there is a significant amount of formal and informal cooperation, coordination and sharing of resources occurring amongst local authorities, which is generally seen as successful.

Submissions from councils also provide instances where councils contract with third parties to provide regulatory services. For example, the Lakes Coast Cluster Group of Building Consent Authorities engages specialist building consent consultants to work across eight territorial authorities (Western Bay of Plenty District Council, sub. 33, pp. 2-3). An interesting aspect of this example is that it combines contracting with third parties with coordination between councils.

Costs and benefits of coordination and contracting

Coordination between councils or contracting with third parties for regulatory services can capture many of the capability benefits of centralisation, while maintaining the advantages of local decision making (such as the ability to cater for spatial variations in community preferences, and access to information). As illustrated in Figure 7.1, coordination and contracting may also avoid some of the perceived negatives associated with having a solely centralised, or decentralised, regulatory system.

Figure 7.1 Benefits of coordination and contracting



However, coordination and contracting come at a cost. The typical costs of coordination are the time and resources needed to coordinate, political risks and loss of local autonomy. Time and resources are also required to secure and implement contracts with third parties and monitor these contracts. As such, decisions to cooperate or contract with third parties should be based on careful consideration and analysis.

The role of the Local Government Act in encouraging coordination

The Local Government Act 2002 (LGA) provides explicit legal provisions for local authorities to work together. For example, section 14(1)(e) of the LGA provides that "a local authority should collaborate and cooperate with other local authorities and bodies as it considers appropriate to promote or achieve its priorities and desired outcomes, and make efficient use of resources". In order for a local authority to maximise its effectiveness—as required by the LGA more generally—it is also the case that coordination

and cooperation should always be considered as options in order to determine what delivery or implementation approach would elicit most local value.

Despite these provisions, the Efficiency Taskforce argues that the LGA provides “only limited encouragement for sharing innovation and collaboration between councils”. The Taskforce suggests that a clearer legislative mandate or incentive for coordination “may be achieved by strengthening the provisions in section 14(1)(e) of the Act” (p. 27). The Taskforce also recommends “that the Government explores ways to change council practice to encourage the sharing of innovation and collaboration”, and it gives the example of “requiring councils to prepare a policy on sharing innovation and collaboration” (p. 27).

The survey evidence that councils are already coordinating in a range of areas suggests that the LGA is not significantly constraining coordination. It is also unclear that strengthening section 14(1)(e) and developing further council policies would significantly increase coordination between councils, in light of council survey evidence about the wide range of factors councils consider in deciding whether or not to proceed with cooperation. Important factors include a shared vision of regulatory outcomes and objectives and the buy-in of middle management and council officers.

Ensuring coordination and contracting is successful

Coordination and contracting is more likely to be successful where councils have information on ways to cooperate and contract, sufficient time to consider implementation options when new regulatory tasks are introduced, and clear guidance on regulatory tasks.

Information on ways to cooperate

Throughout this inquiry, local councils have provided the Commission with numerous examples of coordination activities, and advice on the pros and cons of such activities. As this information from councils is a valuable resource for councils contemplating coordination in the future, the Commission has summarised it in an online primer on coordination for councils. The primer is available on the Commission’s inquiry homepage at www.productivity.govt.nz.

In addition, information on the similarities and differences across local authorities and the relationships between administrative and functional economic areas is a useful resource for understanding and identifying opportunities for cooperation between local authorities. With this in mind, the Commission has undertaken a statistical analysis of industry similarities between territorial authorities, which is available on the Commission’s website.

Such analysis—and the approach taken to that analysis—may assist local authorities to deepen their own understanding on the advantages and disadvantages of collaborative approaches, and with which other local authorities collaborative efforts may be best pursued. While not exclusively, current cooperation is generally on a geographic basis, and physical proximity is only one of many collaboration considerations.

Time to allow coordination and contracting

Positive forms of cooperation that encourage innovation, rather than stop-gap measures, require sufficient time to develop. A consistent message from local authorities during engagement meetings was that the speed with which central government seeks to implement a regulation and the consultation process it uses can have an important impact on the possibilities and incentives for local cooperation and coordination. For example:

The short timeframes for response to government bills introducing new regulatory functions for local authorities is a key limitation reducing opportunities for coordination. (Waimakariri District Council, sub. 30, p. 14)

One of the costs of collaboration is the speed that things can be achieved at. Time is needed to plan any project and the more parties to the project the longer it takes. Councils are often given a task by legislation, to carry out within a timeframe, and then criticised for lack of consistency at a later date. (Opotiki District Council, sub. DR 106, p. 3).

As an example of good practice, the Commission was told how the process used by the Ministry of Primary Industries to draw together local authority officers working in food safety within area groupings laid a

foundation for further conversations about how the Food Bill could be implemented in a coordinated way across their areas.

If local authorities have to respond quickly to a new duty, then they are more likely to establish their own in-house procedures as being the quickest and most easily controlled development process. For best outcomes in terms of resource efficiency and consistency, the timeline for introduction of a new regulation should allow time for cooperation between local authorities to get off the ground.

R7.5

The Government should provide sufficient lead-in times for new regulation in order to ensure that councils have time to consider opportunities for local cooperation in administering and enforcing the regulation.

Clear guidance to local authorities

As well as allowing councils sufficient time to explore cooperation opportunities, clear guidance from central government can also help align local authority interpretations of new regulatory duties, reduce duplication of work on regulatory implementation and increase the likelihood of successful cooperation:

Successful cooperation is possible where there are... clear simple definitions in the regulation (for example, in the definition of standards). This would aid consistent interpretation between regulating authorities. (Western Bay of Plenty District Council, sub. 33, p.10)

In addition, cooperation between councils can arise in response to perceived deficiencies in the quality of central government guidance. For example, local government may look to cooperate in response to the lack of technical or policy support from central government. The Ashburton District Council provides a vivid anecdote of an instance of this:

Chaos reigned as Councils scrambled to work out how to implement the new Standard [the National Environmental Standard on Contaminated Land]. Joint meetings were set up by Mid and South Canterbury Councils together with the Regional Council to try and decipher the requirements and develop a consistent approach. Concerns about the legislation were then referred back to the MfE Taskforce for review. It would have been more efficient to have sorted these issues out before the legislation was introduced. (Ashburton District Council, sub. 40, pp. 6-7)

As Ashburton District Council notes, this kind of cooperation is a less efficient response to additional regulatory duties than working through the issues prior to implementation. Chapter 5 discusses the role of central government in providing guidance on the implementation of local government regulation.

Strengthening relevant institutions

Improving the capability of local government requires a multi-faceted approach undertaken cooperatively by both levels of government. Current organisational arrangements do not appear to be building momentum to lift the capabilities of local government. Chapter 12 considers organisational options that might accelerate the development of capabilities.

8 Local authority regulatory processes

Key points

- There are improvements local authorities can make to their decision making. Some improvements rely on 'leadership from the top' in local authorities, but good processes can also reduce the variability in the quality of the analysis undertaken to make decisions. There are also ways to increase the transparency of local regulatory decision making by producing information in a standardised way and making it available on council websites. At the very least, this would allow stakeholders to quickly access the key information that had been used to support regulatory decisions.
- The consultation or public participation requirements for decision making differ between the Local Government Act 2002 (LGA) and the Resource Management Act 1991 (RMA). There is a blanket requirement that all new bylaws or changes to bylaws go through the Special Consultative Procedure (SCP) process. There is a case for amending the LGA to enable local authorities to take an approach to consultation proportionate to the level of discretion they have and the significance of the issue they have to regulate.
- There is considerable debate about the participation process under the RMA, in particular whether it incentivises early and full participation by councils and participants, or incentivises parties to 'keep their powder dry' for the Environment Court.
 - The evidence suggests that councils and participants have incentives to resolve issues rather than go to court, and appeals to the Environment Court are mostly resolved through mediation.
 - Evidence of the efficacy of the Environment Court's mediation process in resolving appeals challenges the view that participants are unwilling to compromise.
 - There may be value in the mediation capability of the Environment Court being made available to councils earlier in the plan-making process.
- There is a general need to improve quality management systems that would ordinarily be used to resolve consistency issues. This has been largely accepted by the sector during engagement meetings. The Commission outlines the features of good quality management systems and ways that good practice can be facilitated within councils.
- Councillors have an important governance role in driving performance improvements in local authority regulatory processes. However, it is also possible for councillors to become inappropriately involved in regulatory matters. Where councillors are involved in regulatory decisions, it is important that an appropriate separation is maintained between the governance and advocacy roles of councillors.
- Requirements to use independent hearings panels (IHPs) in resource management decisions can weaken the accountability and ownership that councillors have for regulatory decisions. The impact of further expanding the use of IHPs on councils' decision-making role, and councils' accountability to their communities, should be carefully considered.

The processes involved in developing, managing and governing regulation are crucially important for the delivery of good regulatory outcomes. Chapter 4 notes that there are some concerns about the quality of local authority regulatory processes—notably the quality of local decision-making processes, the extent and quality of public participation and inconsistency in implementation. There are also issues with the regulatory governance of councillors.

This chapter discusses what local authorities can do to improve the performance of their regulatory processes. It also considers some ways central government can assist in lifting performance. Specifically, this chapter discusses ways to improve local authority decision making, management processes and governance processes.

8.1 Improving local authority decision making

Quality of local regulatory impact analysis

Two legislative provisions establish minimum standards for local government regulation making:

- Section 77 of the LGA requires local authorities to assess the benefits and costs of regulatory options, given the present and future interests of the district or region. The Act also explicitly acknowledges in s79 that the assessment will be proportionate to the significance of the matters affected by the decision.
- Section 32 of the RMA requires local authorities to carry out an evaluation before issuing or changing a policy statement or a plan. This evaluation needs to consider whether the proposal represents an efficient and effective way to achieve the stated objectives, the costs and benefits associated with the proposal, and the risks of action or inaction on the part of the local authority.

The Commission looked at the quality of the processes used for a selection of decisions made by local authorities over the past five years (for detailed results, see Appendix D). These were in the areas of land allocation, waste management and minimisation and dog control. The objective of the review was to assess the quality of the decision-making process, not the substantive content of regulatory decisions. The focus of the review was, therefore, on whether the information and analysis provided to decision makers allowed a well-informed decision to be reached. The assessment was informed by analysis of staff reports, submissions, expert analysis and meeting minutes. These were supplemented by interviews with council staff.

For each area of regulation, three decisions from each of the three types of councils (large, mid-sized and small populations) were assessed (Table 8.1). This provides a sufficient number of decisions (nine for each area of regulation) to have confidence that the results reflect underlying issues in the sector rather than idiosyncratic differences between local authorities.

Table 8.1 Overview of quality review approach

Level of significance (in declining order)	Large (Pop. >100,000)	Mid-sized (Pop. 30,000 – 100,000)	Small (Pop. <30,000)
Decision to set or change land allocation limits (residential, industrial, commercial)	Evaluate different decisions made by local authorities of similar sizes		
Decisions on waste management and minimisations plans or bylaws	Evaluate similar decision made by local authorities of different sizes		
Decision to impose or change dog control measures			

There are no 'official' quality assurance criteria against which the quality of local decision-making processes can be reviewed. However, the good practice guidelines produced by the Society of Local Government

Managers [SOLGM] (SOLGM, 2013b)²⁹ and the Office of the Auditor-General [OAG] (2007b) have underlying principles that closely resemble the criteria against which The Treasury reviews central government processes. This suggests that good regulatory practice is widely applicable to any regulatory situation, be it local or national.

Because of this, local decision-making processes were assessed against some general principles of good regulation making. These included whether or not:

- the regulatory issue/problem was adequately identified and examined;
- the objectives of the regulatory decision were clear and well articulated;
- a sufficient range of regulatory options were identified and analysed;
- implementation, monitoring and enforcement issues were fully considered; and
- effective engagement was held with those impacted by the regulatory decision.

In assessing the adequacy of the information provided to decision makers, the review also considered whether or not the information and analysis was proportionate to the nature of the regulatory decision.

What the Commission found

Local authorities generally follow adequate regulatory decision-making processes. This finding is not dependent on the size of the local authority. The review specifically tested the hypothesis that larger local authorities are able to follow better regulatory processes because of their greater financial resources and internal capability. The analysis revealed that while larger local authorities are able to draw upon a larger body of technical information when making regulatory decisions, smaller local authorities appear better able to incorporate specific community concerns, due to their closer relationship with the community. To some extent this reflects a trade-off between the resources available to a local authority and the level of community responsiveness that can realistically be achieved.

However, there are a number of areas where improvements are needed:

- **More specific tailoring of regulatory objectives to local conditions:** Local government decisions often adopt the objectives listed in national legislation, rather than thinking critically about how those objectives might apply to their locality. This was particularly the case for Waste Management and Minimisation Plans, where only two out of the nine councils evaluated presented a set of objectives that were both complete and convincing in responding to local priorities.
- **Consideration of more alternatives:** In several cases, the options analysis was confined to only the status quo and one possible change. In all cases, the decision-making process would have been improved by considering a wider range of options.
- **Consideration of a broader range of alternatives:** There was a tendency to assess alternative options with the same broad characteristics (for example, only options that were a little stricter or a little more lenient than the council's preferred option were analysed). While this technique can provide a good check on the overall balance of a decision, options that have quite different dimensions should also be analysed.
- **Clearer evaluation of options against the stated objectives:** Many decisions did not include a discussion of how successful each option would likely be in achieving the stated objective of the regulation.
- **Undertaking robust implementation analysis:** There was little evidence of analysis of implementation challenges and the need for ongoing monitoring or review of local government regulation (for example,

²⁹ These modules are accessible online for subscribers. The Commission received electronic copies of these legal compliance modules from SOLGM for the purposes of carrying out this review.

Waste Management and Minimisation Plans and bylaws commonly lacked detail on the compliance costs associated with the options that were ultimately pursued).

F8.1

While processes have been found to be adequate, there remains considerable room for improvement in local government decision-making processes, specifically in regard to more specific tailoring of regulatory objectives to local conditions, better options analysis and better implementation analysis.

Improving local regulatory impact analysis

There are improvements local authorities can make to their decision making. Some improvements rely on 'leadership from the top'. Local authority leaders should expect that regulations are suitably tailored to local circumstances, and that staff will broaden the policy options to be considered by councils. Clear leadership on the importance of improving these matters, followed through with clear expectations and more critical review of proposals by senior managers and councillors, can achieve improvements in these areas.

These are matters of the content of advice, rather than the process to develop it, which can only be indirectly influenced by process requirements. That said, good processes can reduce the variability in the quality of local analytical processes. While the regulatory decisions made by local government are wide ranging, and no two councils are the same, the core components of regulatory decisions are the same. Every regulatory decision made by local authorities should respond to an identified and well described problem, have clear objectives, identify and analyse options that resolve the issue, and select the option that resolves the issue in a way that best achieves the stated objectives. Regulatory decisions also need to anticipate key risks and implementation steps.

The use of standardised ways of presenting information (templates) is likely to help to increase the transparency of local regulatory decision making. A template would set out the key components of the analysis underpinning the regulatory decision and information used in making decisions, in a standardised format. At the very least, standardised templates would allow stakeholders to quickly access the key information used to support regulatory decisions. At the central government level, this role is played by Regulatory Impact Statements (RISs). While some local decisions are accompanied by similar reports, many decisions are informed by reports and analysis that are not readily available once a final decision has been made. The material that is made available in support of local regulation is generally not presented in a simple, replicable format.

Increasing scrutiny by publishing the background analysis to regulation making ought to ensure that filling the templates out does not become a 'tick-box' compliance exercise. A standard template may also help councils to determine when process improvements might be needed to appropriately generate the kind of information they require, or where capability needs to be built.

F8.2

Regulatory decisions made by local government would benefit from the use of templates that ensure that the key components of the analysis underpinning the regulatory decision, and information used in making decisions, is set out in a standardised format.

R8.1

Councils should make publicly available on council websites, using a standardised template format, the key components of the analysis underpinning regulatory decisions and the information used in making decisions, to improve transparency.

The development of templates to assist with the provision of standardised information could be undertaken by SOLGM and Local Government New Zealand (LGNZ), in conjunction with the Department of Internal Affairs (DIA).

As well as standard templates, the availability of good guidance materials can help develop consistently high quality processes across the local government sector by setting out minimum expectations of local decision making. There is already significant guidance on good bylaw-making processes provided by both LGNZ and SOLGM. This guidance should be amended to link clearly with how to best use templates. Expanding the use of templates could be accompanied with a push to increase the use of the guidance material. This might be done by LGNZ and SOLGM, or it could be carried out by the kind of institution envisaged in Chapter 12.

Improving consultation requirements under the LGA

The consultation or public participation requirements for decision making differ between the LGA and the RMA. The following section discusses the consultation requirements for bylaw making under the LGA, and recommends how the efficiency of consultation can be improved and the costs reduced.

The decision-making and consultation requirements in the LGA are prescriptive or rules-based. Their intent was to ensure the transparent and accountable exercise of the new functions and powers accorded to local authorities by the 2002 Act. This minimises the flexibility and discretion of local authorities to tailor their decision-making process according to the context. For example, there is a blanket requirement that all new bylaws or changes to bylaws go through the Special Consultative Procedure (SCP) process.

Local authorities that participated in the inquiry noted the inefficiency of these processes. For example:

There is a strong emphasis on consultation associated with local government regulation.... Consultation is important and can raise critical issues. However, often the quality of feedback is not high, while at the same time the process is costly & time consuming (especially the associated administration – summarising submissions, responding to applicants, phone queries etc)..... Simplifying these processes to ensure that residents do have a genuine opportunity to comment, while reducing administration requirements, would reduce the cost of the process without significantly affecting the quality of regulation. (Ruapehu District Council, sub. 24, p. 4)

The blanket provision requiring an SCP overlooks the fact that local authorities can have very little discretion in making some bylaws. In the case of speed limits, for example, local authorities are required to use the calculation methodology provided by the New Zealand Transport Authority (NZTA) through regulation,³⁰ with very little discretion; however full community consultation through the SCP process is still required.³¹ There is a case for amending the LGA to enable local authorities to take an approach to consultation proportionate to the level of discretion they have and the significance of the issue they have to regulate.

R8.2

The Local Government Act 2002 should be amended to enable local authorities to take an approach to consultation proportionate to the level of discretion they have to regulate, and the significance of the issue.

Improving public participation under the RMA

The process for public participation in RMA decisions is somewhat different. Schedule 1 of the RMA sets out the plan- and policy-making process, summarised in Figure 8.1.

The public can be involved in local rule making at various stages. For instance, the local authority may choose to involve members of the public in *development of the policy framework* (and should, as a matter of good practice). However, it is at the formal 'notification' stage that public consultation must occur, by informing the public of the change.

The public can make submissions on the intended plan or policy change once it has been notified. Either a committee of council or a panel of independent commissioners appointed by the council:

- considers submissions;

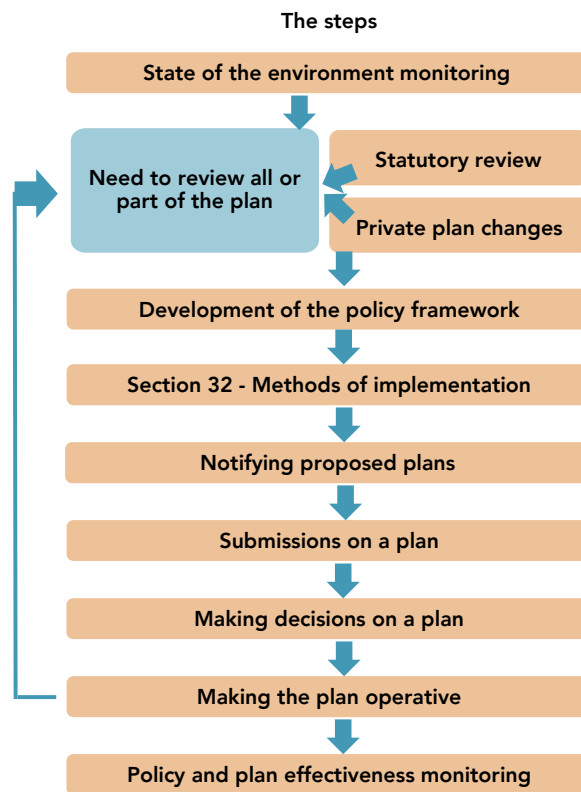
³⁰ *Land Transport Rule - Setting of Speed Limits 2003*

³¹ Local authorities can avoid the need for an SCP for a change to a bylaw by writing an authorisation to make particular kinds of amendments *by resolution* into those bylaws, however this is limited in scope. It would not be used, for example, to amend an entire bylaw.

- may summarise them and call for further submissions;
- conducts a hearing or several hearings; and
- makes recommendations to the council on whether it should adopt the plan, and any amendments that should be made to the version of the plan that was notified.

The council then makes a decision about making the plan or policy 'operative'. This decision can be appealed to the Environment Court which, if the case progresses to a hearing, will be heard *de novo*. This in turn may result in the council being directed to amend the plan or policy provisions.

Figure 8.1 The plan-making process



Source: Quality Planning Website: www.qualityplanning.org.nz/plan-development/

There is considerable debate about the participation process under the RMA, in particular whether it incentivises early and full participation by councils and the public. The proposition is that good participation early in the process can resolve issues without the need for costly appeals to the Environment Court. This is discussed in following sections.

Incentives for full participation in decision making under the RMA

One view in the debate is that because participants expect that a plan or policy statement will be appealed to the Environment Court, and the Court will hear the case *de novo*, no one has an incentive to fully participate or disclose all of the relevant information. They are incentivised, in other words, to 'keep their powder dry' during the local authority's decision-making process. Proponents of this view argue that this undermines the quality of a local authority's decisions, which in itself fuels the need for appeals. Box 8.1 presents views from the literature and submissions to the inquiry on this issue.

Box 8.1 Participation and 'keeping the powder dry'

It is also apparent that some parties do not participate fully in the Council hearing process, leaving their 'powder dry' for the appeal process. Knowing that an Environment Court appeal process exists means that there is no incentive for parties to resolve issues during the council hearing process. Similarly from the Council's estimates and the Ministry for the Environment (MfE)

data, a substantial proportion of the costs are also incurred after the Council decision. (Dormer and Payne, 2011, p. 4)

Maintaining unrestricted ability to appeal the merit of councils' decisions at the end of the plan-making process will encourage participants to preserve their negotiating position throughout and will discourage creative compromise. (Land and Water Forum, 2012, p. 73)

The current RMA system for plan making has created a series of incentives for particular behaviours. The current ability to appeal policies to the Environment Court creates a number of incentives that reinforce the very long time that it takes to complete a plan development process. From the outset of a plan development process the incentive for anyone other than the council is defer expenditure or effort and try to secure their objectives with the least possible effort or expenditure. This means that by the time of the council hearing few of the major submitters will have prepared a full brief of evidence to support their submission. The cost of a full brief of evidence is not incurred until after a submitter appeals. This is rational behaviour, but it invariably means that the council hearing does not benefit from the same level of evidence or research that would be presented to the Environment Court. (Hawke's Bay Regional Council, sub. DR 67, pp. 6-8)

On the other hand, other inquiry participants took the view that applicants and local authorities participate fully in the process (Box 8.2)

Box 8.2 Commitment to full participation

The Council's experience is that a full range of evidence is presented by applicants and well-resourced submitters in opposition, and Council itself always mounts a full case. The only instances where corners may be cut in evidence at the local level would be where witnesses need to be brought from overseas, which occurs only very infrequently.... It is the Council's view that there is a strong association, if not a causal connection between the resourcing of the appellant and the propensity to appeal an RMA decision. This is because of the costs involved in taking a case and the need for legal representation in order to be "successful" at mediation or in presenting a case. This means that most parties do participate fully in the local hearings process as they hope to achieve the outcome they seek at that level, at lesser cost. (Christchurch City Council, sub. DR 88, p. 11)

In our experience, contrary to the Commission's assumption, participants in council processes do not 'keep their powder dry' for appeals. Such an approach would be a waste of time and money. Often, the council process results in a positive outcome for submitters or the applicant, meaning that appeals are not required. This is all the more so if the effort put in at the council level is robust and fulsome.... We consider that, based on our experience, the 'decide, announce, defend' approach of many local authorities to planning provisions is in fact a key driver for disincentivising a collaborative approach early in the process. (Russell McVeagh, sub. DR 94, p. 3)

In a submission to the RMA Amendment Bill 2013, LGNZ notes that councils do not do a full cost-benefit analysis for all proposed plan provisions, because it is not cost-effective to do so:

[...] in practice, the depth and quality of analysis does increase as the plan-making process unfolds. Appeals are invariably characterised by high quality analysis and evaluation of costs and benefit, much of it quantified (by councils and other parties). That concentration of effort is rational because it ensures scarce public resources are expended where there is real contention and not on issues that will not be in debate. Section 32 needs to be seen in that wider context... it is unrealistic to expect plan-makers to have a full and accurate understanding of the costs of every provision in a plan prior to notifying a plan. (LGNZ, 2013, p. 9)

The incentives that LGNZ notes for local authorities are also applicable to other participants in the process. It is more likely that participants are not 'keeping the powder dry' for the Environment Court—simply because they often will not have 'the powder' at early stages of the process. People have incentives to resolve matters without going to Court, and will provide information to do that, but no one will pay to create information until they know what they need, which might not happen until later in the process.

F8.3

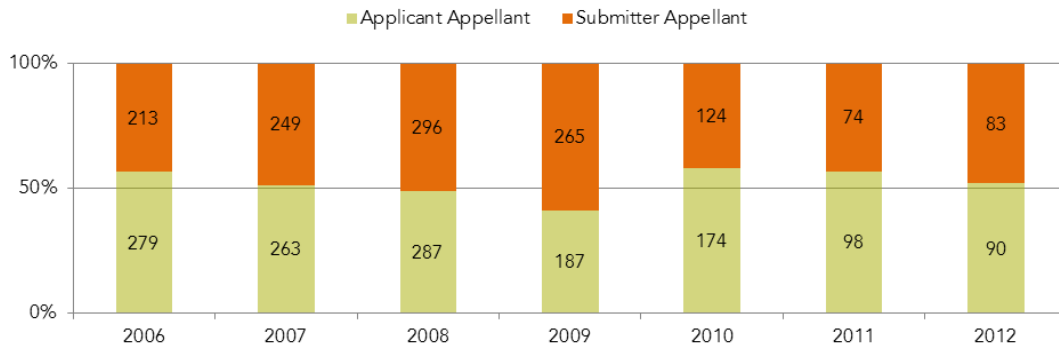
Participants in local authority processes under the Resource Management Act are usually not incentivised to hold back information they already have, but there are incentives to only gather information and evidence once the main issues in contention are clarified. Currently, clarification is more likely to happen after the submissions hearing process.

What can data from the Environment Court tell us about participants' behaviour?

The Commission has done some analysis of appeals to the Environment Court in an attempt to understand how people behave, and whether there are opportunities to improve the efficiency of the process for participating in RMA planning and resource consent decisions.

Figure 8.2 compares the number of resource consents appeals in terms of those lodged by applicants compared to those lodged by submitters. The data labels show the actual number of appeals. Between 2006 and 2012, applicants for consents were appellants in 52% of appeals and submitters initiated 48% of consent appeals. In summary, the use of appeals is taken up by both applicants and submitters roughly in equal parts.

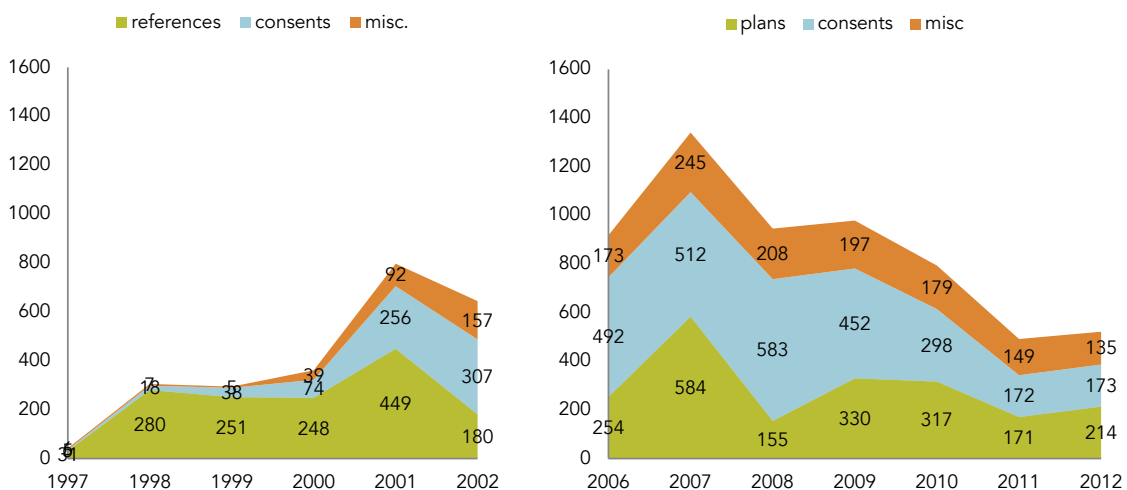
Figure 8.2 Appellants for Resource Consent Appeals, 2006 - 2012



Source: Productivity Commission analysis of Environment Court data.

Figure 8.3 categorises matters before the Court (1997-2002) according to RMA instruments, resource consents, plans/references and miscellaneous. The naming convention changed for 'references' to 'plans' but the terms can be interpreted interchangeably.

Figure 8.3 Court workload by RMA instrument, 1997 – 2002 and 2006 – 2012



Source: Productivity Commission analysis of MfE (2003) and data provided by the Environment Court.

Notes:

1. Left: matters considered by the Court in 1997 to 2002. Right: matters filed with the Court in 2006 to 2012. The choice of time period for both figures was dictated by data availability.

The first series, on the left-hand side, is drawn from the number of cases where the Court made decisions in the period 1997 to 2002. The second series, on the right-hand side, is drawn from data on new matters referred to the Court (as opposed to matters that reached a decision) in the period from 2006 to 2012. There appears to be three broad phases in the Court's workload. In the late 1990s to early 2000s plan-related appeals (green series) dominated the Court's workload. In the mid to late 2000s resource consent appeals (blue series) took the centre stage. From 2010 onwards, plan and consents appeals feature in roughly equal proportions.

A variety of factors influence the overall caseload and composition of appeals. First, the overall buoyancy of the economy will influence activities; in particular, resource consent activities. This can plausibly explain the drop in filings over 2009/10. As well, it has largely only been the first generation of plans that have been developed and appealed. It is unclear what will happen to the volume of plan appeals (Environment Court 2010:13). With the 2009 changes to the RMA, local authorities were relieved of the requirement to review plans every 10 years. This is likely to reduce the number of plan changes, and therefore appeals.

What is particularly noteworthy is that few appeals progress to a hearing. Although the overall length of the appeals process may be several years, analysis by Newhook (2012) indicates that most appeals are resolved through mediation much earlier in the process. Box 8.3 sets out an example from Newhook (2012).

Box 8.3 An example of appeals - Western Bay of Plenty Proposed District Plan Review

- Forty appeals were filed in March 2010. They were assigned to the Court's Complex Track (which came into being as part of our revamp of the Court's case management system in the early 2000s). The appeals were managed under one overarching topic, with a number of sub-topics that related to specific appeal points and parts of the Plan.
- Five appeals were withdrawn in their entirety.
- Three pre-hearing conferences were held for the purpose of identifying issues, setting objectives, and providing a methodology for mediations.
- Mediations were conducted between August 2010 and August 2011. The high rate of success with these mediations resulted in Consent Orders issuing between January and August 2011, resolving thirty appeals.
- An important feature of the mediation work was that the Commissioner commenced by conducting workshops for refinement of issues and settlement methodology. Resolution was achieved on a "top-down" basis, moving from objectives, to policies, to methods.
- There was active and constructive participation on the part of all parties, and of importance, particularly by the Council. Parties were represented at the mediations by people with full delegated authority to settle.
- Four appeals remain, which are under active case management. The Court is part-way through hearings. The issues that remain are at the more difficult end of the spectrum, including Māori cultural issues, some with a high level of sensitivity.
- The great majority of the provisions in the review have been resolved in a little over two years.

Source: Newhook, 2012.

Although it is difficult to generalise from individual cases, the Western Bay example indicates that the Court's mediation process can be a relatively efficient way of addressing disputes. The high number of appeals where compromise is possible can be resolved through mediation. Newhook's analysis is generally supported by the Commission's statistical analysis of Environment Court cases which use mediation.

Evidence of the efficacy of the Environment Court's mediation process in resolving appeals challenges the Land and Water Forum (LAWF) view (LAWF, 2012, p. 73) that participants are unwilling to compromise. Judge Harland in 2012 comments that a majority of cases are resolved without a Court hearing, as follows:

Bearing in mind that cases which reach the Environment Court are the tip of the iceberg, and bearing in mind that approximately 82% of these cases settle before reaching a hearing, it is reasonable and important to acknowledge that those cases which the Court decides, are those few cases which involve issues of such difficulty that they have been unable to be settled using the many alternative dispute resolution methods available to assist parties reach a position of compromise. (2012:6.)

F8.4

Evidence from the success of mediation processes suggests that participants are prepared to compromise and participate constructively in the Resource Management Act decision-making process, if this process is run well.

Quality consultation

The quality of consultation with the community in developing draft plans can make a difference to the likelihood of appeals. Taranaki Regional Council submitted on its plan process:

The Council notes that it developed its full suite of regional plans in reasonable timeframes over a decade ago through a highly consultative process with key stakeholders and the community. The Council is continuing its collaborative approach in the reviews of its plans which it expects will greatly reduce the potential for appeals. These processes are, however, not without cost, and take time but lead to a greater understanding of issues and the need for certain regulatory responses among all parties. (Taranaki Regional Council, sub. DR 75, pp. 7-8)

Commenting on the Taranaki process, the OAG noted:

In the Taranaki region, there appears to have been a high degree of agreement with the community on policy development. There were no appeals on the aspects of the Regional Freshwater Plan relating to agricultural discharges. Taranaki Regional Council considers that its early engagement with its community on the issues led to greater acceptance of the proposed policy. (OAG, 2011a, pp. 56-57)

These observations (and other examples provided by submitters) show that more time consulting with the community prior to preparing the wording of the plan and active engagement on the actual draft wording of the plan can reduce the number of appeals. The quality of local authority processes can and do influence appeal behaviour. There are examples of good practice within the sector that can be disseminated and built on. Ways of disseminating good practice is further discussed in Chapter 7.

F8.5

The quality of engagement and the initial Resource Management Act decision-making process can reduce the likelihood of appeals.

Help with participation – mediation

The evidence presented above suggests that the participants in decision making under the RMA are prepared to compromise under a mediation type process, and that quality consultation at the front end of the plan-making process can reduce the number of appeals to the Environment Court. Taking these findings together, there could be gains in improving participation and reducing cost if the mediation capability of the Environment Court was available to support local authority decision-making processes, before the appeals stage.

The Environment Court has, in recent years, developed its case management and mediation capability. In discussing recent improvements in the Environment Court's case management, Christchurch City Council submitted that:

There is extensive use of pre-hearing conferences and mediation, in an attempt to elicit as much agreement as possible prior to hearing (in fact many appeals appear to be lodged in order to protect positions and gain some concessions rather than with the actual intent of proceeding to hearing). Only a small proportion of appeals actually proceed to hearing and evidence is largely constrained to material giving context, and issues where there is disagreement. (Christchurch City Council, sub. DR 88, pp. 11-12)

If feasible, appropriate access to this capability earlier may facilitate the plan and policy-making process, and is a way that government could support local authority processes to perform well.

R8.3

The Ministry for the Environment should consider the feasibility of making the Environment Court's mediation capability available to support local authority plan-making processes earlier.

8.2 Improving local authority management processes

The single biggest issue businesses have in their dealings with councils is perceived inconsistency in the application and administration of regulatory standards (Chapter 4). Businesses indicated a strong feeling of resentment where variation did not appear to reflect local preferences or arose from the "attitudes of councils". When the inconsistency occurs within the same council, this can be seen as very unfair. Typical comments in the Commission's business survey were that "it's because of the council officer we got on the day". Inconsistency created uncertainty about "who to believe" and what the "real situation" is.

Approaches to addressing inconsistency

Variation in local authorities' approach to regulation can reflect local preferences and be efficient. Where there are inconsistencies in approach to a nationally determined standard, there are sometimes calls for the provision of more central guidance. More guidance can be helpful in some instances, but improving practice at the local level will often be about improved local authority management practices.

More guidance or standards required?

A commonly suggested approach is to manage variation through greater 'guidance' or specification of how the standard should be applied. Guidance documents, or further standards on implementation, however, are still open to interpretation:

What has become clear is that the [National Policy Statement on Renewable Electricity Generation] is not having the desired effect of requiring councils to consistently provide for wind farm development in Local Plans. The way in which some different Councils are recognising the nationally significant benefits of wind farms and providing for wind farm development can only be described as 'chalk and cheese'. In our view some Councils are actively and appropriately providing for wind farm development while other Councils are actively using their Local Plans to provide regulatory road blocks, namely in the form of the *non-complying* activity status. (Wind Energy Association, sub. DR 90, p. 5)

The Wind Energy Association submitted that this was because of a lack of guidance on implementation of the National Policy Statement on Renewal Electricity Generation (sub. DR 90, p. 5). However, variation in how wind farms are regulated locally is likely to be a reflection of differences in local preferences. This is unlikely to be an issue that guidance can resolve.

In general, guidance is most likely to help by providing shared definitions and standard calculation methodologies that local authorities can build into their regulations. This has occurred for local stock movement bylaws. Shared calculation methodologies and central guidance means that the large compliance costs for stock movement bylaws are fairly consistent between local authorities, limiting variation to the matter of fees (Box 8.4).

Box 8.4 Shared calculation methodologies and stock movement bylaws

The Commission reviewed a small sample of stock movement bylaws. Most of the sample clearly based the bylaw on the NZTA guidelines for temporary traffic movements. Most local authorities in the sample:

- used the NZTA guidance for safety procedures, so compliance costs (such as the number of staff that needed to be on site, and the signs required) were consistent; and
- if the bylaw required stock underpasses in some situations, they used a methodology consistent across the sample for calculating when stock underpasses would be required (the compliance costs for stock underpasses can be greater than \$30,000. Permits typically cost in the order of \$500).

Improving local management

Inevitably though, improving the consistency of decision making within local authorities is largely about how local authorities are managed—improving culture, sharing good practice and implementing quality management systems. This may involve working with other local authorities, as discussed in Chapter 7. Improving the consistency of decision making between local authorities, especially where they are implementing national standards, is likely to require a stronger focus on local authorities working together. However, the Wind Energy Association (sub. DR 90) warns that improving local management through collaboration with other councils has its limits:

The Association is of the view that cooperation (between councils) is not resulting in discernible benefits in the provision for wind farm (and renewable energy) development in local plan regulation. In some cases, the wind industry is observing perverse outcomes where collaboration does occur. The Association is of the firm view that central government regulation is required, and that collaboration between councils cannot occur to the extent required in order to deliver more effective and cost efficient regulation for wind farm development across New Zealand. (Wind Energy Association, sub. DR 90, pp. 11-12)

In summary, variation in the administration of regulation is usually best addressed through the internal quality management systems within local authorities. However, there will be some areas of regulation where further guidance would be beneficial.

F8.6

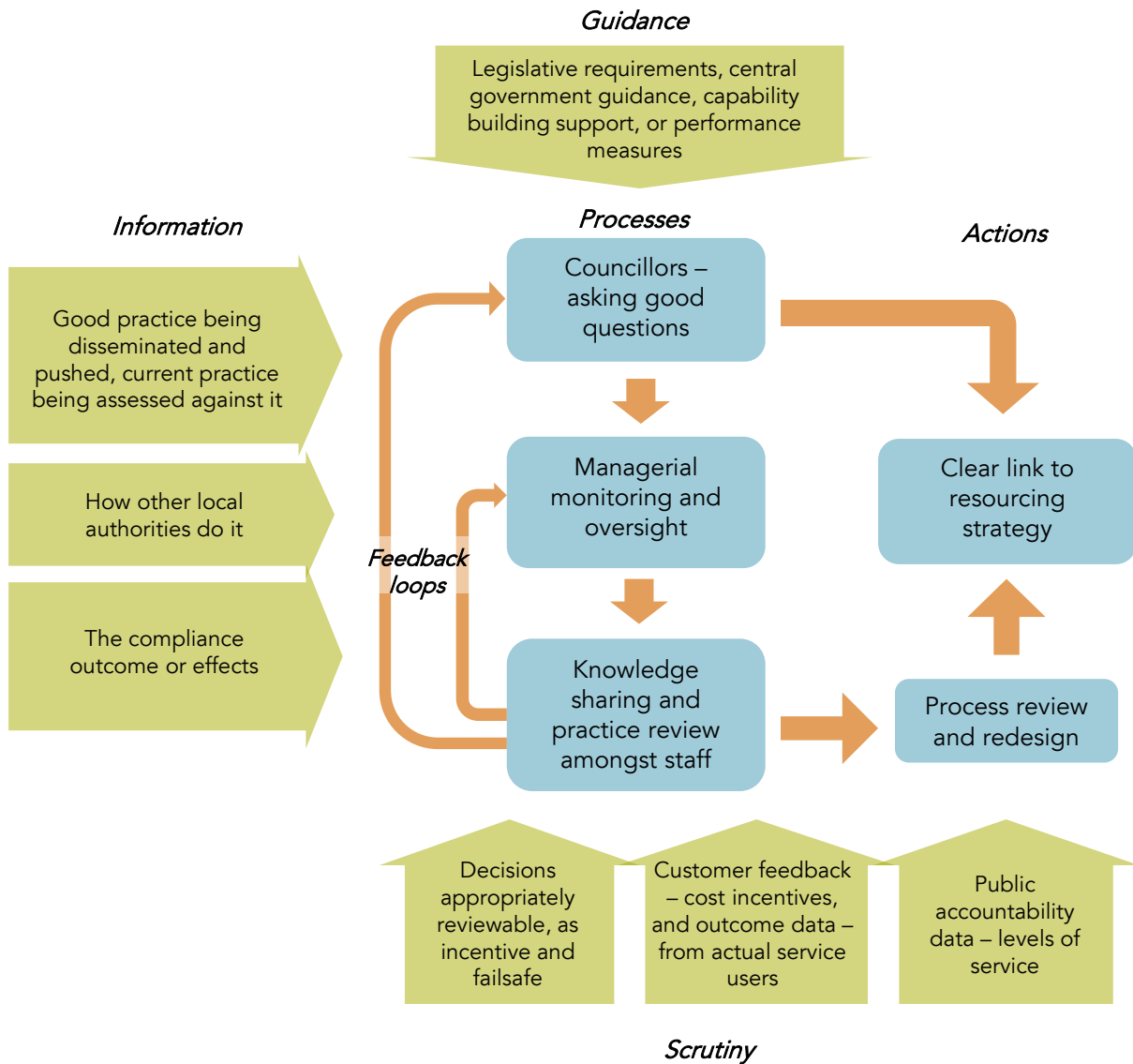
Providing more guidance can help reduce inconsistent administration of regulation in some instances, but reducing inconsistency will often be achieved by the local authority concerned improving its management practices.

The next section focuses on how the quality of management processes can be improved to reduce internal inconsistencies in the delivery of regulatory services.

A framework for managing quality and consistency in administration of regulation

A commitment to effective quality management is at the heart of driving quality and consistency in regulatory administration. It will involve time and cost, and requires organisational commitment. It requires an ongoing dialogue between all levels within the organisation about how to measure and improve performance. Figure 8.4 outlines the actors, actions, and features of a system for quality and consistent delivery of regulatory services. The quality of administrative decisions will also reflect the recruitment and training practices of a local authority. Chapter 7 discusses workforce development.

Figure 8.4 A quality management framework



The role of councillors – asking good questions

Councillors can have a role in driving improvements in the performance of the regulatory system. They can do this by setting expectations of robust systems and seeking assurance that these are in place. This will often be about asking pertinent questions of chief executives and regulatory managers. The governance role of councillors is discussed further in section 8.3.

Managerial monitoring and oversight

Regulatory staff typically have a high level of discretion and independence, as part of providing them with protection from undue political or organisational influence. However, this can also lead to staff being reluctant to share their practices and experience. Discussing the different approaches individual staff take to reach decisions can be uncomfortable, because it can imply that managers are questioning personal performance. However, this is really important for sharing good practice and improving the consistency of decision making.

Good managers will encourage staff to think about their roles, and discuss and encourage the adoption of a healthy and consistent set of service values that will lead to the desired outcomes. The proper application of those service values needs to be consistently prioritised and recognised by managers, so that staff can have confidence that 'doing the right thing on paper' is the same as doing the right thing in the field. Conflicting messages about how staff are expected to behave, and what values managers and the organisation support, will break down a service culture.

Placing risk in the right place is also a critical part of building a healthy service culture. As regulations create significant financial risks for local authorities, being clear about the distinction between personal performance for which staff will be held to account, and risks eventuating in the regulatory environment for which they will not, is critical to incentivising well-balanced and effective decision making.

Knowledge sharing and practice review amongst staff

Inconsistency between staff may not be deliberate. A lack of knowledge about how colleagues approach similar situations may be at the heart of accidental inconsistency. Peer review and knowledge sharing techniques can help ensure that independence and a sense of responsibility do not lead to isolation and inconsistency.

- **Peer review systems:** Done well, these can act as moderation exercises where regulatory staff can learn more about how their colleagues approach particular regulatory decisions, and shared understanding can develop. Managed poorly, they can be divisive or unproductive as staff feel their competence is being challenged. It is important to make the experience a positive one for staff, in order to create meaningful engagement.
- **Precedent register:** There is value in codifying and disseminating some, but not all, tacit knowledge. Writing down some precedent-setting decisions in a document staff own and manage themselves may help as a reference for future decision making.
- **Operations manual:** A more formal approach to managing customer contacts can be to use scripting, where staff work through a flowchart of questions to give consistent answers. There would be economies of scale for local authorities in a region grouping together to do this, which might also improve the consistency of advice across local authorities. The script would need to vary where local authority processes vary—that in itself may be a catalyst for reconsidering whether that variation is necessary.
- **Virtual call centre across local authorities:** It is common practice in call centres to sample and review some recorded calls for quality assurance purposes, including opportunities to improve consistency. Where relatively few staff in a local authority manage customer contact, the cost of implementing such a system may exceed the benefits. However, for smaller local authorities, it may be possible to achieve economies of scale by operating as a 'virtual' call centre with other local authorities. Calls could be sampled and reviewed using a panel of people drawn from those councils, without actually centralising into one call centre.

Feedback loops

Any system of quality management relies on feedback loops as prompts for addressing potential quality issues. It is likewise important that they contain a good mix of information to determine the range of potential problems and issues.

Most local authorities will have a complaints mechanism. Although this is one kind of feedback, and a critical one, it is easy to dismiss this information as just dissatisfaction—a certain amount of which is to be expected from regulation. Other kinds of information can help local authorities understand if there is a broader issue, including:

- trend information in customer satisfaction (from actual customers who have used the service, rather than members of the community at large);
- comparators with practice in neighbouring local authorities—knowledge of how other local authorities do things and what this means for the time, cost and the substance of decision making;
- an understanding of how related decisions are taken by either the regional council, or in the case of the regional authority, by territorial authorities in its region. For example, the relationship between regulations for drainage works and the consents needed for earthworks to give effect to them, is pertinent for both regional and territorial authorities; and

- outcome data on the results of decisions—did unforeseen risks eventuate? Was it reasonable for them to have been foreseen? What could be done differently next time?

Process review and redesign

A process of continuous improvement is likely to lead to regular incremental improvements to the way things are done. Periodically, however, it is worthwhile stepping back, assessing what all the feedback information is saying, and considering whether the process as a whole would benefit from more fundamental changes.

There are a number of management tools in circulation for reviewing and redesigning processes to get them more efficient and effective. Common ones include (Evans & Lindsay, 2005):

- **The Baldrige Criteria for Performance Excellence:** The Baldrige system is part of an awards programme for encouraging improvement in performance. It assesses applicants for the award against criteria in seven categories. The criteria are updated each year. The Baldrige system is for application to a whole organisation, but the criteria might help local authorities think about improving their regulatory activities.
- **ISO 9000:** This system was originally an attempt to harmonise quality standards across the European Common Market. It has incorporated many of the Baldrige Criteria's original principles. It provides more detailed guidance on process and product control than Baldrige, and provides systematic approaches to many of the Baldrige Criteria requirements in the process management category.
- **Six Sigma:** Is a business improvement approach that seeks to find and eliminate causes of defects and errors in service processes, by focusing on outputs that are critical to customers and a clear financial return for the organisation.

Some local authorities are already using these systems (notably Baldrige) with some success. The different systems give differing emphases to improving different kinds of quality:

Although each of these frameworks are process focussed, data-based, and management-led, each offers a different emphasis in helping organisations improve performance and increase customer satisfaction. For example, Baldrige focuses on performance excellence for the entire organisation in an overall management framework, identifying and tracking important organizational results; ISO focuses on product and service conformity for guaranteeing equity in the marketplace and concentrates on fixing quality system problems and product and service non-conformities; and Six Sigma concentrates on measuring product quality and driving process improvement and cost savings throughout the organisation. (Evans & Lindsay, 2005, p. 135)

Put differently, the ISO 9000 approach is better suited to improving quality through consistency with practices in other local authorities, Baldrige focuses on organisational goals and results and Six Sigma drives process improvements that reduce costs.

It is up to local authorities to determine what quality improvement framework best suits them, but making use of some structured quality management processes can be expected to yield positive results.

Clear link to resourcing strategy

A continuous improvement approach to managing quality will likely identify small and cost-effective improvements that can be made. However, the same approach should identify more significant underlying issues, such as insufficient resourcing for particular activities or improvements. Certainly, quality management is not going to be fully effective if improvement activities are not linked with sufficient resourcing.

Quality management systems need to be able to generate a robust value proposition about how improvements will meet needs in the community and how these improvements stack up alongside other priorities, such that they should be funded. Although efficiencies may be gained within existing budgets, in most cases more radical changes (where warranted) will not be costless.

Are regulatory functions being managed in this way? If not, why not?

Naturally, the answer varies across local authorities. Features of the quality management systems will be very familiar to most local authority staff and managers. How effectively those features are implemented will vary. Notably, in engagement meetings with local authorities, there was general agreement and acceptance that there was an absence of a robust and deliberate approach to quality management for regulatory decisions. Reasons could include:

- **Resource restrictions:** most forms of change involve up-front cost. If it has been made apparent that no resource will be made available, managers and staff are likely to feel discouraged to identify potential practice improvements.
- **Organisational culture/inertia:** the way things have always been done forms a routine that it is not always easy to question. In the absence of external stimulus to do better, it is possible for local authorities (and any organisation) to go some time without seeking to improve.
- **Costs of disruption:** significant changes to the way local authorities carry out their business can result in detrimental performance results. At least one local authority has been put under additional reporting requirements because a restructure of its consenting function meant that it missed a performance target for the RMA, despite its process now being demonstrably more efficient.
- **Capability:** not all local authority managers may be trained or experienced in this kind of approach to management.
- **Size:** management systems will be less rigorous or formalised where there are smaller teams to manage. This is not necessarily a bad thing, although in the absence of a formal system it is easy for some things to 'slip through the cracks'.

Improving quality management within local authorities is a matter for the governance and management bodies of those local authorities. Priority setting, determining what improvements are desirable, and what systems or approaches should be used to achieve service improvements are all matters integral to local authorities managing their own business. That said, there are ways that the broader sector can help.

Support for improvement

Working with other local authorities can strengthen professional ties, widen the pool of comparators and break deadlocks within small teams about the 'best' way to do things. There is also a range of professional institutes relevant to the regulatory arms of local authorities that can assist, such as the:

- New Zealand Institute of Liquor Licensing Inspectors;
- New Zealand Institute of Environmental Health;
- Building Officials Institute of New Zealand;
- New Zealand Institute of Animal Control Officers; and the
- New Zealand Parking Association.

These institutes and associations can strengthen common practices and play a role in identifying and disseminating good practice. However, reliance on professional associations to improve practice also has the potential to create internal tensions within local authorities, where the 'professional' view differs from the organisational one. Chapter 7 discusses the work of these organisations and cooperation between local authorities.

Agencies that have an oversight role of regulation, such as MfE, can also play a part in facilitating knowledge sharing and dissemination of good practice.

The question is whether or not quality improvements in the administration of regulation can occur across all local authorities. The role an enhanced institutional response might play is discussed in Chapter 12.

8.3 Improving governance

A full discussion of 'good governance' is not undertaken here, not least because it is a broad area which affects more than just the regulatory roles of councils. This section discusses four issues relevant to the regulatory responsibilities of local authorities:

- the role of councillors in driving performance improvements in local regulation;
- systems to manage inappropriate involvement in regulatory decisions;
- the ability of councillors to 'own' local plans and policies; and
- managing councillor involvement on Independent Hearings Panels (IHPs).

The role of councillors in driving performance improvements

Councillors can initiate action that will lead to improvements and drive higher standards of performance from the council as a whole. The chapter previously noted that councillors have an oversight role to play in internal quality management systems to improve the administration of regulation. This does not necessarily require them to have a policy proposal. One of the most powerful things that councillors can do is ask pertinent questions. These might be questions that require staff to demonstrate:

- that they know what neighbouring authorities are doing, and how they treat common questions;
- that they know and have considered what leading practice across the sector is;
- how they share potentially precedent-setting decisions internally; and
- that they have quality management systems which can give councillors and the public confidence that consistent decisions are given in similar situations.

Councillors can also set and make known to staff the standard—the quality and depth—of the information they require in order to make good decisions or to adequately scrutinise council performance. For example, many local authorities undertake customer satisfaction surveys. Some of the surveys that purportedly provide information about customer satisfaction with regulatory services rely on broad community sampling, even though only a small proportion of the sample will have had interaction with regulatory services. Reliance on those results was unlikely to give councillors a clear picture of how regulatory services are actually performing.

Systems to manage inappropriate involvement in regulatory decisions

While councillors have an appropriate governance role in driving performance improvements in local authorities, there are also ways that councillors can become inappropriately involved in regulatory matters.

The governance role requires councillors to act in the interest of their city, district or region as a whole. They are required to uphold the policies, processes and standards of good governance. An expectation that councillors might advocate for an individual in a regulatory matter, such as a prosecution decision, is at odds with councillors' governance role. Communities need to be assured that in regulatory matters there will not be inappropriate political interference.

Some of the difficulty, however, is that there are legitimate policy calls bound up in decisions that arise from or primarily affect individual business activities or prosecution cases. As well as potential involvement in individual regulatory decisions, councillors may be called upon to make resourcing decisions allowing staff to proceed (or not) with prosecutions. This is discussed further below.

Involvement in individual prosecution decisions

It is no surprise that some members of the community see value in councillors acting as their advocates when faced with an adverse prosecution decision. The need for suitable appeal mechanisms is obvious but

there is a question about the appropriateness of political involvement in appeals. In the case of prosecution decisions, councillors' governance role is paramount. The Auditor-General has noted that:

The Crown Law Office's *Prosecution Guidelines* are clear that prosecution decisions should be free from political influence. 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."

In central government, there is a strong convention that enforcement decisions are made by officials, independent of political influence, because it is seen as "undesirable for there to be even an appearance of political decision making in relation to public prosecutions." This convention has been given statutory recognition in section 16 of the Policing Act 2008. We see no reason for different principles to apply when the enforcement agency is a local authority. At least one regional council has had legal advice to this effect, but has not acted on it. (OAG, 2011a, para 5.47-5.48)

Involvement in prosecution decisions is a relatively straightforward example of political interference which should not occur. Submissions bore out that there was significant variability in the degree to which local elected members were involved in decisions relating to the implementation of regulations (Chapter 4).

Resourcing decisions for prosecutions

Even where there are appropriate 'firewalls' between those administering regulations within councils and councillors, it is still possible that councillors will be required to make what amounts to a decision about whether or not prosecution should occur. For some smaller territorial authorities, \$40,000 upwards in legal fees represents a percentage point or more of annual rates. Where the prosecutions budget is insufficient, staff must come to the council with a budget amendment to enable them to proceed.

In this case, there is a blurry line between policy and administration. On the one hand, deciding across a council's regulatory priorities and its broader spending priorities is the legitimate role of elected councillors. On the other hand, when those decisions are prompted by a specific regulatory breach, and the consequences of the funding decision for the alleged offender are relatively knowable, it is hard to escape the appearance that political motivations may influence whether or not the alleged offender is prosecuted.

The Commission proposed in its draft report that there might be merit in exploring a pooled funding or insurance style model for funding prosecutions. In such a scheme, councillors would still be able to set policy about the level of resourcing or annual contribution, but would be able to determine that in isolation from decisions about specific prosecutions. This proposal found little support from local authority submitters. For example:

Where appeals and prosecutions are likely to create a significant cost to ratepayers, with limited likelihood of success or limited ability to recover the cost, it is appropriate that governors are involved in the decision. The question is one of scale and whether the cost is proportionate to the scale of the problem. There are a number of regulatory areas where taking an offender to court for an unpaid fine will cost councils more than the maximum fine able to be charged..... In our experience the cost of initiating prosecutions or appeals is not the major determinant of whether such actions are taken or not. We are not convinced that there is a problem that would benefit from a mutual styled fund. (Hastings District Council, sub. DR 85, p. 9)

Options to address political involvement in prosecution decisions

Where councillors are involved in regulatory decisions, it is important that it is for governance rather than management matters, and that the circumstances maintain an appropriate separation between the governance and advocacy roles of councillors. The requirements in the LGA have not proven wholly effective in achieving this separation. The option of a pooled funding mechanism was rejected by most local authority submitters as being disproportionate to the problem.

Other options for addressing inappropriate political involvement fall on a spectrum from strengthening the statutory requirements to separate prosecution decisions from political involvement, through to more radical structural options (such as putting compliance activities in a council-controlled organisation at arms length from council).

On the strength of the available evidence, a moderate strengthening of the statutory requirements on councils is most appropriate. For example, this might be achieved by requiring local authorities to comply

with the Crown Law guidelines for prosecutions. The Commission agrees with the OAG that there is no reason for different principles to apply when the enforcement agency is a local authority rather than a central government agency.

R8.4

The Department of Internal Affairs should begin the process to strengthen the statutory requirements on local authorities to separate prosecution decisions from political involvement.

The ability of councillors to 'own' and be accountable for decisions

There is considerable debate about the role of councils in resource management decision making, and the role of other bodies such as the Environment Court, IHPs and a potential role for more collaborative decision making. This is part of a much broader policy debate on the environmental management system but it is touched on here because it relates to councillors' accountability for regulatory decisions and their incentive to 'own' the decisions that are made. The broader debate is summarised by Taranaki Regional Council in its submission:

The discussion of resource management decision making, including proposals by the Land and Water Forum to enhance council decision making through collaborative processes, and debates around *de novo* hearings at the Environment Court, are all interrelated and raise broader issues regarding the nature of local democracy – and particularly representative vs participatory models of democracy. The report of the Local Government Efficiency Taskforce released in November last year concluded that the Government should confirm the representative model of democracy for local government and that this would achieve efficiencies in local government processes.....As noted earlier, the Council considers that local decision making by elected members of the community should remain at the heart of resource management. (Taranaki Regional Council, sub. DR 75, pp. 7-8)

Taranaki Regional Council is advocating that decisions about resource management should be made by councillors who are elected by the community and to whom they are accountable. This section discusses the requirement on councils to make use of IHPs under the Resource Management (Simplifying and Streamlining) Amendment Act 2009.³² Box 8.5 describes IHPs.

Box 8.5 About Independent Hearings Panels

IHPs are made up of commissioners, appointed by the council, to carry out the council's duties to hear applications for a notified resource consent or plan/policy changes under the RMA. There is an accreditation programme for commissioners (including for councillors who are also commissioners), and they are often drawn from fields with relevant professional expertise, such as in planning or tikanga Māori. Councils cannot delegate responsibility for final decisions on a plan or policy—instead IHPs make recommendations to council based on their hearings of evidence and submissions.

The Resource Management (Simplifying and Streamlining) Amendment Act 2009 enabled applicants to request a council appoint an IHP to hear a notified resource consent instead of the council. If such a request is made, the council must accede to the request.

What does the increased use of IHPs mean for the accountability of councils in the use of their regulatory powers? For example, can councils, having delegated their functions, powers and duties to hear and decide on a notified resource consent application to an IHP, then reject the IHP's recommendations?

It is not clear that councils do have the discretion to reject an IHP's recommendations and the RMA is silent on the matter. The issue is discussed in Nolan et al. (2012). Commenting on the precedents created by the Privy Council in *Re Erebus Royal Commission; Air New Zealand Ltd v Mahon*, they conclude:

³² Section 100A allows for an applicant or a submitter to a notified resource consent application to request the council to appoint at least one independent hearing commissioner to hear and decide the application. If the council receives such a request, it must delegate its functions, powers and duties required to hear and decide on the application to one or more independent hearings commissioner(s) who are not members of the council.

In the case of a recommendation from a hearing panel that has followed due process and met all the requirements of its delegated power, the local authority should rely on that recommendation in the absence of a firm procedural or evidential reason why it should not. In most circumstances it will be difficult (if not impossible) for a local authority to find probative evidence that would reasonably justify a decision not to approve a hearing panel's recommendation, particularly if it can be shown that:

- (a) the hearing panel was appropriately appointed and followed correct procedure in carrying out its duties;
- (b) the evidence was extensive and provided a proper basis for the conclusions reached by the hearing panel;
- (c) the hearing panel fully considered the submissions in opposition to the matter being heard; and
- (d) the matter being heard was considered in accordance with the relevant key provisions of the RMA.

If any of those matters were established, such that there was a material concern about the integrity of the decision, then the only proper approach would be for the matter to be reheard in full, either by the local authority or by another independent panel appointed. (Nolan et al, 2012, p. 5)

The legal precedent appears to be that councils can only diverge from the decision of an IHP where there has been a procedural failure, the IHP heard insufficient evidence to draw the conclusions it did, or the conclusions made by the IHP do not proceed from the evidence it heard. Nolan et al. (2012) consider that the only appropriate action a council could take would be to have the matter reheard in full. Their view is that it would not be appropriate for the council to simply change a decision if it disagreed with the policy recommendation of the hearings panel.

According to Nolan et al. (2012), the inability of councils to differ from the decisions of hearings panels under existing provisions may already be playing out in practice:

Under the current system councils often delegate the hearing of a plan change or application to a hearing panel or sub-committee of the council but retain the power to make the final decision. We are aware of several instances where councils have sought to depart from the recommendation of the hearing panel or sub-committee in their final decision. The RMA is silent on a council's ability to do so. Our experience is that, following legal advice, the council usually decides not to depart from the recommendation of the hearing panel or sub-committee. However, delays often result in the issue of the final decision while the council debates the correct approach. (Nolan et al, 2012, pp.6-7)

Local communities may not appreciate how limited the discretion of local authorities is, and seek to hold them to account for the recommendations of the IHP, even though local authorities may have very limited ability to diverge from IHP recommendations. The power to make recommendations that cannot be rejected effectively weakens the role of councils in making resource management decisions and ultimately their accountability to their constituents.

F8.7

Local authorities may have very limited ability to diverge from the recommendations made by independent hearings panels. The requirement to use a hearings panel weakens the accountability of councillors to the community for the decisions made.

The Commission notes that the discussion document *Improving our Resource Management System* (MfE, 2013a) includes the use of IHPs as a key feature of the proposed single resource management plan process. It is not clear whether their use would be mandatory. However, IHPs would be mandatory under the proposed 'optional collaborative process' for freshwater-related regional plans and policy statements in *Freshwater Reform 2013 and beyond* (MfE, 2013b).

The freshwater proposals are based on the earlier work of the Land and Water Forum (LAWF). Under the proposals, councils may choose to provide a collaborative planning process when preparing, changing and reviewing freshwater policy statements and plans. An IHP would be appointed with a majority of non-council commissioners. It would make recommendations to the council on any changes to the proposed plan arising out of submissions. The council would retain responsibility for approving a plan for notification, but the council would be under a statutory requirement to consider the recommendations of the IHP and give reasons for deviating from IHP recommendations. While it appears that councils would be able to

reject or alter the decision of the IHP as long as they stated their reasons for doing so, Nolan et al. (2012) argue that this is not the case. The precedent created by the Privy Council in *Re Erebus Royal Commission; Air New Zealand Ltd v Mahon* means:

It is never, and never would be, appropriate for the local authority to simply insert its own decision, without having heard the evidence. This is contrary to the approach in the LAWf report which suggests it would be appropriate for the regional council to reject, or 'tweak', the decision of the hearing panel provided that it states its reasons for doing so. (Nolan et al, 2012, p. 5)

This creates a dilemma. On the one hand, it is undesirable to weaken council accountability for regulatory policies. On the other hand, there are reasons why it is inappropriate for councils or any other body to supplant the view of the hearings panel with its own view, without having gone through the same process.

This illustrates how fraught any attempt to increase the requirements to use IHPs can be. Any further expansion of the use of IHPs should consider the impact on the role of councils, their ownership of resource management decisions and their accountability to their communities for the decisions they make.

R8.5

The Ministry for the Environment should consider the impact of expanded requirements to use independent hearings panels on the decision-making role of councils, and councils' accountability to their communities for the resource management decisions they make.

In summary, the 2009 amendment to the RMA reduced the ownership and accountability of councils for notified resource consents where IHPs are required to be used. A proposed expansion of the role of IHPs for plan and policy making is likely to further diminish the role of elected councillors in resource decision making (Table 8.2).

Table 8.2 Trends in requirements for the use of IHPs

Changes	Smaller or greater role for councils?	Smaller or greater role for IHPs?
Resource Management (Simplifying and Streamlining) Amendment Act 2009: Ability for applicants to require an IHP to hear a notified resource consent instead of a council	▼	▲
Proposals: <i>Improving our Resource Management System</i> and <i>Freshwater Reform 2013 and beyond</i> : Requirement for IHPs for all plan and policy making	▼	▲

Managing councillor involvement on IHPs

This chapter has discussed the governance and decision-making role of councillors. This final section examines whether councillors should be involved on IHPs. Does their involvement undermine the purpose of having such panels, and is it possible for a councillor to be independent in such decision making? Are there systems to manage the role of councillors as elected representative and independent commissioner?

If IHPs are to be independent they must hear applications impartially but they must also be seen to be independent in their deliberations. South Taranaki District Council argues that Independent Hearings Commissioners are an effective method of demonstrating impartiality:

Local Government, due to its intimate contact with its communities, does face the difficulty of being impartial. Local Elected Members also struggle with regulatory principles at times, this can result in inconsistent implementation of regulation. More education of Local Elected Members on the role of regulation in local government would assist this matter.Independent Hearing Commissioners are an effective method of demonstrating impartiality to the community. The 'Making Good Decisions' qualifications has been very successful in raising the standard of decision making and most

Independent Hearing Commissioners hold that qualification. (South Taranaki District Council, sub. DR 68, p. 4)

However, as the Institute of Professional Engineers of New Zealand (IPENZ) argue, IHPs need to be *seen* to be independent and this can be difficult to achieve when councillors are able to be commissioners:

Although there are accreditation processes in place to ensure Commissioners have the requisite skills, the fundamental issue is that councillors are unable to be truly independent as they cannot realistically divorce themselves from their role as community representatives. An important element of independence is being seen to be independent. (IPENZ, sub. 17, p. 5)

There is, however, a rationale for having a mix of relevant experts and councillors on IHPs. Councillors can bring a deep knowledge of local issues and values to assessing evidence under the hearings process. Their inclusion may also strengthen links between council regulatory policy and other strategies (such as economic development strategies). This input may also assist in council 'ownership' of the recommendation, although this is not assured (as discussed above).

In the Commission's view, accredited councillors can play an important role on IHPs, and the independence of IHPs and the role of councillors on IHPs can be managed to maintain the advantages of the impartiality of IHPs and the value brought by councillors to IHP deliberations. Firstly, councillors serving as commissioners go through the same 'Making Good Decisions' course as non-councillor commissioners to achieve accreditation. Secondly, there is a process for submitters to challenge the independence of the commissioners and for a ruling to be made requiring that a commissioner step down. Thirdly, managing the potential for there to be a perceived lack of independence is about the quality of the processes that IHPs use, and how they are chaired.

F8.8

The inclusion of councillors on independent hearings panels can call into question the impartiality of such panels. However, accredited councillors can play an important role on hearings panels and any perceived lack of independence can be managed through strong principles for managing conflicts of interest, quality processes for running hearings panels and competent chairing of hearings panels.

9 Local regulation and Māori

Key points

- It is generally accepted that the Crown cannot transfer its obligations and responsibilities under the Treaty of Waitangi. The Resource Management Act 1991 (RMA) and Local Government Act 2002 (LGA) impose certain obligations on local authorities in respect of Māori, but they do not delegate to local authorities the Crown's obligations and responsibilities under the Treaty.
- It is the Crown's responsibility to interpret its obligations under the Treaty and to translate these into policy and procedural requirements for local authorities. There is a question about whether or not the policy and procedural requirements in the RMA and LGA, with respect to facilitating participation by Māori in local authorities' decision making, satisfy the Crown's responsibility.
- Local authorities are presented with two particular challenges:
 - Where Māori have a kaitiaki interest in regulation, local authorities are challenged to effectively mesh two governance systems in a way that works for both parties and the community.
 - The decision-making system relies largely on levels of capacity that often are not present in local Māori groups.
- Māori have an interest in the regulatory system, especially for environmental management, that stems from their relationship with the environment (which can include a kaitiaki relationship). Both the RMA and LGA can be interpreted as requiring provision for this relationship to be made in the regulatory decision-making process.
- A kaitiaki relationship is more complicated than a strict question of who owns or who regulates a resource. Māori might have a kaitiaki relationship with an environmental feature that they do not have a legal property title to (notwithstanding native title claims).
- Adequate systems, processes and rules need to be in place to mitigate the perceived risk that recognition of tikanga Māori might be used as an excuse for inappropriate commercial gain by Māori (accepting that such an abuse would run counter to the kaitiakitanga and manaakitanga values that exist within tikanga Māori). The Commission has identified good practice models to help achieve this.
- There are rules within any regulation about who exercises or is involved in the exercise of the powers set out in the regulation. Arguably, it is these process or decision rules (rather than the actual content of the regulation) that are of most importance to maintain, enhance or restore the kaitiaki relationship.
- Local authorities should aim to support Māori who are involved in decision making with sufficient inclusion of tikanga Māori in plans, policies and regulations to be able to meaningfully adjudicate whether or not particular proposals align with tikanga Māori.

9.1 Introduction

Involving Māori in decision making presents a significant opportunity. Recent moves towards greater involvement in governance of environmental resources are, for those local authorities involved, one of the most fundamental changes to their nature and operations in recent times. It can act as a catalyst for innovation. To achieve effective involvement of Māori, local authorities will need to find new ways of working with their communities and carrying out environmental management.

Although the Treaty relationship is between iwi and the Crown, iwi are affected as much by the regulatory functions conferred on local authorities as they are by central government. Indeed, because iwi and hapū rohe (areas) are at a regional or sub-regional level, a lot of their interests will be local in nature, and touch on the roles of local authorities. Māori groups are a significant community of interest for local authorities, to whom (unlike other groups) there are specific statutory obligations for inclusion in decision making.

In the wake of the Wai262 report (Waitangi Tribunal, 2011) there has been considerable debate about how local authorities and others can better involve iwi in environmental regulation and governance. Local authorities are not the Crown and therefore are not the Treaty partner. However, it is generally accepted that when the Crown statutorily delegates regulatory functions, it retains a responsibility to translate its related Treaty duties into procedural and policy requirements for the local authorities that carry out those regulatory functions. Central government needs to take an ongoing interest in whether the procedural and policy requirements it has placed on local authorities are effectively delivering on its Treaty duties.

This latter is important in a regulatory context, because (as noted in Chapter 4) appropriately recognising the relationship of Māori to environmental features involves effectively meshing two different systems of governance—local representative democracy, and the tikanga and kawa of local iwi. Put another way, it calls for the reconciliation of kāwanatanga and rangatiratanga. At present, this governance or ‘system’ issue is left largely up to local authorities to resolve. The best English term available for what needs doing is establishing a “partnership”—the language of Treaty responsibilities.

Local authorities and iwi are best placed to work out their relationship at the local level, but there are real questions about whether the current legislative framework best enables that relationship. There are practical issues, raised in Chapter 4, such as whether the current systems for including Māori in decision making rely on a level of capacity that often is not available in Māori organisations currently. This is a regulatory design issue.

Because the language of the requirements in the RMA and LGA differ (the RMA focuses on iwi, whereas the LGA talks about Māori more broadly), the broader term Māori is used throughout this chapter. However, for much of the discussion of environmental management, the relevant interests would lie with local iwi.

9.2 The obligations of local authorities toward Māori

Local Government Act 2002

The LGA recognises the Crown’s obligations under the Treaty of Waitangi by placing obligations on local authorities to facilitate participation by Māori in local authorities’ decision-making processes (s4). Local authorities must be informed about how their decision making can impact on Māori community wellbeing. The provisions apply to all Māori in the city, district or region. They acknowledge that Māori other than manawhenua may be resident in the area.

The LGA includes requirements for local authorities to:

- provide opportunities for Māori to contribute to decision-making processes (s14);
- establish and maintain processes for Māori to contribute to decision making (s81(1)(a));
- consider ways in which they can foster the development of Māori capacity to contribute to decision-making processes (s81(1)(b));
- provide relevant information to Māori (s81(1)(c));
- take into account the relationship of Māori and their culture and traditions with their ancestral land, water, sites, wāhi tapu, valued flora and fauna, and other taonga (s77(c));
- set out in its long-term plan the steps that the local authority intends to take to foster the development of Māori capacity to contribute to decision-making processes (cl 8 of Schedule 10); and

- identify in its annual report the activities undertaken to establish and maintain processes to provide opportunities for Māori to contribute to the decision-making process (cl 35 of Schedule 10).

Resource Management Act 1991

The now-repealed Town and Country Planning Act 1977 recognised as a matter of national importance the relationship of Māori and their culture and traditions with their ancestral lands. A number of planning decisions provided due recognition of the importance of the relationship.

The RMA extends the recognition of the relationship between Māori and the natural environment, and identifies how local authorities must consult and work with tangata whenua. Local authorities are required to consult with iwi authorities when preparing or changing regional policy statements, regional plans and district plans and to engage with tangata whenua in other resource management decisions. The key statutory obligations are as follows.

- Sections 6(e) and 6(f) require recognition of and provision for “the relationship of Māori and their culture and traditions with their ancestral lands, water, sites, wāhi tapu, and other taonga” and “the protection of historic heritage from inappropriate subdivision, use and development.”
- Particular regard must be given to kaitiakitanga (s7(a))—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.”
- All persons acting under the RMA (including applicants, councils and tangata whenua) must take into account the principles of the Treaty of Waitangi (s8).

The RMA also imposes obligations of consultation with tangata whenua. There are different requirements for resource consents, notice of requirements and plan development processes.

Section 26A of the RMA provides that there is no duty to consult any person about resource consent applications and notices of requirement unless a duty to consult is imposed by another enactment. However, for many resource consent applications and notices of requirement, consultation with tangata whenua will play a significant role in assessing the effects of Māori cultural values, and the matters set out in Part II of the RMA, and will likely improve the decision-making process and outcome. For example, in *Takamore Trustees v Kāpiti Coast District Council* [2003] 3 NZLR 496, the High Court said that s7(a) (which provides that particular regard must be had to kaitiakitanga) created an obligation not just to hear and understand the views of tangata whenua about the proposed road, but also to allow those views to influence decision making. The judge said: “Consultation by itself without allowing the view of Māori to influence decision making is no more than window dressing” (at [86]).

Consultation with tangata whenua is mandatory when developing plans and policy statements. Clause 3 of Schedule 1 of the RMA sets out a process and identifies guiding principles for consulting with iwi authorities. The consultation must go beyond the mere sending of a notice to the iwi authority, and requires affirmative action to establish and maintain a process for consultation. In certain circumstances, the process may require financial support for the consultation to be adequate and productive of relevant information (cl 3B of Schedule 1).

In 2003, the matters of national importance under the RMA were amended to add s6(f): “[T]he protection of historic heritage from inappropriate subdivision, use and development.” The RMA defines “historic heritage” to mean natural and physical resources that contribute to an understanding and appreciation of New Zealand’s history and cultures, and specifically includes “sites of significance to Māori, including waahi tapu” (s2 of the RMA). Consents have been refused for the establishment of a wind farm on an historic ridge and telecommunication installations in areas affecting sacred hilltops.

Statutory acknowledgements

Statutory acknowledgements arise from the settlement of historical claims under the Treaty of Waitangi. They are an acknowledgement by the Crown of a claimant group’s particular cultural, spiritual, historical and traditional association with specified areas. They are only ever given over Crown-owned land. Statutory

acknowledgements impose particular obligations on councils when dealing with relevant resource consent applications. Councils are also required to record in policy statements and plans all areas affected by statutory acknowledgements.

Treaty duties and obligations of local authorities

The dominant view is that local government owes no responsibilities under the Treaty, apart from those specific statutory obligations already identified. The Treaty partners are the Crown and Māori, and because local government is not the Crown, local government owes no responsibilities under the Treaty. Even where central government delegates functions and powers to local government, the onus remains on the Crown to ensure that its Treaty responsibilities are fulfilled. This view has been adopted in the LGA. It is also the view taken by the Department of Internal Affairs (DIA). *The Policy development guidelines for regulatory functions involving local government* (DIA, 2006) advise that the Crown cannot transfer Treaty obligations and responsibilities. It is the Crown's responsibility to interpret its obligations under the Treaty and to translate these into policy and procedural requirements for local authorities. This view is also consistent with the Waitangi Tribunal's approach, which stresses that the Crown is under a continuing obligation to ensure that its Treaty obligations are fulfilled.

Because the Treaty was between Māori and the Crown, the Crown is under a continuing obligation to ensure that its Treaty duties are fulfilled. In its *Ngawha Geothermal Resources Report* (Waitangi Tribunal [Wai304], 1993), the tribunal declared that the Crown cannot avoid or modify its Treaty obligations by delegating its powers or Treaty obligations to the discretion of local authorities. That means that, if the Crown chooses to delegate to local authorities responsibility for the control of natural resources, it must do so in terms which require local authorities to afford the same degree of protection as is required by the Treaty to be afforded by the Crown.

9.3 How local authorities are currently involving Māori in regulation making

Four types of mechanisms are currently being used by local authorities to include Māori in decision making:

- Māori committees;
- joint management agreements;
- statutory consultation; and
- iwi management plans.

Māori committees

Māori committees are a fairly common response to the LGA s14 and s81 requirements to include Māori in decision making, and to build their capability to do so. Their role and particularly the scope of decisions they are involved in varies extensively between local authorities.

The Greater Wellington Regional Council has a charter of understanding signed by the seven iwi in the region and has an active relationship with these iwi. Each of them has a different role and each was invited to nominate somebody with the skills that the new committee requires. When we last surveyed councils on this topic more than 50% of councils had negotiated charters of understanding with local iwi or hapū. (Local Government New Zealand [LGNZ], sub. 49, p.13)

The Council is satisfied, with regard to the main body of its regulatory functions, that it is able to meet its Treaty obligations. For instance, it holds monthly meetings with Te Rūnanga Executive, and an Annual Hui for all Rūnanga members, residents of Tuahiwi and Marae Trustees, representation from Te Rūnanga O Ngāi Tahu, Councillors and staff. These meetings and the Annual Hui provide the opportunity to address all resource management issues, and difficulties with consent or District Plan processes, and any servicing issues.

These meetings cover the scope of all regulatory functions that the council performs as they affect Ngai Tuahuriri and include, from time to time, issues of particular relevance to them, including lowland stream water quality (in relation to council drainage maintenance and esplanade improvement works),

potable water quality, and other regulations that enhance environmental protection and improve quality of services. (Waimakariri District Council, sub. 30, p. 6)

Joint management agreements

Ordinarily a result of raupatu claims settlement acts³³, joint management agreements (JMAs) create, to varying degrees, joint Māori and local authority management of natural features. Included in this category can also be some arrangements that, although not formally JMAs, have their character. The Ōrākei Reserves Trust is an example where the reserve is owned by Māori, but the Trust has a balance of councillors and Ngāti Whātua o Ōrākei members.

At the strong end of the spectrum of agreements is the Waikato River Authority:

Another regulatory innovation is that of co-governance and co-management with iwi regarding the protection and enhancement of the Waikato River. This has had the positive effect of iwi working alongside the local authorities and developing a healthy joint working relationship. (Waikato District Council, sub. 16, p. 4)

For the Waikato District Council it is not the Treaty of Waitangi that has had the greatest influence but the subsequent raupatu settlement acts. This has positive effects for both parties in being able to cut costs of consultation and appeals to the Environment Court because iwi are now formally at the beginning of the decision-making process. This has led to the inclusion of a new Vision and Strategy to the District plan for the protection and restoration of the health and well-being of the Waikato River and the signing and implementation of a Joint Management and Governance Agreement. (Waikato District Council, sub. 16, p. 3)

Towards the weaker end of the spectrum is the only voluntary JMA (currently), between Taupō District Council and Ngāti Tūwharetoa, where an owner of Māori freehold land may apply to have their resource consent application for that land heard by a joint committee from the district council and Ngāti Tūwharetoa.

Statutory consultation processes

The Waitangi Tribunal has commented:

It is fair to say that the system is designed to facilitate Māori reaction to priorities being set by local councils and applicants. While this in itself is an advance on the pre-RMA position, there are obvious structural shortcomings in this approach. Other than the almost entirely unused control and partnership mechanisms to which we have referred above, there are few opportunities for Māori to take the initiative in resource management. Māori are usually sidelined in the role of objectors. (Waitangi Tribunal, 2011, p. 115)

Inquiry participants bore out that the extent of their involvement was largely as objectors. Both Māori and local authorities were dissatisfied with this state of affairs. The other common problem that can arise is insufficient capacity to actually participate in the process as currently designed.

Iwi management plans

An option for addressing iwi resource management interests has been the inclusion in the RMA of a requirement that local authorities 'take into account' iwi management plans:

There is one important exception [to Māori being sidelined as objectors]. Section 61(2A) of the RMA requires that district and regional plans must take into account 'any relevant planning document recognised by an iwi authority' and lodged with the council, where it is relevant to the resource management issues of the region. These 'iwi management plans' provide the only mechanism by which iwi authorities are able to exercise influence on resource management decisions by setting out their own issues and priorities without any consulting council or applicant filter. It is the only instance where Māori can be proactive in resource management without needing the consent of a minister, a local authority, or an official. (Waitangi Tribunal, 2011, pp. 115-116)

However, iwi management plans can be a very weak way of involving iwi in decision making as there are no requirements for including Māori in deciding how those plans will be taken into account.

³³ With one exception.

9.4 Opportunities and challenges for including Māori

The increasing use of formal instruments for involving Māori in decision making, and particularly joint management agreements, may be one of the most significant changes to how local government carries out its regulatory functions. It is also apparent that JMAs represent the most significant and therefore (from an iwi perspective) usually most desirable form of recognition for kaitiakitanga. Making JMAs work well will be critical for environmental management in New Zealand. Increasing Māori participation in regulatory decision making creates opportunities to innovate, but also faces some challenges.

Opportunity – a catalyst for innovation

Including Māori in environmental management decision making creates some opportunities. It may be a way of 'recruiting' public assistance in monitoring the quality of the environment (increased information to the local authority from vigilant kaitiaki), assistance in restoring degraded environments (such as volunteer labour for riparian planting), and sustainable management of particular features (placing rāhui on shellfish takes, for example).

Including Māori further in decision making ought to act as a catalyst for local authorities to think differently about what and how they regulate. In turn, this would likely lead to some regulatory innovation on the behalf of local authorities.

Challenge – matching decision-making systems to capacity to participate

The capability of many Māori groups to be involved in the resource consent or district and regional planning process was raised as problematic, both by Māori groups and others. For example, an inquiry participant who was part of a Māori group noted that the consultation process under the RMA, particularly with its statutory deadline of 20 days, made it almost impossible for a smaller hapū, reliant on volunteers, to engage effectively in the process. This led to their objecting to complicated proposals, and then acquiring the time and resources to try to understand and assess the proposal.

The effect of inclusion of Treaty requirements in the RMA was described simply by one submitter as:

It places a resource demand on Māori, local authorities and applicants. (Ashburton District Council, sub. 40, p. 4)

Some inquiry participants took a more nuanced position:

Local authorities address consultation in many ways, with some local authorities set up with representation mechanisms which make consultation processes easier. However, the volume of regulation requiring consultation is often overwhelming not only to the authority concerned but to the iwi and hapū involved as well. There is a huge problem with the capacity within iwi and hapū to be able to sufficiently consider the matters being addressed in many of the consent applications and also the timescales involved in the considerations. This in turn has a profound impact on the planning process and the ability of local government to do its business in a more inclusive way, which is the principal intent of the Treaty of Waitangi. (LGNZ, sub. 49, pp.12-13)

Māori [are] more included, greater dialogue, but their expectations are not matched by their resources/capacity to participate/respond. Capacity issues often result in protracted processes both in terms of staff time and delays. Certain relationships require face to face visits and cannot be rushed. Māori find that local authority more approachable than in the past; relationships with staff tend to work well; often more challenging for politicians as the contact is not as frequent as that of staff. Local authorities have been challenged to be engaged with Tangata whenua, and to understand the Maori world view, and the arrangements of Iwi and Hapū with their boundaries. (New Plymouth District Council, sub. 58, pp. 3-4)

At present, significant capacity within Māori organisations is taken up with the settlement process, particularly as it approaches the government target for resolving all historic Treaty grievances by 2014 (Te Puni Kōkiri, 2010, p.17). It has been suggested that this may change post-Treaty settlement, as capacity currently taken up in negotiating settlements becomes available for other purposes. Alternatively, that same capacity may be needed for the effective management of Treaty settlements, once they are received.

Whether or not significant capacity for engaging in the current processes of decision making will become available in the near future is unclear.

Although there are benefits from better including Māori in decision-making processes, there is little, if any, satisfaction for any of the parties involved in the current resource management process for including Māori in decision making.

If the system is reliant on actors within it possessing a level of capability that they do not have, then the system will be inefficient or inadequate. In this context, establishing Māori committees may not be a sufficient response by local authorities to meet their LGA s81 obligations towards building Māori capability for involvement in decision making.

9.5 What is kaitiakitanga?

The Waitangi Tribunal has found that kaitiakitanga forms one of two foundational and interlinked concepts within Māori thinking on environmental management (the first is whanaungatanga—the organisation of concepts and relationships through whakapapa or familial connections).

Kaitiakitanga is really a product of whanaungatanga – that is, it is an intergenerational obligation that arises by virtue of the kin relationship. It is not possible to have kaitiakitanga without whanaungatanga. In the same way, whanaungatanga always creates kaitiakitanga obligations. (Waitangi Tribunal, 2011, p.105)

The tribunal explains how, because the relationship Māori have with the environment is described in terms of whakapapa, the claim that particular Māori groups have to kaitiakitanga is based on this sense of relationship. In Māori cosmology, there is little or no distinction between human ancestors and whenua, maunga or awa from which one descends (or to put it in the appropriate cultural context, can whakapapa to). This is the whanaungatanga relationship of which the tribunal speaks.

Box 9.1 Example of a kaitiakitanga relationship

Today, some Māori leaders have combined the roles of legal trustee and kaitiaki. Mr Munro explained to us how the kaitiakitanga of Poroti Springs in Northland had been handed down from generation to generation, and how European legal processes have been used (and can be used further) as part and parcel of kaitiakitanga. He told us how the ‘court appointed trustees’ of the land block in which Poroti Springs are contained are also kaitiaki of the springs in a long line of kaitiaki: ‘We have inherited the role of kaitiaki from a long time ago from a long line of traditional guardians before us’.

Their ‘guardianship’ of land and springs was first ‘formalised’ in this way in the 1890s, when their tupuna created a legal reserve and sought the protection of the law for the springs that were of such importance to all of Ngāpuhi. Before 1895, rāhui and tapu were the sole forms of management but after the creation of the reserve, the trustees were able to deal with those who sought to use their water from a position of legal strength – at least, Mr Munro told us, until the 1960s and the Water and Soil Conservation legislation. With a significant increase of private water uses in the 1970s, especially of the Waipao Stream that feeds the springs, the Poroti Springs dried up in the early 1980s. The result was a ‘furore’ and the kaitiaki called all the people home, held hui, and launched litigation which eventually succeeded in restoring some of the water volume to the springs. Ms Meryl Carter told us that the home people have since begun a community education programme in local schools (and through them to parents) about the importance and value of the springs to the tribe. They have also inaugurated community restoration programmes to replant the riparian strips of the Waipao and also to get funding for farmers to fence the stream (thus protecting it from stock effluent). Although the local people are not wealthy, they have participated in difficult and expensive RMA processes since the 1990s, and have been ‘proactive in every single resource consent to take water and effluent discharge consent’. Frequent, expensive Environment Court battles ensued. They often lose. This is kaitiakitanga in action.

Source: Waitangi Tribunal [Wai2358], 2012, pp.77-78.

A kaitiakitanga relationship is more complicated than a strict question of who owns or who regulates a resource. Māori might have a kaitiakitanga relationship with an environmental feature that they do not have a legal property title to (not withstanding native title claims).

The LGA can be interpreted as referring to the kaitiaki relationship:

...if any of the options identified under paragraph (a) involves a significant decision in relation to land or a body of water, take into account the relationship of Māori and their culture and traditions with their ancestral land, water, sites, waahi tapu, valued flora and fauna, and other taonga. (LGA, s77c)

The term kaitiakitanga is not used in the LGA; however, the kaitiaki relationship is a relationship that would be included by the requirement in s77c. As discussed further in section 9.8 the Waitangi Tribunal envisages that a range of recognition might be necessary to adequately address this relationship. Some examples are discussed further in section 9.8.

9.6 Meshing two systems of governance – the big picture

The challenge in recognising and providing for kaitiakitanga is that it requires, to some extent, the merging of two systems of governance—tikanga Māori, and tikanga Pākehā (conceived of as the rule of law). This section sets out the key features of both, before discussing the main issues for meshing the two. Section 9.7 goes more into the detail of making this work for local regulations.

Characteristics of tikanga Māori as a system of governance

Tikanga Māori is the Māori system of law and custom. The term 'tikanga Māori' is sometimes used interchangeably with 'Māori customary law'.

The first key characteristic of tikanga Māori is that it is dynamic and not fixed to a set time or time period or based on a strict application of precedent. The dynamism of tikanga Māori stems from its foundation on principles, rather than rules. The application of tikanga Māori involves a continuing review of fundamental principles in a dialogue between the past and the present.

Justice Durie (formerly Chief Judge of the Māori Land Court, now a Justice of the High Court) explains the capacity of tikanga Māori to adapt to new circumstances and the role of precedent:

...adherence to principles, not rules, enabled change while maintaining cultural integrity, without the need for a superordinate authority to enact amendments. Custom does not, therefore, appear to have been lacking for vitality and flexibility. Inconvenient precedent could simply be treated as irrelevant, or unrelated to current needs, but precedent nonetheless was regularly drawn upon to determine appropriate action. Accordingly, while custom has usually been posited as finite law that has always existed, in reality customary policy was dynamic and receptive to change, but change was effected with adherence to those fundamental principles and beliefs that Māori considered appropriate to govern the relationships between persons, peoples and the environment. (quoted in New Zealand Law Commission, 2001, pp. 3-4)

The key points to draw from Justice Durie's explanation are:

- tikanga Māori is based on principles;
- tikanga Māori is flexible and receptive to change;
- tikanga Māori is not based on a strict application of precedent, but precedent and past understandings are often drawn upon in determining the appropriate course of action in a particular case; and
- change is guided by the fundamental principles and values underlying tikanga Māori.

The second key feature of tikanga Māori is that its application is not synonymous with the personal interpretation of a particular individual. As the Law Commission stated in its report on *Māori Custom and Values in New Zealand*, tikanga Māori is founded on underlying values and fundamental principles and idiosyncratic or perverse attempts to rely on Māori custom law may be detected (New Zealand Law Commission, 2001. p. 5).

In the context of local regulation, managing something according to tikanga means the application of Māori customary law to the management of an environmental feature. There are relatively strong and weak forms of doing so, which are discussed further in section 9.7. Although tikanga Māori is a Māori way of doing things, it is not exclusively Māori. That is, many of the principles involved are consistent with the values that the broader community holds towards environmental management. At least until, like any law, a desired use and the regulation of it come into conflict. Specific principles identified by the Law Commission (2001) are:

- whanaungatanga;
- mana;
- tapu;
- utu (including muru); and
- kaitiakitanga.

The strong sustainability focus of tikanga Māori should give communities some comfort that its application will not undermine other important aims of environmental regulation, such as conservation.

Box 9.2 Example of applying tikanga Māori to environmental management

Priscilla Paul and Jim Elkington both referred to the practice of managing and transplanting pipi, cockles, mussels, kina, pāua, oysters and scallops for a variety of reasons, including sustainability. Transplantation was managed according to the spawning cycles of the various species, and traditional regulatory mechanisms such as rāhui were used to ensure sustainable quantities of kaimoana developed before any harvesting took place.

Source: Waitangi Tribunal, 2011, p.112.

The rule of law – tikanga Pākehā

There are many differing conceptions of the rule of law. However, most conceptions agree on certain 'procedural' principles as being essential to the rule of law. These procedural principles are focused on issues such as how law is made, how known and accessible it is and how and whom it is applied by. It is these procedural principles that are most relevant to the current context (see Box 9.3).

Box 9.3 Principles of the rule of law (tikanga Pākehā)

Lord Bingham (a Law Lord and judge in the House of Lords) identifies the core of the principle of the rule of law in this way: "all persons and authorities within the state, whether public or private, should be bound by and entitled to the benefit of laws publicly made, taking effect (generally) in the future and publicly administered in the courts." (Bingham, 2010, p. 8).

Lord Bingham identifies eight principles that together make up the rule of law:

- *The law should be accessible and so far as possible, intelligible, clear, and predictable.* Lord Bingham gives three reasons why it must be so. First, if we are liable to be prosecuted, fined, or imprisoned for doing something, we ought to be able to find out what it is we must or must not do. Secondly, if we are to claim the rights which the civil (non-criminal) law gives us, or to perform the obligations which it imposes on us, it is important to know what our rights or obligations are, otherwise we cannot claim the rights or perform the obligations. Thirdly, the successful conduct of trade, investment, and business generally is promoted by a body of accessible legal rules governing commercial rights and obligations. It is far less attractive to do business in a place where the parties' rights or obligations are vague or undecided.
- *Questions of legal right and liability should ordinarily be resolved by application of the law and not*

the exercise of discretion. This does not mean that every decision affecting the rights or liabilities of the individual should be made by a court or tribunal, or that the criteria governing administrative decisions should be prescribed in statute or regulations made under statute. However, decisions should be based on stated criteria and be amenable to legal challenge.

- *The laws of the land should apply equally to all, save the extent that objective differences justify differentiation.* Some categories of people should be treated differently because their position is in some important respect different. But any departure from the general rule of equal treatment should be scrutinised to ensure that the differential treatment is based on real differences.
- *Ministers and public officers at all levels must exercise the powers conferred on them in good faith, fairly, for the purpose for which the powers were conferred, without exceeding the limits of such powers and not unreasonably.*
- *The law must afford adequate protection of fundamental human rights.*
- *Means must be provided for resolving, without prohibitive cost or inordinate delay, bona fide civil disputes which the parties themselves are unable to resolve.* Everyone should be able, in the last resort, to go to court to have his or her civil rights and claims determined. An unenforceable right or claim is a thing of little value to anyone.
- *Adjudicative procedures provided by the state should be fair.* This requires, amongst other things, the independence of decision makers. Decision makers must be independent of anybody or anything which might lead them to decide issues coming before them on anything other than the legal and factual merits of the case as, in the exercise of their own judgment, they consider them to be. The decision maker must also be impartial. This means that the decision maker, to the greatest extent possible, should approach the issues with an open mind, ready to respond to the legal and factual merits of the case.
- *The rule of law requires compliance by the state with its obligations in international law as in national law.*

Source: Bingham, 2010.

The key issues in reconciling the two systems

The key challenges in meshing tikanga Māori and the principles of the rule of law (tikanga Pākehā) are ensuring that a decision-making system that incorporates tikanga Māori satisfies the following.

- Decision makers should be independent from those affected and should approach the decision with an open mind. Potential conflicts of interest are a particular issue in JMAs, where an iwi authority has a role in the decision-making process in respect of a resource in which they have a direct interest.
- The law must be accessible and, as far as possible, clear and predictable. Tikanga Māori is by its nature flexible and dynamic, which means its meaning and application will not always be clear and predictable. Tikanga Māori is also not very accessible to many New Zealanders, as there is a general lack of knowledge and understanding about tikanga Māori.

The nature of tikanga Māori is that it is not codified, and not as inculcated through the education and other social systems as statute law. As well, tikanga Māori relies on the application of principles to a situation, rather than appealing to precedent. Precedent has been one way that knowledge of how the law will be applied has been established. On the other hand, these are relatively minor difficulties compared to the general lack of knowledge about what tikanga Māori is. It seems reasonable to contend that the principles of tikanga Māori are knowable (for instance, the Law Commission (2001) outlines what it sees as the principles of tikanga Māori). As with statute law or a district plan, knowing its content gives a fair indication of how it is likely to be applied.

Another perceived sticking point can be a view that recognising tikanga Māori might depart from the general rule of equal treatment (that the laws of the land should apply equally to all). In practice, many laws make a distinction between the rights of different groups of individuals, such as those that own a piece of property and those that do not. In this context, Māori might have an interest in a regulatory matter or environmental feature that is not a property right under the general law of New Zealand, but would be a recognised interest under tikanga Māori. Provision is made for these relationships in the LGA and RMA. Recognising the different interests of groups is consistent with the general rule of equal treatment, albeit sometimes politically difficult.

Having discussed the general differences or sticking points between the systems of law, section 9.7 discusses some of the matters that need to be considered when thinking about including Māori in decision making for particular regulations.

9.7 Meshing two systems of governance – some of the details

For specific local regulations, there are four particular matters that need to be addressed in order to effectively mesh the two systems of governance:

- determining the appropriate level of recognition for kaitiakitanga;
- making sure that Māori are included meaningfully (according appropriate place to tikanga Māori);
- ensuring that ‘good governance’ principles still prevail in the administration of regulation; and
- managing the costs involved.

Determining the appropriate level of recognition for kaitiakitanga

In thinking about how kaitiakitanga should be taken account of, the Waitangi Tribunal envisaged a spectrum of approaches, based on the significance of the relationship between Māori as kaitiaki and the resource, and the strength of other interests:

“Such a system should be capable of delivering the following outcomes to kaitiaki:

- *control* by Māori of environmental management in respect of taonga, where it is found that the kaitiaki interest should be accorded priority;
- *partnership* models for environmental management in respect of taonga, where it is found that kaitiaki should have a say in decision making but other voices should also be heard; and
- *effective* influence and appropriate priority to the kaitiaki interests in all areas of environmental management when the decisions are made by others.

It should be a system that is transparent and fully accountable to kaitiaki and the wider community for its delivery of these outcomes.” (Waitangi Tribunal, 2011, pp. 285-286)

The critical factors to be assessed in making this decision are:

- the greater the evidence of the taonga’s importance, the greater the need to consider kaitiaki control as the appropriate outcome; and
- third party interests must be considered: where private property interests will be affected by restrictions proposed by kaitiaki, an exclusive control model may be inappropriate. (Waitangi Tribunal, 2011, p. 113)

Meaningful inclusion of tikanga Māori

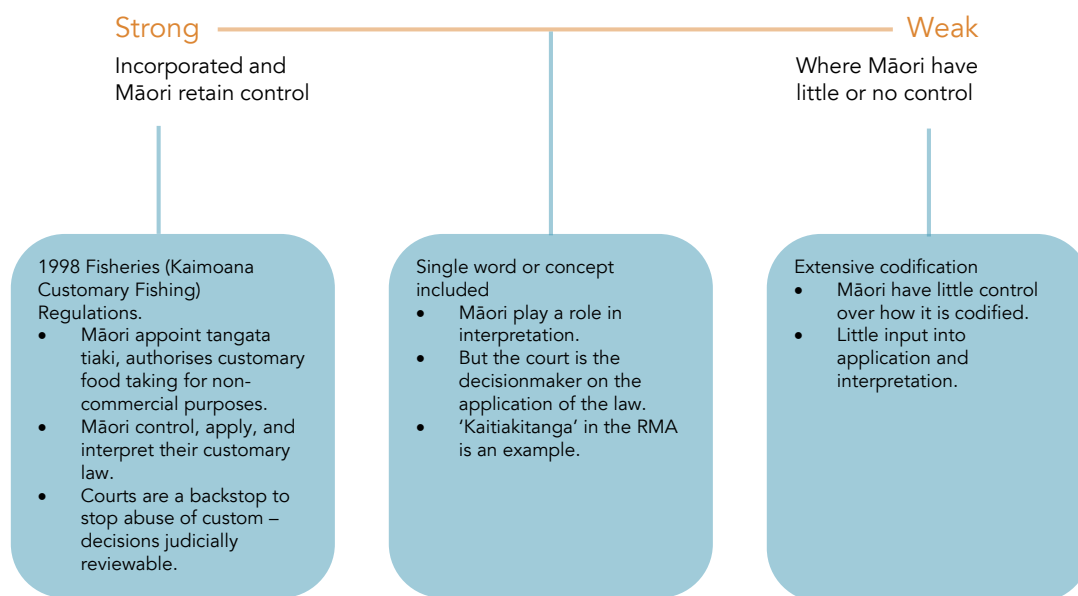
The aspirations of Māori place an emphasis on involvement in the making and administration of regulation ahead of but not excluding their content:

Mr Munro concluded his korero by referring to a whakatauki expressed earlier in the hearing by Mr Maanu Paul:

... if I can reach out and grasp the words that were spoken by Maanu when he said that the water is me and I am the water. That's the same expression that we want to express to yourselves as well, as the waters of Waipao are us and we are the waters of Waipao. We have been – we were charged with the responsibility from our parents, our grandparents and our tūpuna to look after that water and it's been very hard for us to have to go through processes that disenfranchise us, where we are more like flies on the wall and we are not a part of the process or the decision making. The question is asked, "What is it that you want?" And our answer is that we want the right to talk about our water. We want to sit at the decision-making table. We don't want to be like flies on the wall that nobody takes any notice of. (Waitangi Tribunal, 2012, pp. 77-78)

Hart identifies that within any regulation there is what he calls 'secondary rules'—these are rules of recognition, rules of adjudication and the rules of change (in Coates, 2009). Put another way, they are the rules within any regulation about who exercises or is involved in the exercise of the powers set out in the regulation. Arguably, it is these secondary rules (rather than the actual content of the regulation) that are of most importance to maintain, enhance or restore the kaitiakitanga relationship. Coates envisages a spectrum of strong to weak incorporation of tikanga Māori into regulation, where strength is largely dictated by the degree to which Māori retain the ability to interpret how their custom should be applied.

Figure 9.1 Spectrum of ways to involve iwi/Māori in regulatory governance, from strong involvement to weak involvement



Source: Adapted from Coates, 2009.

Determining a sufficient level of Māori involvement in regulatory governance is critical for achieving good regulatory outcomes in matters that affect wāhi tapu or activities that touch on tikanga. Simply appointing a Māori decision maker, when the rules they must apply do not include tikanga, is unlikely to suffice.

For example, accrediting and involving local kaumātua on independent hearings panels is one way that is sometimes used to give recognition to the kaitiaki role of local iwi. It is a relatively simple way, within the existing decision-making structure, to have Māori represented at the decision-making table, as may be appropriate for matters relating to significant bodies of water or other significant local environmental features. However, transplanting kaumātua into an independent hearings context, where they are required to apply non-tikanga matters in an impartial manner will give them limited legitimate scope to assess the matters before them in terms of their interaction with tikanga. Where issues arise, it is likely to be where the district plan does not consider tikanga Māori in a sufficiently explicit way to support the role of manawhenua as kaitiaki. The solution lies in how tikanga is included in local regulation.

Providing for kaitiakitanga (as defined in the RMA), or the management of an activity according to tikanga Māori can be done in strong or weak forms. Often, recognising custom effectively will require resolving:

- the way tikanga is referred to, particularly so that references to particular concepts can be set in the context of other principles of tikanga Māori;

- how to include Māori in its application, so that any interpretation or decision about tikanga has credibility; and
- what strength is given to custom—should it just be considered, or is applying it required?

As well as envisaging a spectrum of strong to weak incorporation of custom, Coates (2009) states that there are both pros and cons to any particular kind of incorporation of custom (Table 9.1).

Table 9.1 Strengths and weaknesses of different ways to incorporate tikanga Māori into regulation

Issue	Option	Strengths	Weaknesses
How the custom is included in the regulation or legislation	Single word or concept included	Receives greater consideration than it would if Māori were just another stakeholder.	Those deciding on the regulation have to determine whether Parliament is including the custom attached to it, or just using a Māori word. This can lead to variable interpretation. If a custom is inserted (through including a single word) it might not function well without complementary customs that make the system work.
	Extensive codification	Result is regulation that is accessible, largely predictable and clear.	May not codify all the relevant customs, which may skew the kinds of decisions made under the regulation (sometimes argued as being the case for Te Ture Whenua Māori Act 1993). Relatively inflexible. Because codification establishes which customs can be recognised, it can stop other related ones from being applied. There is more flexibility in single custom reference (kaitiakitanga in RMA).
Who makes decisions about the application of the custom	Local Māori (manawhenua)	Regional variation in tikanga will be catered for. Will not face challenges related to translation of terms or cultural understanding.	A lot of discretion can produce uncertainty for those that the regulation might apply to (the uncertainty would be derived from lack of knowledge about the custom). Can create an impression of inequality with non-Māori.
	Local authority or court	Perception of greater independence and objectivity.	If the custom is misinterpreted and that sets a precedent, it may move the concept away from the Māori meaning.
Whether the custom is a 'consideration' or a 'requirement'	Consideration	Allows greater flexibility to determine the extent of the kaitiaki relationship and match the consideration to it (as envisaged in Wai 262).	Considerations can be traded off with other values. This does not provide a safeguard that where the kaitiaki relationship is strong, it will be given due recognition.
	Requirement	Increases the likelihood that significant relationships with natural features will be addressed appropriately.	Less flexibility to take a proportionate approach to addressing kaitiaki interests, when taken into account with other interests.

Source: Adapted and expanded from Coates, 2009.

Although Coates (2009) intended that this be applied to the content of particular regulations, rather than the institutional structures around, say, environmental management, it is clear that there are implications for how well local authorities include Māori in their regulatory decision-making processes.

Box 9.4 Ngāti Pāhauwera and the management of hāngi stones

Members of Ngāti Pāhauwera have expressed concern in the past that the tribe's kaitiakitanga/guardianship of the stones did not feature sufficiently in other decision making about use of river resources. Scarcity is also an issue apparently. Ngāti Pāhauwera want to ensure the stock of hāngi stones coming loose in the river beds is managed to be able to meet cultural uses. This includes traditional gift exchanges.

The deed of settlement bill proposed:

- Any person must obtain written consent from Ngāti Pāhauwera trustees before they may extract loose hāngi stones from the bed of the Te Hoe or Mōhaka Rivers within Ngāti Pāhauwera's area of interest inland of the coastal marine area. This includes riverbed landowners.
- Ngāti Pāhauwera trustees may give consent to extract hāngi stones on any terms and conditions that they see fit.
- If a person has the required consent to extract loose hāngi stones, that person does not also need to obtain consent from a local authority for the same activity.
- If a person, in carrying out another activity, extracts any hāngi stone, they must return it unless they also have Ngāti Pāhauwera's hāngi stone consent.

This new control on all extraction (compared to currently permitted levels of taking under the Regional Council's regional plan) will make Ngāti Pāhauwera values about hāngi stones much more visible in a way that the iwi has not achieved to date under the RMA.

Source: Craig Linkhorn, n.d., pp. 6-7.

Maintaining 'good governance' principles

A concern with involving local Māori more in regulatory decision making is that they are more likely than local authorities to encounter situations where they have a conflict of interest as regulators. This would be the case where they are regulating business competitors, or have both a kaitiaki and a business interest in a natural resource (such as water).

However, there are processes available to manage such concerns. For example, a perceived lack of independence by manawhenua sitting as independent hearings commissioners may simply be about the internal controls on conflicts of interests that an iwi has. The Commission was advised that it was not necessarily always important that a member of local manawhenua adjudicates matters of tikanga—what was important was that they have some say or confidence in the person chosen to adjudicate. This would recognise rangatiratanga while protecting against a lack of or loss of independence.

There is also some concern that recognising tikanga Māori will in some way privilege Māori interests or enable Māori to 'capture' the regulatory system for pecuniary interest. Whether recognising tikanga Māori is likely to give special advantage to Māori is not straightforward. It needs to be said that recognising Māori customary law ought to make the practice of Māori custom easier—that is one reason to recognise it, and is entirely compatible with the nature of New Zealand's constitution, and the generally accepted Treaty law that Māori language and custom are a taonga whose 'active protection' is guaranteed by the Treaty.

On the other hand, it is reasonable to object to custom being distorted or used as an excuse for inappropriate commercial gain. Such gain would run counter to the kaitiakitanga and manaakitanga values that exist within tikanga Māori. Adequate systems, processes, and rules can avoid this. Box 9.5 sets out the example of customary fishing arrangements. Although not an area that local authorities regulate, it sets out

a good model for recognising the kaitiakitanga role local Māori can play within an arrangement of checks and balances that mitigates against the abuse of customary law.

Box 9.5 Tangata tiaki and customary fishing

The Fisheries (Kaimoana Customary Fishing) Regulations 1998 allowed tangata whenua of an area to appoint a 'kaitiaki' or 'tangata tiaki'. This person, or group of persons, once confirmed by the Minister of Fisheries, gains the power to authorise individuals to take aquatic life for customary, non-commercial food-gathering purposes. These authorisations can require that the taking of the fisheries resources be consistent with the tikanga of the tangata whenua of that customary food-gathering area. Some examples of the types of authorisations that could be granted are when food is required for koha, tangihanga or a big hui.

Although the tangata tiaki is to apply custom in the first respect, an authorisation by the tangata tiaki to gather food can be judicially reviewed by the general courts on the grounds that it is not 'customary', or that it is for commercial gain. There is therefore a judicial backstop that ensures accountability and that the tangata whenua do not abuse or overly exploit what is 'customary'.

"I would contend that provided the court does not dictate the content of the custom and only operates to prevent an overly expansive interpretation of custom, there seems to be an appropriate balance struck by the legislation as to the proper adjudicatory and decision-making mechanisms."

Source: Coates, 2009, pp. 33-35.

Managing the costs involved

In response to the question about regulatory variation due to the effect of the Treaty on how local authorities undertake their regulatory functions, submitters noted:

Consultative requirements and costs incurred by firms that require consents may be higher than otherwise. Approvals may be delayed. Some proposals may not materialise. (Local Government Forum, sub. 15, p. 17)

In relation to Iwi input into Resource consents there will be extra costs on applicants and Council. This is part of the co-governance arrangements that will be agreed to between the Crown and Iwi. These costs will need to be accommodated as part of Iwi joint management agreement or joint committee arrangements and associated administrative costs in establishing these co-governance arrangement costs could be significant for local government. (Hauraki District Council, sub. 59, p. 5)

Including Māori in regulatory decision making is not costless, just as it is not without benefits. For example, expending effort on including Māori in the decision-making process well may save time and money on appeals later. Approaches that submitters described as cost-effective are covered further in section 9.8.

9.8 Mechanisms for meshing the two systems of governance

The RMA vests statutory authority to regulate for environmental management in the Crown and local government, but that statutory authority must be exercised in a way which recognises the rights and protections of Māori under the Treaty of Waitangi and relevant legislation. The challenge is to find ways to mesh the two systems of governance: the system established by the RMA and the expression of kaitiakitanga by Iwi. As the Waitangi Tribunal has recognised, although Māori groups seek control of taonga Māori, "there will be occasions where that cannot, indeed should not, be the result" (Waitangi Tribunal, 2011, p. 112). This means that Māori should not necessarily be accorded exclusive control in all situations where a taonga is identified or a kaitiaki relationship established. There are many overlapping and conflicting interests and it is impractical and unfair to adopt a single remedy without recognition of these other interests. What is needed is a system which allows all legitimate interests to be considered against an agreed set of principles and balanced case by case.

As well, the effectiveness of decision-making processes will stand or fall on whether the process will work for the levels of capability present amongst the participants. At present, there is often a mismatch between the requirements of the system (notably timeframes), and the ability of Māori participants to meet them.

The LGA includes a requirement that local authorities have a policy on building Māori capability to participate in decision-making processes. The practical effect appears to have been patchy, but has largely resulted in the establishment of Māori committees. Given the range and nature of capacity constraints faced by Māori seeking to engage in local authority decision making, this appears somewhat inadequate.

The aim for local authorities should be to support Māori who are involved in decision making with sufficient inclusion of tikanga Māori in plans, policies and regulations to be able to meaningfully adjudicate whether or not particular proposals align with tikanga Māori.

R9.1

Local authorities should aim to support Māori who are involved in decision making with sufficient inclusion of tikanga Māori in plans, policies and regulations to be able to meaningfully adjudicate whether particular proposals align with tikanga Māori.

Recent proposals to formally include an opportunity for Māori to provide advice to local authorities before a decision (MfE, 2013, pp. 65-67) may also misalign the process for including Māori with their level of capability. Policy analysis is not a key purpose of most Māori groups and consequently they are not likely to have much capacity in that area. Māori groups are better placed to contribute in setting the agenda for analysis and then considering its implications once that analysis is presented.

Irrespective of process requirements and who does or does not have Treaty duties, Māori, and particularly local iwi are a significant community of interest within any given local authority. Effectively and appropriately involving Māori in the decision making of a local authority would be a matter of good practice, even if there were not statutory requirements to do so. In practice, there may need to be both a reconsideration of the statutory processes for including Māori in decision making, and further attention by local government to its responsibilities to build the capability of Māori to participate in decision making.

The next section discusses some good practices that may help.

Mechanisms for enabling iwi control, management and influence

Co-management

Co-management is a broad concept, covering a spectrum of arrangements from information provision and consultation at one end to full decision making and control at the other.

In 2005, the RMA was amended to provide for JMAs (see s 36B of the RMA). JMAs can be entered into between local authorities and iwi authorities or groups that represent hapū, and they can provide for the joint performance of any of the local authority's functions, powers or duties under the RMA relating to natural or physical resources. Co-governance and co-management agreements have also been reached through Treaty of Waitangi settlements.

The Waikato-Tainui Raupatu Claims (Waikato River) Settlement Act 2010 provides for co-governance and co-management of the Waikato River. Governance functions are carried out by the Waikato River Authority, which is made up of an equal number of members appointed by the Crown (by including regional and local councils) and members appointed by certain tribal groups recognised as river iwi. Māori-appointed commissioners participate in hearing committees and boards of inquiry in respect of applications for resource consents for activities which affect the river. The Act also requires JMAs between Waikato-Tainui and relevant local authorities that recognise certain spiritual and cultural imperatives in policy and planning instruments, and joint decision-making powers or iwi influence in particular circumstances.

The experience of Ngāi Tahu with Environment Canterbury regarding Te Waihora (Lake Ellesmere) may also be instructive. It is a partnership that is deepening over time, and may yet become a local authority-initiated (rather than statutorily required) joint management agreement. It illustrates both that it is possible to develop a partnership with Māori under the existing RMA arrangements, but also that co-governance is

something that comes at the end of a long process of developing a partnership, rather than being the first thing that a local authority will leap to. More explicit provision for intermediate steps within the RMA might lead to more local authorities looking to deepen the existing partnerships they have with Māori.

Iwi representatives or commissioners on council committees

- Environment Canterbury noted that the legislative changes made by the Environment Canterbury (Temporary Commissioners and Improved Water Management) Act 2010 provided the council with the opportunity to have an appointed Ngāi Tahu commissioner in the governance structure. A commissioner was nominated by Ngāi Tahu and is a senior member of that iwi. Environment Canterbury commented in its submission that this mechanism:

... has worked immeasurably well in Canterbury in that a trusted and respected member, with the confidence of the iwi, is able to contribute to the ultimate decision making process of our council on significant land, water and environmental matters. This has been a significant component of the growing relationship with Ngāi Tahu and we believe that appointment opportunities for iwi members in local government governance structures should be considered. (Environment Canterbury, sub. DR 97, p. 3)

- Tauranga City Council noted that it includes tangata whenua representation on joint committees (such as the Smart Growth Implementation Committee and the Tauranga City Council/Tangata Whenua Joint Committee). (Tauranga City Council, sub. DR 65, p. 16)

Regular meetings with iwi and iwi representatives

- The Waimakariri District Council described how it meets regularly with local iwi to deal with both general and specific issues of regulation and environmental management:

... it holds monthly meetings with Te Rūnanga Executive, and an Annual Hui for all Rūnanga members, residents of Tuahiwi and Marae Trustees, representation from Te Rūnanga O Ngāi Tahu, Councillors and staff. These meetings and the Annual Hui provide the opportunity to address all resource management issues, and difficulties with consent or District Plan processes, and any servicing issues. These meetings cover the scope of all regulatory functions that the Council performs as they affect Ngāi Tūāhuriri and include, from time to time, issues of particular relevance to them, including lowland stream water quality (in relation to Council drainage maintenance and esplanade improvement works), potable water quality, and other regulations that enhance environmental protection and improve quality of services. (Waimakariri District Council, sub. 30, p. 6)

Joint planning committee

- The Hawke's Bay Regional Council has focused on including Māori in the development stage of regulation, rather than restricting the role of regional iwi to reacting to a proposal of an applicant or the council. The council has established a joint Regional Planning Committee with the representatives of the mandated Treaty claimant groups with an interest in the region. The committee is based on equal representation of councillor and iwi members. The council submitted that:

By focusing the input of Māori into regulation at the development stage the hoped for outcomes include: less likelihood of the fragmentation of regulation (through possible river boards), a reduction in the costs of decision making, greater certainty for stakeholders and the wider community, and the potential for reduced conflict and entrenchment of positions over resource management issues. (Hawke's Bay Regional Council, sub. DR 67, p. 8)

Joint management agreements

- The Waikato River Authority is an example of a joint management agreement that establishes co-management and co-governance of the Waikato River by iwi and council.
- An example of a joint management agreement at the 'weaker' end of the spectrum is the joint management agreement between Taupō District Council and Ngāti Tūwharetoa, which enables an owner of Māori freehold land to apply to have their resource consent application heard by a joint committee from the district council and Ngāti Tūwharetoa.

Memorandum of Understanding

- Hurunui District Council has a formal Memorandum of Understanding with Ngāi Tahu and local Rūnanga which sets out an agreement about how they will work together (Hurunui District Council, sub. DR 96, p. 9).
- LGNZ's submission provided an example of charters of understanding between a regional council and regional iwi:

The Greater Wellington Regional Council has a charter of understanding signed by the seven iwi in the region and has an active relationship with these iwi. Each of them has a different role and each was invited to nominate somebody with the skills that the new committee requires. When we last surveyed councils on this topic more than 50% of councils had negotiated charters of understanding with local iwi or hapū. (LGNZ, sub. 49, p.13)

Operational policies and structures.

- Tauranga City Council has established clear policies on: consultation with tangata whenua on resource consent applications; the monitoring of earthworks by tangata whenua; cultural impact assessments; the remuneration of external representatives (including tangata whenua) on council committees; and koha. The council also has a dedicated Takawaenga Māori unit to facilitate relationships with tangata whenua and to maintain and monitor the implementation of the iwi/hapū protocol agreements (Tauranga City Council, sub. DR 65, p. 17).

Informal processes

- Hurunui District Council submitted that "this area is regulated enough and councils and Māori will form their own plans and working arrangements according to the needs of their particular areas." It noted that, although it has a formal Memorandum of Understanding with local iwi, in practice informal processes for consultation and information sharing "brings about the most gains" (Hurunui District Council, sub. DR 96, p. 9).

9.9 Conclusion

It is generally accepted that the Crown cannot delegate its Treaty duties when it delegates regulatory functions. This gives central government an interest in how well those duties are performed across the local government sector. There are clear gaps in performance. However, the effectiveness of decision-making processes will stand or fall on whether the process will work for the levels of capability present amongst the participants. At present, there is often a mismatch between the requirements of the system (notably timeframes), and the ability of Māori participants to meet them.

Effectively involving Māori in local decision making requires meshing two systems of governance—tikanga Māori and the rule of law. Effectively meshing the two systems can be achieved by focusing on:

- establishing appropriate 'secondary rules' about who decides on what, when, and how;
- supporting Māori decision makers with appropriate provisions for tikanga Māori in rules and plans; and
- providing appropriate legal backstops and safeguards.

These solutions may be more diverse than simply extending the use of co-management agreements.

There is already plenty of experimentation occurring within local government at involving Māori in decision making, although it is distributed unevenly across the sector. Practice is likely to continue to develop—effective relationships deepen over time, and will call for new approaches to develop in response.

10 Monitoring and enforcement

Key points

- Monitoring and enforcement activities are critical to effective regulation. Investment in good policy-making processes can be significantly undermined if monitoring and enforcement are done poorly.
- The Commission has reviewed local authority practices against four features of an effective enforcement strategy: a risk-based approach, sufficient compliance monitoring, adequate enforcement tools and sufficient penalties to deter non-compliance.
- There are indications of a low level of prioritisation of monitoring and enforcement resources based on risks. This situation can be improved by pooling experience and databases among councils to identify trends and patterns in compliance, and encouraging councils to separate their monitoring and enforcement activities and budgets from consent processing activities and budgets. Improvements in monitoring will also come about through formal coordination between councils and other monitoring and enforcement agencies.
- Improvements in enforcement tools and penalties are required. Constraints on the use of infringement notices—combined with the low level of fines where infringement notices can be used—can inhibit councils’ capacity to encourage compliance with regulation. To address this:
 - The agencies responsible for regulation that local government enforces should work with Local Government New Zealand (LGNZ) to identify regulations that could usefully be supported by infringement notices and identify penalty levels that are disproportionately low, relative to the offence.
 - Section 259 in the Local Government Act 2002 (LGA)—relating to the empowerment of infringement notices—should be amended to enable regulations to be made for infringement notices for similar kinds of bylaws across local authorities, rather than on a council-specific and bylaw-specific basis.
- Taken together, these proposals will improve council enforcement strategies and enhance the ability of the wider regulatory system to generate desired outcomes.

Chapter 1 explained that a regulatory regime involves a number of components: setting a regulatory standard, monitoring compliance with the regulatory standard, taking enforcement action when there is non-compliance and performance review. This chapter deals with two of these components: monitoring compliance against regulatory standards and taking enforcement action. Chapter 8 considers local government decision-making processes more generally.

Monitoring and enforcement are critical to effective regulation. As noted in Chapter 4, investment in good policy-making processes can be significantly undermined if monitoring and enforcement are done poorly or insufficiently.

Monitoring and enforcement activities should be viewed by councils as two elements of a broader ‘enforcement strategy’ that aims to promote compliance with regulatory standards. An effective enforcement strategy has four features: a risk-based approach, sufficient compliance monitoring, adequate enforcement tools and sufficient penalties to deter non-compliance.

The chapter assesses how well local authorities take account of these four features in their enforcement strategies, and recommends improvements to address areas of weakness.

10.1 Framework for promoting compliance with regulatory standards

An enforcement strategy that promotes compliance with regulatory standards should be based on a good understanding of why people comply with such standards, a judicious mix of compliance promotion and deterrence and a risk-based approach to targeting enforcement efforts.

Understanding why people comply with regulatory standards

There is no single enforcement tool that will maximise regulatory compliance. Rather, a range of tools will influence different motives in compliance behaviour—with moral suasion, trust and persuasion on the one hand, and the threat of detection and punishment on the other. These are often referred to as compliance versus deterrence models of regulation (Reiss, 1984).

While the majority of people want to do the right thing by complying with regulations, compliance activity is necessary to ensure that people modify their behaviour to comply with regulations. A deterrence model considers how people weigh up the benefits and costs of breaching a regulatory standard (Becker, 1968; Stigler, 1970).

In a deterrence model, the cost of non-compliance is the threat of being penalised. The size of this threat depends on the probability of being discovered and punished, and the severity of the penalty. The probability of being caught is in turn linked to the level of monitoring undertaken by the regulator. The individual will also weigh up the probability that, once non-compliance is detected, the regulator will apply the full penalties available to it.

This way of thinking about compliance behaviour indicates that there is a strong connection between the effectiveness of a regulatory regime and the level of monitoring by a council, the severity of penalties that can be imposed under the regulation and the council's ability and willingness to actually impose these penalties.

The difficulty that local authorities face—when designing enforcement strategies—is that compliance behaviour is motivated by many factors, and motivations will vary between different regulated actors in different situations (Box 10.1). This means that an enforcement strategy will have a different impact on differently motivated individuals and organisations (Gunningham, 2010).

Box 10.1 Factors motivating individuals and firms to comply with regulatory standards

Simple models of deterrence are only part of the explanation of the underlying motivations of individuals and firms to comply with regulatory requirements. More sophisticated compliance models incorporate the following factors:

- **bounded rationality**, where it is acknowledged that people have limited knowledge and capacities to process information and make rational decisions (Simon, 1982), and where simple 'decision rules' (such as 'intuition') are used to rationalise and deal with the complexity and uncertainty in formulating decisions (Tversky & Kahneman, 1981);
- **informal sanctions**, which include negative publicity, public criticism, embarrassment and shame, loss of 'corporate prestige' and reputation (for example, Makkai & Braithwaite, 1994; Paternoster & Simpson, 1996);
- **cooperation and trust** between the regulator and those regulated (for example, Scholz, 1984; Axelrod, 1984); and
- the need for **legitimacy** by firms in the eyes of the government, industry peers and the public (Edelman & Suchman, 1997).

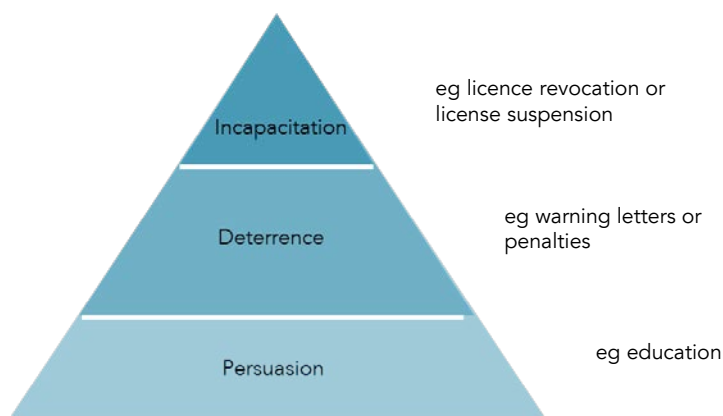
Source: MED, 2010.

A judicious mix of compliance promotion and deterrence

Most regulatory specialists now argue, on the basis of considerable evidence, that a judicious mix of compliance promotion and deterrence is likely to be the best enforcement strategy (Gunningham, 2010). The enforcement challenge is striking the right balance between persuasion and coercion in securing regulatory compliance. This balance may differ between regulatory regimes. Similarly, the ideal balance of persuasion and coercion may differ between local authorities due to differences in the populations being regulated.

A 'multi-pronged' regulatory enforcement strategy is needed in order to address the diverse compliance motivations of those regulated (MED, 2010). The complexity of compliance behaviour has led to the idea, first put forward by Braithwaite (1982), that compliance is most likely—and most effective—when a regulator displays an explicit enforcement pyramid with a hierarchy of graduated responses to non-compliance (Figure 10.1). Responses to non-compliance should range from persuasion to more hard-edged responses such as criminal penalties. Having a range of responses available allows regulators to tailor enforcement strategies to the behaviour of individual parties and use available monitoring resources most effectively.

Figure 10.1 Braithwaite's enforcement pyramid



An implication of the enforcement pyramid approach is that coercive enforcement strategies would only be used after persuasive methods have maximised voluntary compliance (Ayers & Braithwaite, 1992). This approach acknowledges that most regulatory action occurs at the base of the pyramid, where compliance is sought through persuasion but escalated when compliance is not forthcoming.

However, care is needed when applying this approach. Ayers and Braithwaite note that compliance is most likely when regulators "have access to an armoury of deterrent and incapacitative weapons", but they also note the potential for misusing this armoury. Regulators "must avoid both the mistake of selecting a sledge hammer to swat a fly and selecting a flyswatter to stop a charging bull" (Ayers & Braithwaite, 1992, p. 52).

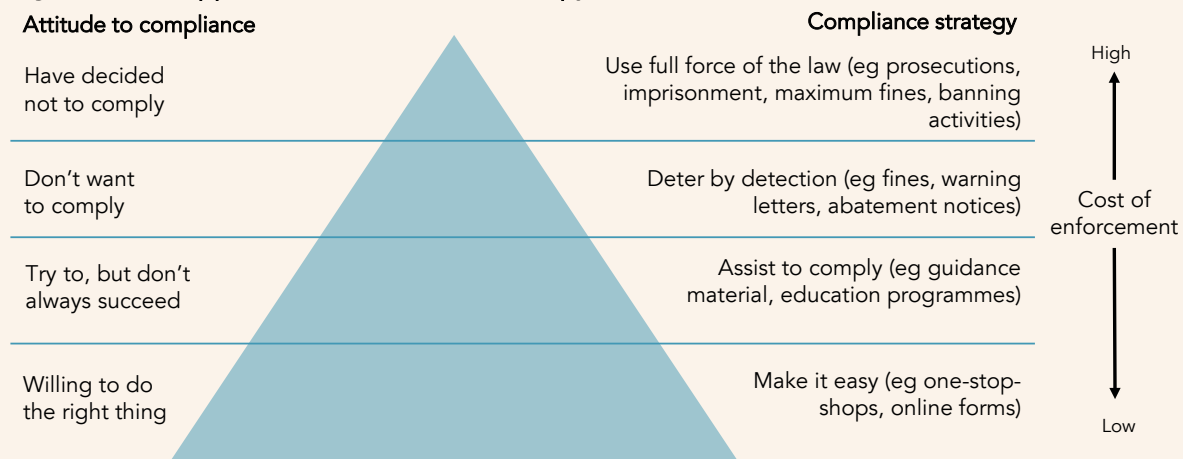
This emphasises the importance—when applying the enforcement pyramid approach—of ensuring the adequate potency of the upper limits of sanctioning. As noted, the enforcement pyramid, and balance of enforcement measures, could look different across different regulatory regimes. For example, high-risk regulatory activity may have tougher enforcement tools and sanctions compared with lower-risk regulatory activity. Box 10.2 applies the enforcement pyramid approach.

Box 10.2 Application of the enforcement pyramid

Figure 10.2 applies the enforcement pyramid. At the base of the pyramid, compliance is encouraged by appealing to individuals' social responsibility and leveraging cooperative approaches. This level recognises that the majority of people want to do the right thing by complying with regulations. For these people, the ideal strategy is to make compliance as simple and easy as possible—for example, by implementing online application processes or having convenient opening hours for lodging paperwork.

Further up the pyramid are people who are willing to comply with regulations but, for whatever reason, do not always succeed. These people need to be assisted to comply by, for example, providing guidance material or education programmes. Still further up the pyramid are those who do not want to comply. For these people, the strategy escalates to a deterrent threat (warning letters, fines, publicity around successful prosecutions), thereby appealing to their rational self-interest. Finally, at the top of the pyramid there are a small number of individuals who decide not to comply. These people should face the full force of the law (Aryes & Braithwaite, 1992).

Figure 10.2 Application of the enforcement pyramid



Ayres and Braithwaite (1992) draw on the compliance literature to summarise the important insights to be considered when examining the efficiency and effectiveness of monitoring and enforcement regimes.

- A complex set of economic, psychological and sociological factors underpins regulatory compliance decisions. Individuals and firms have different motivations based on values, social responsibility, economic rationality and law-abidingness. These play out in different contexts and situations.
- Some individuals and firms will comply with the law if it is economically rational for them to do so. Most individuals and firms will comply with the law most of the time simply because it is the law.
- A strategy based totally on persuasion will be exploited when actors are motivated by economic rationality.
- A strategy based totally on punishment will undermine the goodwill of actors when they are motivated by a sense of responsibility.
- Punishment is expensive; persuasion is cheap. A strategy based mostly on punishment wastes resources on litigation that would be better spent on monitoring and persuasion.
- A strategy based mostly on punishment fosters organised resistance to regulation by business and industry.

- Voluntary compliance is most likely when a regulator displays and applies an explicit enforcement pyramid with a hierarchy of graduated responses to non-compliance; moving to more coercive measures only when less coercive means fail.

A risk-based approach to targeting enforcement efforts

Local government cannot regulate to remove all risks because the incremental costs of removing risks rise sharply. Regulatory action, when taken, should therefore be proportionate, targeted and based on an assessment of the nature and magnitude of the risks and the likelihood that regulation will be successful in achieving its aims. Risk-based approaches are a prominent feature of New Zealand's regulatory landscape, used in areas such as border security, financial services regulation and food safety.

Sparrow (2000) sets out the following core elements of a comprehensive risk-based approach to regulatory compliance:

- systematic identification of important hazards, risk or patterns of non-compliance;
- emphasis on risk assessment and prioritisation as a rational and publically defensible basis for resource allocation decisions;
- the development of an organisational capacity for designing and implementing effective, creative, tailor-made solutions for each identified risk;
- use of a range of tools for procuring compliance and managing risks; and
- recognition of the need to retain and enhance the agency's enforcement 'sting', while using enforcement actions economically and within the context of coherent enforcement strategies.

Risk-based approaches sit alongside the strategic use of an enforcement pyramid as a critical element of an effective and efficient enforcement strategy. While an enforcement pyramid approach provides guidance about the types of enforcement and compliance tools to apply and how to apply, these in a graduated way, a risk-based approach offers an evidence-based means of targeting the use of regulatory resources.

Four features of an effective enforcement strategy

Based on the considerations above, an effective enforcement strategy should have four features: a risk-based approach, sufficient compliance monitoring, adequate enforcement tools and sufficient penalties to deter non-compliance.

- **Risk-based approaches** are important because local government is faced with limited resources and must make efficient and effective choices in enforcing regulations.
- **Sufficient monitoring** is important because the probability of being caught is linked to the level of monitoring undertaken by the regulator. A higher probability of being caught provides a greater deterrence effect.
- **Adequate enforcement tools** are important because having a range of available responses allows regulators to tailor enforcement strategies to the behaviour of individual parties, and use available monitoring resources most effectively.
- **Sufficient penalties to deter non-compliance** are important because without these, there is no 'teeth' behind an enforcement strategy.

The rest of this chapter assesses the performance of local authorities against these four features.

10.2 Implementation of risk-based approaches by councils

Some risk prioritisation in relation to activities

Submissions from local authorities indicate that there is a range of different ways in which councils identify and prioritise areas of high risk. Two common ways are:

- to look at the risks in different types of *activities*; or
- to look at risks in different *behaviours* of people or organisations that are being regulated.

Some councils categorise regulated activities according to the risks they entail. For example, Opotiki District Council regulates liquor licences for taverns more closely than those for restaurants (sub. DR 106, p. 6). Similarly, under Auckland's Health and Hygiene Bylaw, procedures that break the skin (tattooing) require a licence, while those that do not break the skin (sun beds) do not (Auckland Council, sub. DR 97, p. 14). Categorising activities based on the risk they entail is a useful way of prioritising council resources towards areas of high risk, provided there is good evidence that some activities have higher risks than others.

Indications of a low level of prioritisation based on behavioural risks

While in some cases activity-based risk assessment is the best option, the drawback of just using an activity-based approach is that it does not distinguish between businesses within a category of activities. Some people or businesses may be more willing to comply than others, and their activities may not need to be monitored so closely. Other people or businesses, on the other hand, may be frequent objects of complaint and this provides a useful indicator that their activities need to be monitored more closely.

Behaviour-related risk profiling has the potential to improve the targeting of compliance activities. Northland Regional Council, for example, enforces its regulation of farm dairy effluent by following up inspections of all dairy farms (prioritised according to the impacts of adverse events), with visits to farms that are non-compliant or whose owners request a visit (sub. DR 77, p. 12).

As well, where the costs of monitoring are recovered from the regulated parties, scaling the volume of monitoring to the particular behavioural risks of individual businesses has the potential to further encourage compliance, as the example of trade waste consent fees illustrates:

In the trade wastes area consents fees and associated monitoring costs are based upon risks created by the discharger, the lower the risk, the lower the fee. Through improvements in the behaviour or quality of their discharges they can achieve reduced monitoring and consent fee costs or get to the stage where we exempt them from the need for a consent. Others who fail to meet their obligations face increased costs. Trade wastes management is done at a local level. (Gordon George, sub. 13, p. 7)

There are indications that local authorities do not focus their monitoring and enforcement resources sufficiently on high-risk activities. For example, the Office of the Auditor-General's (OAG) 2007 performance audit of twelve District Licensing Agencies (DLAs) concluded that DLAs needed to improve their approaches to risk-based regulation:

The DLAs we visited were unable to provide us with a clear rationale, based on a target level of assurance about compliance with the Act, for their monitoring strategies. DLAs were aware of high-risk premises from their contacts with the Police and public health services. However, better co-ordination and analysis of intelligence, an emphasis on active, risk-based monitoring for all licence types, and the use of monitoring results to report on trends in compliance would improve the focus and efficiency of compliance monitoring. (OAG, 2007a, p. 6)

A review of liquor licensing activities in twelve local authority annual reports lends support to this view. Only three of the twelve annual reports provided a clear indication that the council took a risk-based approach to monitoring liquor premises. Most annual reports did not provide a clear indication either way. In addition, there appears to be a wide variation across councils in the frequency with which they inspect liquor premises (Table 10.1).

Table 10.1 Local authority liquor licence monitoring frequency

Local authority	Number of premises	Number of inspections	Number of inspections per 100 premises	Formal risk-based approach?
Auckland Council	3,757	3,757	100	No
Hamilton City	298	251	84	Yes
Tauranga City	302	423	140	Unclear
Wellington City	718	560	78	Yes
Dunedin City	427	444	104	Unclear
Napier City	226	226	100	Yes
Kāpiti Coast District	137	62	45	Unclear
New Plymouth District	210	210	100	Unclear
Masterton District	33	22	67	Unclear
Nelson City	166	350	211	Unclear
Westland District	85	55	60	Unclear
Waimate District	28	28	100	Unclear

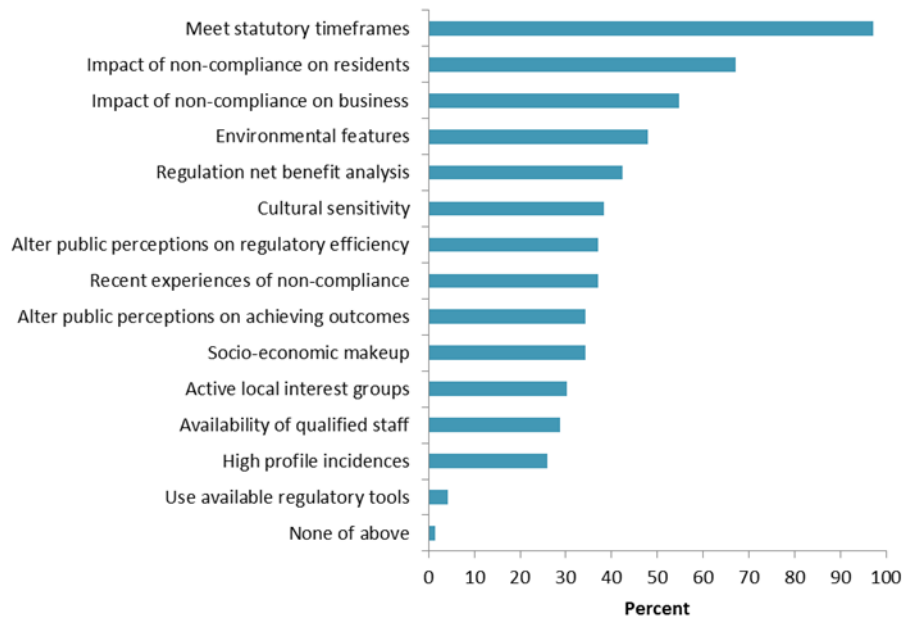
Source: Productivity Commission analysis of annual reports and information provided directly by territorial authorities.

Council views on statutory timeframes and funding mechanisms

Statutory timeframes are rules set in statutes such as the Resource Management Act 1991 (RMA) that require councils to complete consent processes or other tasks within a certain time period. Statutory timeframes are a way of reducing the holding costs faced by individuals and businesses.

Local authorities have suggested that requirements to meet statutory timeframes are distorting the allocation of regulatory budgets (Ashburton District Council, sub. 40, p. 7; Hutt City Council, sub. 51, p. 16; Waimakariri District Council, sub. DR 63, p. 6; Opotiki District Council, sub 106, p. 6). In particular, councils suggested that they spend a significant amount of their regulatory budgets on administrative processing in order to meet statutory deadlines, with the result that other important regulatory tasks such as monitoring and enforcement receive less attention.

Results from the Commission's survey of councils show that statutory timeframes are a key driver of regulatory resource allocation—with over 97% of respondents identifying statutory timeframes as important (Figure 10.3).

Figure 10.3 Drivers of resource allocation to regulatory functions

Source: Productivity Commission, 2012b.

However, Tasman District Council noted:

Statutory timeframes for consent processing have not, in Tasman's case, diverted us away from meeting our monitoring and enforcement responsibilities. (Tasman District Council, sub. DR 61, p. 5).

Several submissions from local authorities also indicated that monitoring and enforcement activities are under-resourced because councils cannot recover monitoring costs from regulated parties (for example Waitomo, sub. DR 95, pp. 3-4 and Waikato Regional Council, sub. DR 92, p. 5). In the absence of cost recovery mechanisms, monitoring and enforcement activities compete for rates-based funding in councils, and rates-based funding allocation does not sufficiently prioritise monitoring and enforcement.

The lack of prioritisation of rates-based funding towards monitoring and enforcement should be addressed by councils directly, rather than necessarily through cost-recovery mechanisms. In some instances, local authorities may need to rethink the priority they accord to monitoring and enforcement.

Proposed improvements

Increasing the level of prioritisation based on risks

Increasing the use of risk-based strategies to allocate monitoring and enforcement resources is challenging for a number of reasons. These reasons include the difficulty of finding evidence of risk, the difficulty of assembling a large enough set of regulatory cases to make judgments about risks and potential public resistance towards profiling potential non-compliers (Box 10.3).

Box 10.3 Challenges in adopting a risk-based approach to allocating monitoring and enforcement resources

- Public perceptions of risk (sometimes amplified by the media) can place pressure on regulators to increase monitoring above the level suggested by an objective risk assessment.
- Focusing on more significant risks can overlook smaller risks, which can accumulate into a significant threat to the desired regulatory outcome.
- Because risk-based approaches tend to focus on known or familiar risks, regulators can fail to detect new and emerging risks that may be 'off the radar'.
- Regulators who focus on highest-risk events can lose sight of the need to achieve the greatest risk reduction for the given level of enforcement expenditure. If the highest-risk areas are very costly to enforce, there may be greater net benefit from spending a limited enforcement budget on reducing numerous smaller risks.
- There may be public resistance towards 'profiling' potential non-compliers, particularly if there are concerns that low risk activities are in fact being targeted.

Source: Baldwin & Black, 2008; Peterson & Fensling, 2011.

A particular concern is that many local authorities may struggle to undertake risk profiling on their own, because the small volume of compliance work that many local authorities undertake will be insufficient to identify trends and patterns in different groups.

There is an opportunity for central government agencies to assist in this kind of work. For example, police data on incidents at licensed premises may help councils to target their liquor licensing inspection activity. Another example is the Ministry for the Environment's use of RMA survey results and analysis of court judgments relating to the RMA to assess regulatory risks.

There are also opportunities for councils to work together to pool their experience and databases to identify trends and patterns in different groups.

However, exchanging information may be complicated by important privacy considerations, incompatible data management systems or differing priorities. An example of differing priorities is that the police might be particularly concerned about the sale of alcohol to minors, while councils might place a higher priority on noise around licensed premises.

R10.1

To promote risk-based allocation of monitoring and enforcement resources in councils, the Department of Internal Affairs, Local Government New Zealand and the Society of Local Government Managers should identify opportunities to pool regulatory experience and databases among councils and central government regulators, to identify trends and patterns in compliance. This work should involve the Privacy Commissioner in order to protect the integrity of private information.

Ring-fencing monitoring and enforcement activities and budgets

The strategies that councils use to prioritise resources while still meeting statutory timeframes are:

- *Allocation of consent processing and consent monitoring responsibilities to two different teams.* For example, Nelson City Council notes that as a result of allocation to two teams, "there is almost no cross-over consequence if consent workloads are difficult to manage in a timely way" (DR 108, pp. 9-10). Tasman District Council has likewise used administrative measures to ensure that monitoring and enforcement resources are not diverted to meet consenting timeframes (DR 61, p. 5).

- *A ring-fenced budget to ensure there is monitoring of permitted activities and the exercise of resource consents.* This includes a minimum baseline resource of staff time for monitoring and responding to non-compliance and complaints (Nelson City Council, sub. DR 108, pp. 9-10).

Ring-fenced budgets and separation of activities are not a failsafe solution to maintaining a focus on monitoring and enforcement. For example, budgets come up for review periodically and, when this happens, there is a risk that ring-fenced budgets will be reduced. However, the Tasman and Nelson examples indicate that there are opportunities for councils to maintain monitoring and enforcement priorities while meeting statutory timeframes.

F10.1

Strategies that councils can use to maintain monitoring and enforcement priorities while meeting statutory timeframes include:

- allocation of consent processing and consent monitoring responsibilities to two different teams;
- a ring-fenced budget for monitoring and enforcement activities

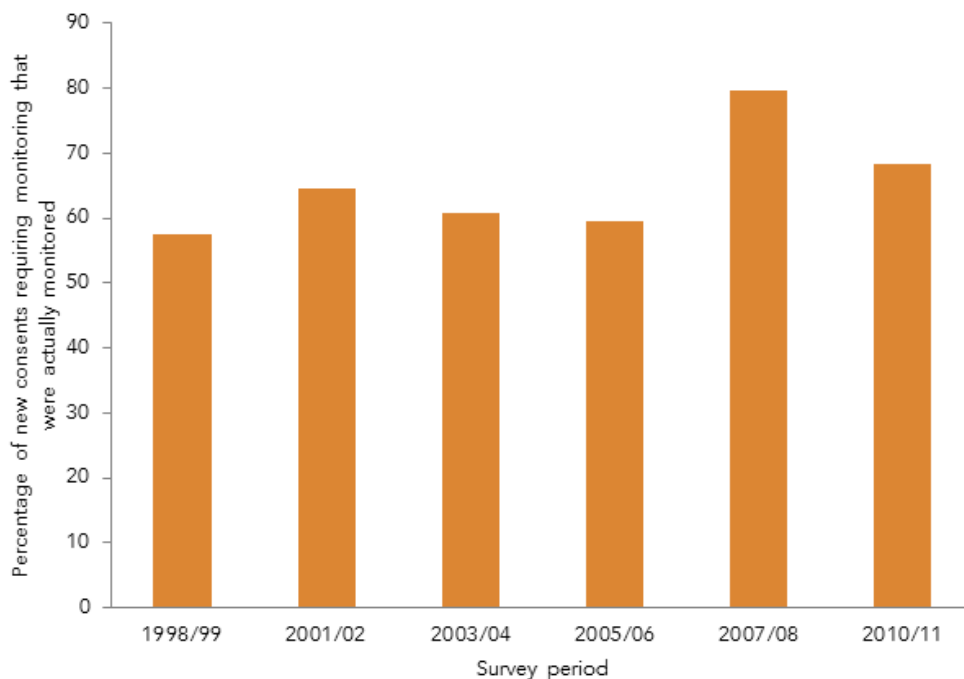
10.3 Sufficiency of compliance monitoring

Assessment of current practices

As noted in Chapter 4, the Commission has heard from a range of local authority inquiry participants that monitoring of local regulation is inadequate in some areas, and that this has undermined the achievement of regulatory objectives.

A review of published RMA data supports the view of councils that they are undertaking insufficient monitoring activity. For example, only 68% of resource consents granted under the RMA for which monitoring was a condition of the consent were in fact monitored in 2010-11 (Figure 10.4 and Table 10.2).

Figure 10.4 Percentage of new consents requiring monitoring that were actually monitored, 1998/99–2010/11



Source: 2010/11 RMA survey data and published survey reports for the periods indicated.

Notes:

1. The 1999/00 result is not provided because it was presented in a manner that did not allow direct comparison with other years.

Table 10.2 Number and percentage of consents requiring monitoring, those monitored and their compliance with consent conditions, 2010/11

Consents processed in 2010/11	Consents requiring monitoring	Consents monitored	Percentage monitored	Percentage compliant
Regional councils (n = 11)	6,411	3,538	55%	77%
Unitary authorities (n = 6)	7,659	5,854	76%	74%
Territorial authorities (n = 61)	6,981	4,989	71%	67%
All	21,051	14,381	68%	72%

Source: MfE survey data, 2012.

The OAG's 2007 report on liquor licensing activities provides further indication of lack of monitoring. In its 2007 performance audit of District Licensing Agencies (DLAs), the OAG commented that:

Staffing arrangements varied in the DLAs we visited, and in every territorial authority the nature and extent of liquor licensing work was different. We were not satisfied that the allocation of territorial authority staff time was appropriate to the range of tasks associated with the scope of the liquor licensing function. Territorial authorities need to carry out a more informed assessment of the range of activities that staff should perform as part of their DLA tasks. (OAG, 2007a, p. 21)

An additional problem is that some local authorities rely much more than other local authorities on the police to carry out the proactive component of liquor licensing monitoring.

Reliance on police monitoring creates a risk of imbalance in the kinds of offences that are monitored and enforced, such that some regulatory risks go largely unmonitored.

Proposed improvements

Section 10.2 suggests that improved coordination between councils and with central government, along with organisational strategies to ring-fence monitoring activities, would increase the focus on monitoring by councils.

Better integration between council and police monitoring activities

An additional improvement to monitoring would be for councils to implement the recent recommendations of the OAG and the Law Commission, in respect of coordination of liquor licensing monitoring.

The OAG noted in 2007 that the parties involved in monitoring and enforcement locally were working together closely, but that there was a need for more formalised collaborative arrangements:

Working relationships between most DLAs and their regulatory partners were close, with DLAs responsive to the needs of the Police and public health services. However, situations had arisen where differences in expectations, priorities, and available resources had highlighted the need for a collaborative arrangement - such as a protocol - recording an agreed approach to processing applications and sharing information. In our view, a protocol would have several benefits, including recording a joint commitment to common goals, developing an understanding of respective roles, and establishing the means to pool collective resources. (OAG, 2007a, p. 21)

Further to this, in 2010 the Law Commission observed:

[A] combined agency protocol for administering, monitoring and enforcing liquor licensing has been adopted in some but not in all locations around the country. We consider that each of the territorial authorities should, as a matter of priority, enter into arrangements setting out how they will work together to administer, monitor and enforce liquor licensing, with the existing combined agency protocol being a minimum standard ... We believe the concerns of the Auditor-General must be addressed at a local level and should be part of the implementation processes when the new legislation

comes into force. Strategic ownership and awareness of alcohol-related issues within key organisations, such as the New Zealand Police and Ministry of Health, is also essential. (New Zealand Law Commission, 2010, p. 385)

R10.2

Territorial authorities should formally coordinate with other monitoring and enforcement agencies, including the police, when administering, monitoring and enforcing liquor licensing.

10.4 Adequacy of enforcement tools

Assessment of current tools

Councils appear comfortable with the range of penalties available to them, except that they consider that infringement notices should be more widely available and the level of penalties through such notices should be increased.

Federated Farmers, on the other hand, urges caution:

Ensuring an enforcement response is scaled to the level of offence is an important principle. We would be concerned that additional enforcement powers are used appropriately and not provide a revenue source that unnecessarily increases enforcement activity. (sub. DR 111, p. 18)

Several Acts covering areas regulated by local government include a provision for infringement notices to be applied in the particular bylaws they authorise. Prominent examples include road traffic offences, litter and certain RMA breaches. In addition, s259 of the LGA enables the Governor-General, by Order in Council, to make regulations prescribing breaches of bylaws that are infringement offences under the Act.

However, regulations enabling councils to impose infringement notices under s259 have to be made on a council-by-council basis. The only infringement notices that have been made on this basis are those under navigation bylaws. This creates a potential gap in the enforcement regimes of some regulations.

These problems are not universal. For example, changes to the Sale and Supply of Alcohol Act 2012 broadened the range of infringement offences, and increased the maximum fines for some offences. Nevertheless, local government participants are generally frustrated that broader access to infringement notices has not been facilitated, and identified a large number of areas where they consider infringement notices would lead to more effective enforcement.

Richard Fisks's submission makes the general case for the value of infringement notices:

Much of a local authority's regulatory functions are authorised by its bylaws. The Act under which bylaws are made may authorise the local authority to enforce certain provisions in bylaws by the use of infringement offence notices. If not, bylaws must be enforced under the Summary Proceedings Act 1957 ... I submit that the enforcement of local authorities' regulatory functions would be significantly more effective and efficient if the use of infringement offence provisions is more widely available than at present. (Richard Fisk, sub. 19, p. 1)

Submitters noted that they were still awaiting the drafting of infringement regulations under the LGA, to enable them to enforce certain regulatory standards (Christchurch City Council, sub. 57, p. 2; Gordon George, sub. 13, p. 1). A range of further submissions made the case for infringement notices to improve the enforcement of particular regulatory standards (Box 10.4).

Proposed improvements to the use of infringement notices are considered alongside improvements to penalties at the end of the next section.

Box 10.4 Councils' views on regulations that would benefit from the availability of infringement notices

Regulation of graffiti, illegal street trading and car window washing

The enforcement of bylaws made under the Local Government Act in relation to issues such as graffiti, illegal street trading and car window washing, would be considerably enhanced if more instantaneous and cost-effective mechanisms, such as infringement notices, were available. Where infringement notices are not available the enforcement of bylaws relies on tools that are often time and resource intensive (prosecution) or do little to act as a deterrent (e.g. seizure of the mops and buckets of car window washers). (Auckland Council, sub. DR 97, p. 8)

An example where costs do not meet the needs of enforcing bylaws is in the case of window washers at intersections in the Rotorua district. Currently to enforce this minor offence information must be laid with the Court for 'a minor offence with a fine not exceeding \$20,000'. For a minor offence of this kind it would be more fitting and efficient for the ability to issue an on the spot infringement to the value of around \$200. (Rotorua District Council, sub. 11, p. 17)

Regulation of swimming pools

Swimming Pool regulations provide no other option other than prosecution for non-compliant swimming pools (and the maximum fine is \$500). Perhaps the possibility of an infringement notice would gain compliance more quickly. The amount of time spent chasing and following on non-compliant fencing where the owner doesn't do anything or make any attempt to get in touch is consistently a common problem which takes weeks to resolve. Another area is the Impounding Act. The only enforcement options available require a huge amount of work and because of this, they are often a last resort and rarely done. Offenders seem to know that we are unlikely to impound goods and as a result, are not often compelled to comply. An infringement notice would be preferable in this instance. (Hurunui District Council, sub. DR 96, pp. 6-7)

Liquor licensing

There does appear to be a void of options in between abatement notices and prosecutions (in relation to liquor licensing). Invercargill City Council is also wary of using 'heavier' enforcement actions for low impact breaches of regulations even when these breaches are on-going. (Invercargill City Council, sub. DR 87, p. 3)

Other areas of regulation

For many other bylaws (for example, controlling signs in public places, keeping animals) the council is not able to create an infringement offence or issue a fine. While there are a range of enforcement tools (seizing property, prosecution), these are often inappropriate for smaller offences. (Palmerston North City Council, sub. DR 79, p. 4)

The very limited ability to set infringement notices for bylaw breaches, only when specific provision to do so, is a problem. E.g. smoking in parks, fires on beaches or skateboarding. (New Plymouth District Council, sub. DR 72, p. 5)

The main regulatory areas that would be more efficiently enforced if infringement notices were available include:

- an infringement regime for any bylaw offences,
- offences under the Local Government Act (eg Fire Hazards),
- offences under the Health Act for general nuisances and failing to register a premise.
- The Fencing of Swimming Pools legislation would also benefit from an infringement regime for failure to bring a pool back into compliance with the Act following an inspection. (Christchurch City Council, sub. DR 88, p. 9)

10.5 Sufficiency of penalties to deter non-compliance

Assessment of current penalties

Inquiry participants have highlighted areas where they believe penalties do not provide a sufficient incentive to comply with regulations or the cost of pursuing the penalty is greater than the penalty itself.

Although some infringement fines—noticeably in the area of the RMA and liquor licensing—have been increased recently, local authorities submitted that further increases are required. Northland Regional Council pointed out that fines for contravening several sections of the RMA have not been reviewed since 1999 (sub. DR 77, p. 12). Tasman District Council suggested that this is a more general problem:

The process of mandating instant fines under the Local Government Act and in relation to navigation safety could be more streamlined. The level of fines where used could be adjusted but this is often just a matter of regular review. For instance it took 11 years to increase a litter infringement fine from \$20, set in 1979, and then a further 16 years to increase it to the current \$400 maximum in 2006 and it is now 2013! (sub. DR 61, p. 5)

The low level of fines can lead to two types of problems. First, it can reduce councils' incentive to impose penalties. For example, LGNZ (sub. DR 109, p. 13) notes that the cost of enforcing and prosecuting illegal dumping offences exceeds the maximum \$400 fine. If this leads to excessive reliance on informal methods to achieve compliance, deterrence can be undermined.

Second, fines may be too low to provide a deterrent. Auckland Council argues that:

... the breach of a rule in a district plan is a \$300 fine. The cost of applying for a resource consent is usually in excess of 10 times this amount. Therefore the "deterrent" effect is minimal and does not impact on some offenders. (sub. DR 97, p. 15)

In relation to prosecutions under the RMA, Environment Court judges are finding that they need to impose higher fines to achieve effective deterrence. For example, in *Waikato Regional Council v Plateau Farms Ltd*, His Honour Judge Thompson in sentencing the defendant said:

I have mentioned the issue of deterrence more than once before. What can be said with certainty in terms of sentencing levels is that of recent times, the Court has been expressing concern that the messages about environmentally responsible farming, and dairy farming in particular, do not seem to be being universally heard.

The Court is well aware that there are substantial efforts at education of farmers to their responsibilities and the major dairy companies have been very much involved in that.

The Court's response, particularly over the last two to three years I think it is fair to say, has been an attempt to drive that message across by increasing the general level of fines imposed for significant offences, particularly where they are committed by substantial farmers.

Similar observations were made by Judge McElrea in *Auckland City Council v Rakesh Kumar Sharma and AVR Enterprises Ltd*:

The cases that are canvassed by council point in different directions. This is partly due to the fact that the cases relied upon by defence council tend to be older cases, often 10 years older or more, and several Environment Court Judges have commented, as have a number of High Court Judges, that the overall level of fines to be expected under the Resource Management Act has increased significantly in recent years.

Proposed improvements

The risk of penalties being used as revenue raising devices—raised by Federated Farmers—needs to be factored into any proposals to broaden or increase fines. It does appear likely, however, that gaps in coverage of infringement notices, together with the low level of fines that have not been reviewed for many years, are reducing the effectiveness of enforcement strategies. The Commission therefore considers that the central government agencies that are responsible for areas of regulation administered by local government should work with LGNZ to identify regulations for which enforcement should be supported by infringement notices and higher penalties. Given the significant potential impact on those who are

regulated, there should be consultation with the affected community before a recommendation is made to government.

Once the Government has decided which regulations need to be supported by infringement notices and their level, it could avoid the implementation problems that have discouraged the use of infringement notices through amending section 259 of the LGA to remove the current requirement to draft regulations on a council by council basis.

Any changes to the level of fines permitted under Acts legislated before 2002 would need to be amended in each Act. Without a process for regularly reviewing these fines, however, their level may become inadequate once again after some years. Options for addressing this include building an indexation factor into each of the Acts in which fines are specified, or implementing a regular review process. The former would be less expensive to administer but the latter would be able to take account of specific circumstances. The appropriate approach for adjusting fines under infringement notices is best considered in the context of a broader review of approaches for adjusting fines that are used across government, as this would avoid creating inconsistencies and would enable the lessons to be drawn from the experience with other approaches.

R10.3

Agencies responsible for regulations that local government enforces should work with Local Government New Zealand to identify regulations that could usefully be supported by infringement notices and penalty levels that need to be increased.

R10.4

Section 259 of the Local Government Act 2002—relating to the empowerment of infringement notices—should be amended to enable regulations to be made for infringement notices for similar kinds of bylaws across local authorities, rather than on a council-specific and bylaw-specific basis.

10.6 Putting the proposals together

The Commission's recommendations in relation to monitoring and enforcement form a package of measures that will improve council enforcement strategies. Improved enforcement strategies will in turn enhance the ability of the wider regulatory system to generate desired outcomes (Figure 10.5).

Figure 10.5 The Commission's proposals to improve monitoring and enforcement



11 Improving regulatory performance assessment

Key points

- Hundreds of regulatory staff and decision makers throughout New Zealand frequently gather information about the performance of a regulatory activity, process or system, and reflect critically on this information. When done well, such activities drive continuous improvement in the way regulation is undertaken.
- Leading practice in performance assessments include some outcome-based annual reports by local authorities, practical Society of Local Government Managers (SOLGM) guidance material, some of the regulatory performance frameworks administered by central government and strong auditor/local authority interaction.
- However, Chapter 4 noted several key weaknesses in current performance assessment practice.
 - Weak system mindset and insufficient feedback loops between central and local government—current performance assessment arrangements do not adequately recognise that regulatory performance is the 'sum of individual parts' of the overall system.
 - Lack of balance in what is measured—local government performance measures are often dominated by measures of timeliness and transactional measures, when a broader range of measures might contribute to better regulatory outcomes.
 - Insufficient focus on use of performance information—nearly six out of ten councils (58%) do not use performance information to improve the administration of their regulatory functions.
- The Commission proposes a package of initiatives to improve performance assessment:
 - The Department of Internal Affairs (DIA) should work with local authorities to remove any instances where authorities provide the same data to more than one department, and make central government administrative datasets available to local authorities to assist in the assessment of regulatory performance.
 - The DIA should work with Local Government New Zealand (LGNZ) and SOLGM to assess the case for common measures of regulatory services, and prepare a framework for implementation.
 - The Treasury, LGNZ and SOLGM should jointly trial a 'health check' of a regulatory regime, in which experts from local and central government would summarise the problems and opportunities in a specific area of local government regulation.
- Taken together, this package should help rebalance the performance assessment framework for local government and promote its usefulness.

This chapter considers how to improve the efficiency and effectiveness of regulatory performance assessment. To be worth the expense and effort, performance assessment should generate the best possible value for the people that assess performance and the people that fund the activity being assessed.

11.1 What is regulatory performance assessment?

Indicators of regulatory performance

Regulations should influence the behaviour of individuals and business, and government itself. The changes in behaviour should lead to correction of market failures and improvement in the efficiency with which resources are used, in turn contributing to broader economic, social, cultural and environmental outcomes.

Additional indicators of good regulatory performance are the quality of the inputs, processes and outputs of regulators. Chapter 1 identifies the following considerations for assessing regulatory quality:

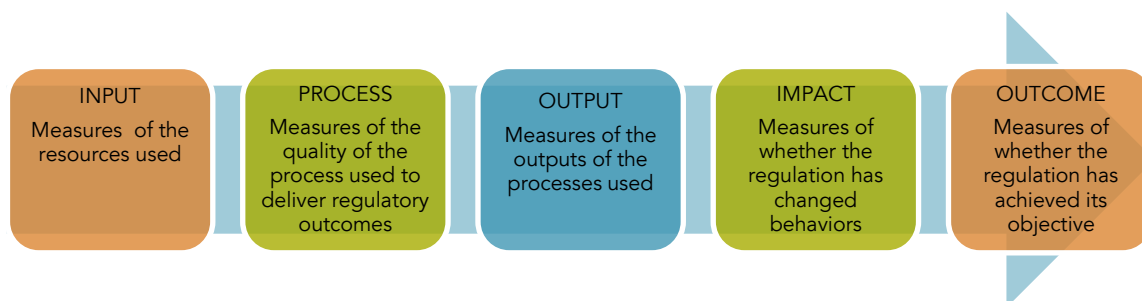
- the adoption of lowest cost, least intrusive methods of achieving mandated aims;
- the application of informed (evidence-based) expertise to regulatory issues;
- the operation of processes that are transparent, accessible, fair and consistent;
- the application of appropriate accountability systems;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

One important indicator of regulatory performance is the capability of regulatory agencies. Chapter 7 discusses capability in more detail, while this chapter focuses on the other indicators of regulatory performance.

Links between indicators of performance

Indicators of effective regulatory performance can be visualised in a chain, to see how each aspect of performance contributes towards the final outcome of regulation (Figure 11.1). The chain of performance indicators emphasises that regulatory performance is as much about understanding and assessing the activities that lead to good outcomes as assessing the outcomes themselves.

Figure 11.1 A chain of regulatory performance indicators



A chain of regulatory performance indicators needs to consider the problem of attribution. That is, to what extent can local authorities attribute good or bad regulatory outcomes to the quality of their inputs, processes and outputs? To what extent do other factors such as the quality of regulatory design or factors unrelated to the regulation affect outcomes? What is the influence of social and economic conditions that are largely outside the control of the regulatory regime? These factors are not easy to identify or measure, but, if neglected, result in an incomplete picture of regulatory effectiveness.

One important implication of the influence of other factors is that central and local government should not measure their own performance in isolation. As noted in Chapter 1, regulatory systems are typically complex, multi-level and mutually dependent. Collaboration is required to put the pieces of the performance puzzle together. This requires performance assessment and performance discussions that cross agency boundaries.

The purpose of performance assessment

The principal purpose of performance assessment is to provide information to decision makers to enable them to improve regulatory performance over time. As such, performance assessment has four tasks:

- collecting the right information on performance;
- putting the information into the right format;
- providing analysis and commentary on performance; and
- sending the information and analysis to the right people, to inform decisions about improving regulatory performance and other decisions.

This definition of the purpose of performance assessment includes holding regulatory decision makers to account in democratic systems. One of the key decision makers in any regulatory system is the voter. On the basis of useful performance information, the voter can assess if his or her council and government is performing adequately, and can make a voting decision accordingly.

The role of performance assessment in the regulatory system

Performance assessment is one element of a wider regulatory system, which Chapter 4 describes as a system consisting of six elements. Figure 11.2 identifies the place of performance assessment in this regulatory system.

Figure 11.2 Place of performance assessment in the wider regulatory system

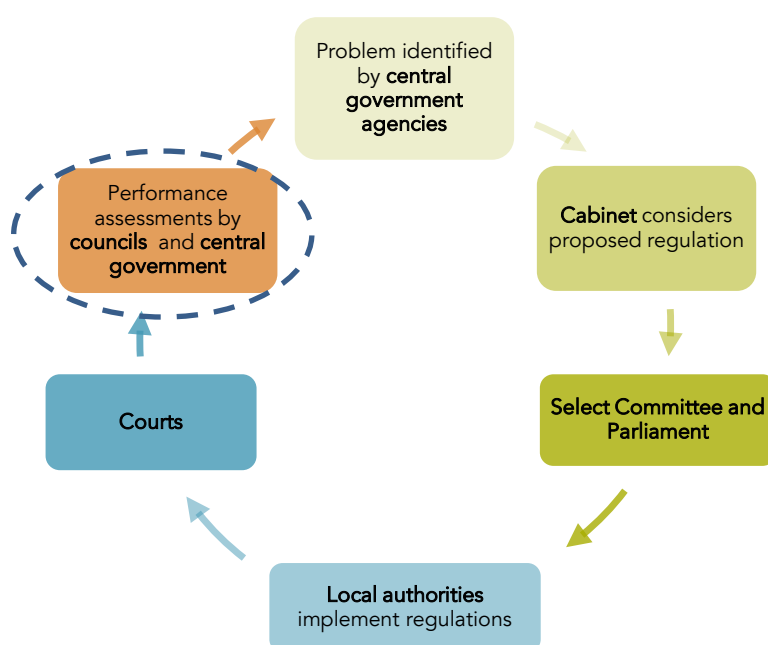


Figure 11.2 illustrates the role of performance assessment in ensuring the wider regulatory system is performing well:

- **Performance is assessed by both central and local government:** The ‘performance assessment’ component in Figure 11.2 contains two separate functions—assessment by councils of their regulatory performance and post-implementation review by departments of the overall performance of the regulation. This emphasises that performance assessment is not a function that is owned by one actor in the regulatory system. Both central and local government have important assessment roles, and interests in the outcome of assessment.
- **Performance assessment should feed into regulatory policy:** An arrow points from the ‘performance assessment’ component to the ‘problem definition’ component. This is the feedback loop. Information on how well a regulation is performing should feed into work by departments to assess regulatory problems. For instance, feedback from councils or the courts may indicate that the problem is smaller or larger than departments first thought. This may require a change to regulatory policy.

- **Performance assessment requires information from multiple parts of the regulatory system:** An arrow points from the 'courts' component to the 'performance assessment' component. This arrow is a shorthand way of saying that performance assessment relies on information from all the other components of the regulatory system. Information from each component is required for departments to conduct post-implementation reviews. Ideally, information from other components would also be useful to councils in assessing their own performance. As noted later in this chapter, for example, councils would benefit from knowing the impact of their dog control policies on the rate of hospitalisation for dog injuries in their communities.

11.2 The benefits and costs of performance assessment

This section sets out the benefits and costs of any system of performance assessment. These general benefits and costs provide a basis for assessing the benefits and costs of performance assessment in local government.

Benefits

The main benefit of performance assessment is that it enables regulatory staff and other decision makers to drive continuous improvement in regulatory systems. Continuous improvement is a feature of high-performing organisations, which actively seek ways to lift their game.

Continuous improvement is a day-to-day, month-to-month and year-to-year process. On a daily basis, the staff administering regulatory regimes respond to new regulatory situations and adapt their practices. Periodically, staff discuss and improve administrative processes. Improvements on an annual basis include amendments to budgets, systems and policies to reflect priorities, such as new areas to focus on or addressing low performance.

Performance assessment is likewise a daily, monthly and yearly process. In day-to-day performance assessment, staff reflect on how well they perform tasks and discuss this with their colleagues. Monthly or yearly performance assessment involves discussion among colleagues but also involves a system of information-gathering and reporting. As with discussions among staff, these performance reports enable staff and other decision makers to reflect on how well regulations are performing and how they could perform better.

Two particular ways that performance assessment drives continuous improvement are:

- **Providing feedback loops through which weaknesses in a regulatory regime can be identified and solutions devised and implemented:** Performance information is a rich source for reflecting on leading practice across a regulatory regime, understanding local and national concerns and learning how to work more effectively together. Sharing performance information between parts of a regulatory regime reduces fragmentation and misalignment within a regime, and can reduce duplication in measurement and reporting.
- **Improving understanding of the regulatory process by communities and specific regulated parties:** Performance information enables people to have more informed opinions on regulatory performance and local issues and this, in turn, sharpens incentives for local authorities to improve their performance.

It is critical to ensure that the benefits of performance assessment and continuous improvement are readily apparent to local authorities and communities. If assessment is not playing a noticeable role in achieving better outcomes and better value for money, such assessment will be seen to be little more than a compliance exercise.

Costs

There can be significant costs of performance assessment (Box 11.1), such as staff time, storing information for easy access and analysis, preparing performance reports, audit costs and consultation costs—all of which can reduce staff time for other activity. There is also risk that performance measures create perverse incentives, such as choosing simple and quick tasks in order to meet numerical targets, or use of measures that reward short-term results that may not be best in the long term. In the case of smaller-scale local

authorities, assessment processes should be simple and low-cost, with mechanisms to make easy use of information produced by others (for example, central government data).

A recent study by Buxton (2009)—which drew on consultation with British local government stakeholders—identified additional costs arising from inspection of public services by an external agency.

- **Avoidance costs:** An alternative strategy deployed by some inspected bodies is to seek to circumvent legislation. This incurs legal and staff costs.
- **Disincentives:** A reduced inclination to experiment and innovate where fear of failure acts as a disincentive to try anything new.
- **Damage to staff morale:** The sense of being checked up on and the workload involved in preparation for inspection may damage morale regardless of the outcome of inspection, and judging services as failing may make it difficult to attract high calibre staff (pp. 22-23).

The important message is that when done badly, performance assessment can have the perverse effect of compromising regulatory performance, by imposing significant compliance costs on councils or driving the wrong behaviours by regulatory staff.

Box 11.1 Submission comments on the cost of regulatory performance assessment

Cost influences what is measured

The resources required to measure the outcome of regulations would inevitably fail the cost benefit test councils are required to apply when setting charges and would provide only limited information as outcomes are influenced by more than simply regulations. (Hastings District Council, sub. 41, p. 22)

The main challenge faced by local authorities in developing a good practice performance monitoring system is the cost constraints around sourcing data. Data collection and maintaining information systems that can manage the different data needs is costly business. And therefore the general tendency is to develop indicators that are easily measurable or process indicators e.g. number of inspections carried out for liquor retail premises or the percentage of dog owner properties inspected per year. (Waitomo District Council, sub. 9, p. 7)

Performance assessment needs to meet a cost benefit test

Environment Southland has concerns that further monitoring and reporting requirements would duplicate the other existing reporting formats and add a further layer of unrecoverable cost to the administrative expenditure for each council for very little benefit or opportunity for recovery for the rate payer. If anything the existing levels of monitoring and reporting requirements should be rationalised to gain cost efficiencies. (Environment Southland, sub. 28, pp. 2-3)

Local government has never shied away from the need to put in place systems and processes that provide assurance of an ability to achieve quality in the delivery of legislative requirements. However, the cost and effort involved in the process, in our view, must not be disproportionate to the benefits. Multiple agencies are already involved in the audit of local government, including the Office of the Auditor-General, the Parliamentary Commissioner for the Environment, the Ombudsman, and the central government department with lead responsibility for any particular regulation. Audit, monitoring, and information-gathering demands may be made of local government with sometimes limited ability to recover the cost of these demands. We do not see this as a capability issue but more so a co-ordination issue for central government agencies. (LGNZ, sub. 49, p. 41)

Cost for smaller councils

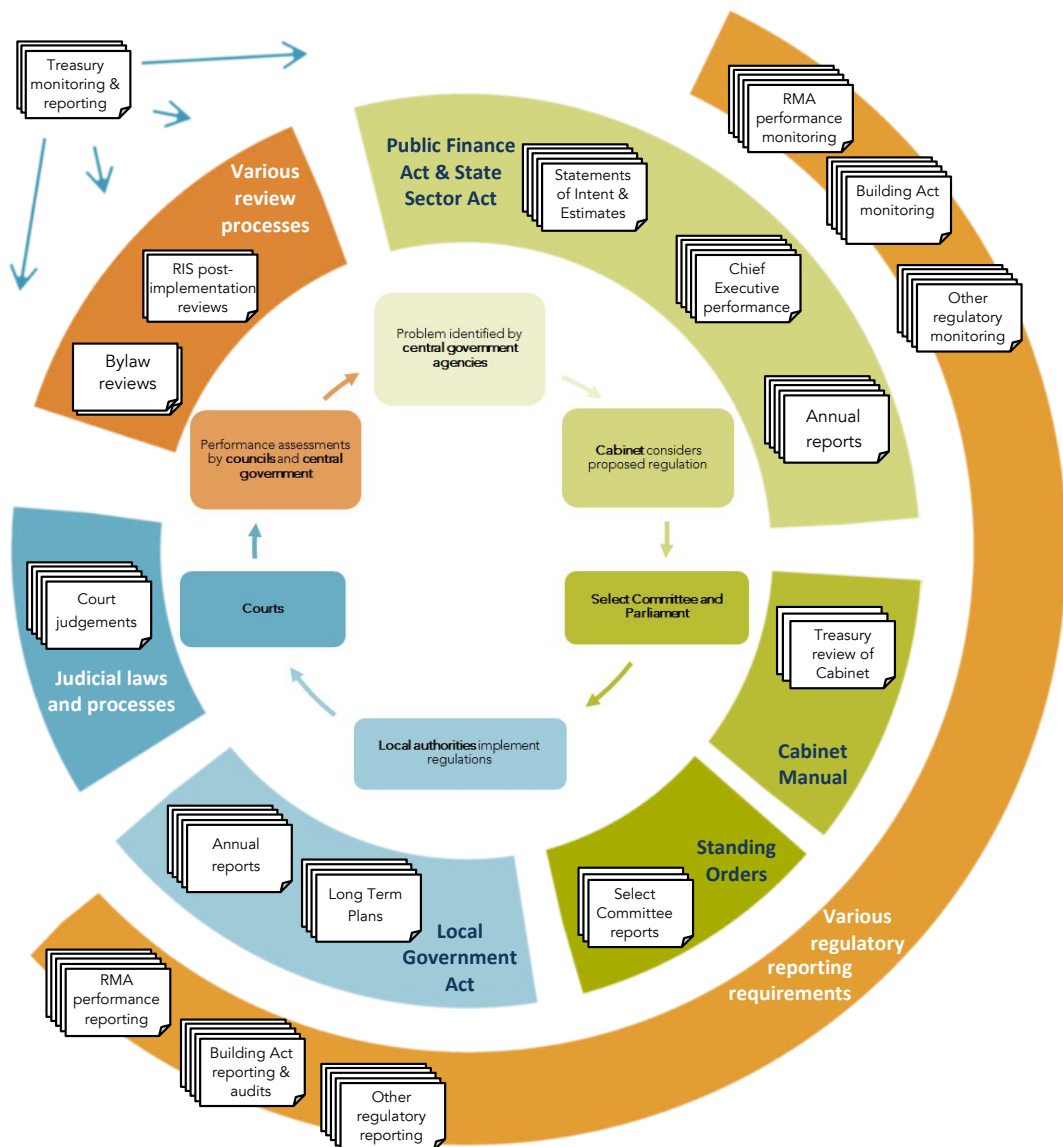
While large councils can afford to undertake more detailed monitoring of the effects of their regulatory interventions, for smaller councils the benefits of such expenditure is outweighed by the cost. (LGNZ, sub. 49, p. 29; Hastings District Council, sub. 41, p. 20)

11.3 Current performance assessment system

Framework for producing performance information

Figure 11.3 summarises the current framework for producing information about regulatory performance. The figure illustrates that there is a crowded regulatory performance reporting space for local government.

Figure 11.3 Current framework for producing information about regulatory performance



Source: Productivity Commission.

Notes:

1. The Office of the Auditor-General and the Parliamentary Commissioner for the Environment also provide an oversight role on behalf of Parliament, and the Department of Internal Affairs provides a monitoring role on behalf of the Minister of Local Government.

Some of the key features of the performance reporting system in Figure 11.3 are:

- **Performance assessment by local government:** Local government is subject to reporting requirements set out in the Local Government Act 2002 (LGA). The framework in the LGA is largely based on the basic performance model established in the Public Finance Act 1989 and the State Sector Act 1988. The objective of the framework is to drive performance at the local level by ensuring communities are better informed. These reporting requirements are shown in the light blue segment at the bottom of Figure 11.3.
- **Performance assessment by policy departments:** The LGA coexists with several other performance frameworks for local government, as shown in the long orange band surrounding Figure 11.3. The two reporting requirements singled out in the figure are the Resource Management Act 1991 (RMA) (where the Minister for the Environment has the power to investigate local authorities resource management performance) and the Building Act 2004 (where the chief executive of the responsible department has the power to monitor local authorities building control performance). Other regulations allowing departments to monitor local government include the Food Act 1981 and the Hazardous Substances and New Organisms Act 1996.
- **Regulatory review by the Treasury and policy departments:** 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.

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. In addition, the Treasury reports annually to the Minister of Finance and the Minister for Regulatory Reform on the level and quality of compliance with regulatory impact analysis requirements, the capabilities and systems of regulatory departments and the performance of regulatory regimes against best practice principles (Office of the Minister of Finance and the Office of the Minister for Regulatory Reform, 2013).

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 reviewer should be independent of the agencies administering the regulation (OECD, 2012).

Strengths of current assessment practice

Society of Local Government Managers guidance

SOLGM has produced a guide called *Performance management frameworks: Your side of the deal*. This guide represents “the collective wisdom of the local government sector with respect to performance management under the LGA 2002” (SOLGM, 2010b, p. 6). It explains the reason for performance management and provides advice on how to set performance objectives, measure performance and use this information to improve performance. One particularly strong aspect of the guide is the focus on creating a ‘performance culture’ in local authorities. A performance culture is the sum of many parts. As the guide notes:

Both your local authority’s direction and the objectives it sets form a part of performance culture. But culture also depends on your local authority’s:

- systems – the mechanisms that are used to capture and report on performance information. These include both the formal (the computer software) and the informal (such as the Mayor’s Monday meeting with your Chief Executive)
- processes – this covers the actual measurement of results, getting results to those who should know, taking action. Most critically it also includes supporting people to succeed
- people – we use this as a shorthand term for the driving of performance into the day to day activity of all staff, the means by which elected members and managers show commitment to performance management, and the rolling out of performance ethos (values and beliefs) in your local authority. (SOLGM, 2010b, p.75)

SOLGM’s guide to performance management is clear and practical, and as such is an important resource for local authorities in establishing and reporting on performance measures. This view is shared by many authorities.

Local authority performance assessment

Local authority performance reporting has improved over time. In 2011, the Office of the Auditor-General (OAG) reviewed six local authorities’ publicly reported performance information for the seven years from 2003/04 to 2009/10. While noting areas for improvement, the OAG found that “the quality of reported performance information for the six local authorities had improved, particularly for the 2009/10 annual reports compared with the earlier years” (OAG, 2011b, pp. 5-6).

One area the OAG positively noted was the focus of some local authorities on measuring impacts and outcomes (though there are many local authorities that do not have this focus):

The better annual reports showed a movement between 2003/04 and 2009/10 away from transactional process or activity-type measures (which focus on completing individual processes, tasks, or reports) toward outcome-based, impact-based, and service-based measures that could be used to understand the effectiveness of the local authority’s operations. (OAG, 2011b, p. 21)

Central government performance frameworks

Local authorities have provided several examples of good central government performance assessment practice:

The Ministry for the Environment’s biennial survey is an excellent tool to monitor and compare Local Government performance on Resource Management Act performance. This type of comparative survey could be used in other areas of regulation. (South Taranaki District Council, sub. 39, p. 6)

The Council considers that the monitoring of performance is being effectively achieved in the Building Control sector through external IANZ [International Accreditation New Zealand] auditing processes. This creates national consistency in monitoring and reporting. The process also enables areas where improvement is required to be clearly flagged, and provides a clear incentive for implementation of such improvement. (Southland District Council, sub. 5, p. 4)

However, some areas for improvement were identified. For instance, Southland District Council considers that “the central government monitoring by the Ministry for the Environment of RMA performance has, in the Council’s opinion, been excessively focused on timeframes, with little focus on the quality of decision-making processes, best practice identification and overall improvement of the sector” (sub. 5, p. 4).

Box 11.2 describes the government’s latest proposals to improve the approach to monitoring local government regulatory performance in respect of the RMA.

Box 11.2 Assessing Resource Management Act administration

MfE already undertakes the biennial survey of local authorities and is working on a national monitoring system to improve the consistency and timeliness of information provided by local councils on the implementation of the RMA. The national monitoring system will include metrics on the costs, time, levels of engagement and good practices across a number of key RMA processes (eg, resource consents) and national tools (such as implementation and effectiveness of NPSs and NESs). The system is intended to replace the current biennial survey of local authorities.

...

It is proposed that improved direction on expectations be provided through an expectations system developed in collaboration with councils. This system is likely to specify key performance indicators to provide greater clarity about what the Government and the community expects from councils in relation to the RMA. Expectations might be related to a customer-centric approach to service delivery (eg, consenting, plan-making, enforcement) or environmental and economic outcomes (eg, water quality).

More detailed monitoring of service delivery is intended to be captured through the national monitoring system. Improved state of the environment reporting will provide better information on performance in relation to ecological, economic, social and cultural outcomes.

...

To ensure these accountability measures and expectations are transparent and systematic, some amendments to the RMA may be required including:

- requiring performance information collected to be made publicly available
- enabling the Government and community to set, in collaboration with councils, clear expectations (eg, an expectation could be a standardised 'customer satisfaction survey' related to how consenting is conducted and reported on, and the nature of information a council should collect)
- enabling the Minister to specify how expectations are reported (so that performance can be benchmarked across local authorities).

Source: Ministry for the Environment, 2013a, p. 69.

Audit/local authority interaction

Local authorities consider that their interaction with auditors, and more generally with the OAG, is a central component of developing effective performance measurement frameworks, and one that generally works well.

[T]he role of the Office of the Auditor-General in auditing performance measurement frameworks has led to some convergence in the types of measures Council uses. (Dunedin City Council, sub. 56, p. 10)

[T]he Office of the Auditor-General not only audits the quality of performance measures used for regulatory functions, it also advises councils on how to improve their performance frameworks, as part of the audit. (Hastings District Council, sub. 41, p. 20)

The role of the auditors is to ensure performance measures are fit for purpose and all councils are subject to what is a form of external assessment. Auditors will assist councils to improve the quality of their performance measures where necessary and one effect of this has been the sharing of good practice. Auditors not only have guidance provided by OAG they are also able to share good practice as they are networked and also audit more than one council. As a result we find a high degree of commonality in the measures councils use. (LGNZ, sub. 49, pp. 33-34)

Local government stakeholders also provided positive feedback about their interaction with auditors in a peer review of the OAG in 2008.

[The Office of the Auditor-General] is seen by local authorities as knowledgeable about its sector, constructive in its approach, and reasonable to deal with.

Local Government New Zealand was similarly positive about the work of the Office. They saw the OAG as a credible watchdog and a constructive partner in improving the standards of governance in local government bodies. This view was echoed by the Society of Local Government Managers, which has an overall role responsibility for improving local body management capability. They saw the OAG team as highly professional, well informed and helpful. They value the support given by the OAG to their efforts to promote and support better management practices in the local government sector. They noted that the Auditor-General had established a Local Government Advisory Group to ensure clear, strong communication with the sector. (International Peer Review Team, 2008, p. 23)

F11.1

There are several leading practices in relation to local government regulatory performance assessment, including:

- Society of Local Government Managers guidance material;
- some local authority annual reports that have moved away from transactional performance measures toward outcome-based, impact-based and service-based measures;
- International Accreditation New Zealand auditing processes for Building Control Authorities;
- the Ministry for the Environment biennial Resource Management Act performance survey; and
- auditor/local authority interaction.

Weaknesses of current local assessment practice

Chapter 4 sets out the key weaknesses in current performance assessment practice. These weaknesses are summarised below.

- **Weak system mindset and insufficient feedback loops**

Good regulatory outcomes require all the elements of the regulatory system to be performing well. If regulatory outcomes are not being achieved, decision makers must be able to diagnose which element of the system is under-performing, and rectify it accordingly. This requires performance measurement that spans the entire regulatory cycle—from problem definition, to policy and regulatory design, implementation, monitoring and enforcement and post-implementation review.

Current performance assessment arrangements do not adequately recognise that regulatory performance is the 'sum of individual parts' of the overall system. Further, there appears to be a general lack of focus on how activities across a regulatory regime fit together and influence each other.

A related issue is the lack of feedback loops between the central and local government components of many regulatory regimes. Where feedback loops do exist, there can be a considerable delay between assessment and receiving feedback.

- **Lack of balance in what is measured**

The ultimate objective of any regulatory regime is to alter behaviour to achieve better (socially desirable) outcomes. However, local government performance measures are often dominated by measures of timeliness and transactional measures.

The focus on process-related measures is partly driven by the statutory reporting requirements and partly by the difficulty of measuring impacts and outcomes, along with a lack of a system mindset. However, a focus on timelines and other process measures can inadvertently impose costs on the community by drawing council resources away from other (potentially higher value) uses.

- **Insufficient focus on assessment of performance information**

The Commission's survey of councils found that nearly six out of ten councils (58%) do not use performance information to improve the administration of their regulatory functions. About half of surveyed councils (53%) do not use performance reviews to identify areas that need additional resources. Further, very few of the surveyed councils regularly use the information to consider the cost-effectiveness of regulation.

Chapter 4 provides evidence in submissions in support of these assessments of performance problems. Appendix F provides further evidence of the problems, in the form of an analysis of dog control reporting, building control reporting and central government performance assessment. These three case studies indicate that there is a lack of balance in dog control and building control performance measures, the

quality of performance measures is important, and there is room for improvement in the way departments assess performance.

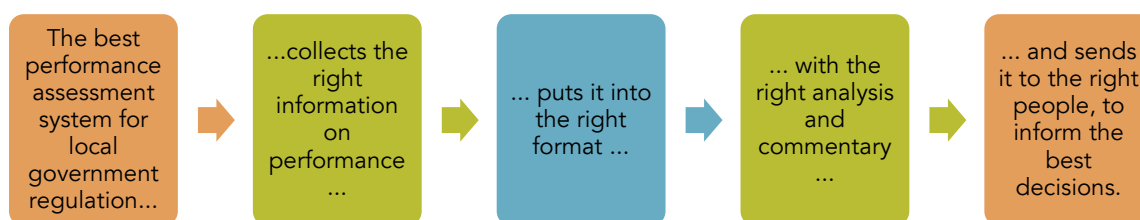
Overall, while there is a reasonably strong focus on providing performance information for accountability purposes (ie to allow citizens and in some cases Ministers to hold local authorities to account for various activities), there is insufficient focus on using performance information to drive continuous improvement. The focus of the next section is on suggesting ways to do this.

11.4 Proposed improvements to performance assessment

Framework for considering improvements

Figure 11.4 sets out the Commission's framework for considering improvements to the performance assessment system.

Figure 11.4 Framework for an effective regulatory performance assessment system



Collecting the right information on performance

The efficient collection of regulatory performance information requires agreement between central government, local government and communities on what constitutes good regulatory performance. An important step in generating agreement about what constitutes good performance is clarifying the of desired regulatory outcomes and standards of performance at the initial policy development stage (see Chapter 5). In addition, information across a broad range of indicators of performance should be collected, including information to enable comparison with past performance, other councils or other regulatory activities.

There are likely to be savings from removal of duplication in information collection. Tauranga City Council notes an example of possible duplication in “provision of quarterly building consent statistics to the Ministry of Business, Innovation, and Employment when building consent statistics are also collected by the Department of Statistics on a monthly basis” (sub. DR 65, p. 19).

There are also likely to be benefits from increased sharing of central government administrative datasets. The information held by government may provide a convenient and low-cost substitute for information that local government has to collect separately. For instance, information from the district health boards or the Accident Compensation Corporation on the number of dog bites may provide a useful measure of the effectiveness of local dog control regulation, and provide a substitute for locally administered datasets of dog bites. Information in central government administrative datasets also potentially provides a national set of data that can enable local authorities to benchmark their performance against other local authorities.

It may not be cost-effective in all instances to use central government administrative datasets for local authority performance assessment. For example, some central datasets may not provide enough information to break data down to a local level, and it may be too costly to add this feature to the dataset. There are also important privacy considerations in any data-sharing project. However, this should not prevent central and local government from investigating, as a first step, whether there are helpful central administrative datasets that could be shared with local government.

R11.1

The Department of Internal Affairs should work with local authorities to:

- remove any instances where authorities provide the same data to more than one department; and
- make central government administrative datasets available to local authorities to assist in the assessment of regulatory performance.

Putting performance information into the right format

There is a large amount of local government performance reporting at present. For example, the average council annual report is about 150 pages long, so that in any one year, councils across New Zealand collectively produce over 10,000 pages of annual reporting.

There is scope to improve the efficiency of performance reporting. Performance reports should be clear and should highlight the most important information. This is a view which has been echoed by other recent reviews:

- The Efficiency Taskforce considered that disclosure of performance information in long term plans should be confined to matters of a strategic nature. In general, a local authority's performance measures do not need to be included in a published long-term plan and should instead be available on the council website. However, the Taskforce did not recommend changes to the form of annual reports (Efficiency Taskforce, 2012, p. 69).
- The OAG has recently emphasised to local authorities that "it is the quality of the performance measures that matter and not the quantity." The OAG recommends that, "In selecting performance measures to report, entities should consider the characteristics of performance that are of greatest importance to stakeholders; reflect the financial significance of the activity; and reflect both the objectives for carrying out the activity and any (external or internal) risks needed to be managed in achieving those objectives". (OAG, 2010, p. 16)

There is also scope to reduce the frequency of performance reporting, without reducing the value of the information that is required for making important regulatory decisions (or important voting decisions in the case of communities and the wider public). One way to achieve this is to take a proportionate approach to the frequency of performance assessment. A proportionate approach focuses on areas of performance shortfalls and areas where the potential for performance improvements is the greatest.

One example of proportionate performance assessment is Education Review Office (ERO) reviews of New Zealand schools. ERO generally expects to review most schools within three years of the last review. However, "ERO will decide to carry out the next review in four-to-five years where ERO finds that the school's curriculum is consistently effective in promoting student learning – engagement, progress and achievement" and based on other performance criteria (ERO, 2012). This longer review timeframe lowers the compliance cost of ERO reviews for high-performing schools and provides a further incentive to improve school performance.

F11.2

Performance assessment should be most frequent when there is evidence of performance shortfalls and when the potential for performance improvements is the greatest. For regulations where performance improvements would not add significant value, assessment may not need to be so regular.

One additional problem with the large amount of performance reporting is that it is difficult to compare regulatory performance across local authorities. Local authorities use quite different performance measures for the same regulatory activities, and the format of each local authority's service performance report in its annual report differs from that used by other authorities.

The government has taken steps to address this problem in respect of local government infrastructure services. It is developing a set of nonfinancial performance measures for councils to use when reporting to their communities. The requirement for these measures was introduced in 2010 through amendments to the Local Government Act 2002, and cover water supply, sewerage, stormwater drainage, roads and footpaths, and flood protection.

There is potential to extend this model to regulatory services.

R11.2

The Department of Internal Affairs should work with Local Government New Zealand and the Society for Local Government Managers to assess the case for common measures of regulatory services, and prepare a framework for implementation.

Once common measures are in place, the next logical step is to consider whether such measures should be publically reported in a benchmarking exercise. The costs and benefits of benchmarking regulatory services are explored further in Box 11.3. The key message is that councils would benefit from taking the initiative in assessing the scope for benchmarking across local government, rather than waiting for central government to initiate benchmarking.

Box 11.3 Potential for council-driven performance benchmarking

Benchmarking can be defined as a process of identifying, understanding, and adapting outstanding practices from organisations anywhere in the world to help an organisation improve its performance. It looks outward to find best practice and high performance and then measures actual operations against those goals (Kumar, Antony and Dhakar, 2006).

However, benchmarking can be a challenging exercise and cost-effectiveness is an important consideration. As the Australian Productivity Commission (APC) notes:

There are a number of trade-offs that have to be considered in the development of a benchmarking program directed at regulatory burdens on business. For example, the analysis becomes more costly (whether assessed in dollar terms, or effort required) if additional [regulatory] burden measures and performance indicators, or greater accuracy for each indicator, are sought. These costs have to be carefully balanced against the broader benefits of collecting, collating, assessing and reporting additional information. (APC, 2007, p. 23)

Benchmarking is unlikely to have any real value without appropriate buy-in from participating councils. A clear message from local authorities is that the approach needs to be used with care, particularly when selecting the specific areas to benchmark.

Simply measuring and reporting performance indicators is unlikely in itself to result in any meaningful performance improvement (Hatry, 2002). In order for councils to extract real benefit from benchmarking, results (where they are robust and of high quality), should be incorporated across processes such as strategic planning or management systems, performance contracts, departmental or individual work plans, performance audits, programme evaluations, service improvement strategies, cost benefit analyses and budget proposals (Ammons and Rivenbark, 2008). Benchmarking should be a tool that provides reassurance when performance is on track and if not, signals the need for attention and perhaps a new approach.

Publication of benchmarking studies may also provide additional incentive to ensure that results are used proactively. Councils generally see a role for wider benchmarking of certain functions, provided that it is to learn from other councils rather than to establish league tables. This is an important consideration, but needs to be balanced against other aspects of effective benchmarking:

The desire to carefully control the comparison ... suggests a sense of anxiety among officials over the possibility that the comparison will be used as a management report card—that is, as a gauge for assessing how well or how poorly department heads and other managers are doing their jobs. Unfortunately, this anxiety can completely displace the search for best practices and produce a

benchmarking design that limits the likelihood of breakthrough discoveries. (Ammons and Rivenbark, 2008, p. 311)

While the focus of benchmarking should be on learning and improvement, an aversion to league tables is not necessarily good grounds to avoid publishing the results from benchmarking studies. Publication of information is an important source of transparency and accountability, and provides councils with additional incentive to ensure that results are actively addressed where needed, rather than simply being collected. In addition, publication of results is an important avenue by which successful programmes can be celebrated.

If councils decided to undertake national benchmarking, taking a proactive approach would allow councils to exert some control over the publication process and enable them to present information in a format of their own choosing. For example, councils could choose to publish supplementary contextual information to help alleviate concerns of performance information being misinterpreted or users making unfair comparisons between different councils. The Waitaki District Council addresses this need to be aware of misuse of results:

We support benchmarking, even as we recognise that the results can be seized on by interest groups for their own agendas, when they don't understand the drivers for variation in performance. (sub. DR 86, p. 5)

Providing the right analysis and commentary on performance information

Performance information is more valuable to decision makers when it is accompanied by commentary identifying whether the information reveals problems or opportunities in the regulatory system. Richard Fisk's submission to the Draft Report provides the case for such commentary and further analysis of performance information:

If there are repeated negative responses to a particular regulation [in community surveys], or its application, it is evident that something needs to be done about it. This need not mean that the regulation needs to go, but may involve providing better education about it, or a different approach being taken by enforcement officers. Some drilling down in to the responses of respondents may be required. (sub. DR 76, pp. 3-4)

Analysis of performance information need not be an in-depth and costly exercise. In fact, there is virtue in acting quickly on performance information, as emphasised in the submission of Phil McDermott:

In assessing performance assessment options, attention should be given to simplicity and responsiveness. Detailed and complex prescribed cycles of assessment, reporting and responding which involve several agencies are likely to be resource intensive, become ends in themselves, and impede responsiveness to changes in circumstance and emergent regulatory shortcomings. (McDermott, sub. DR 60, p. 16)

Regulatory health checks

To establish a quick way to encourage analysis of performance information, the Commission's Draft Report set out the option of a 'regulatory health check'. The aim of a health check is to provide a forum for central and local government officials (as a review team) to share feedback on regulatory performance and work together to identify improvements.

The health check would be a two-step process in which experts from local and central government would summarise the problems and opportunities in a specific area of local government regulation. The two steps are as follows.

- **Step 1: Develop a plain language overview of a regulatory regime:** A regulatory overview would briefly set out the purpose of the regulatory regime, the roles of different players, the types of benefits and costs the regime will create, the information base and who has responsibility for maintaining a system overview. Appendix E provides an example of a regulatory overview document, with respect to dog control regulation.

A number of submitters wrote in support of the idea of a plain language regulatory overview, noting that regulatory overviews would provide a sound basis for good policy development (SOLGM, sub. DR 83, p. 7), develop a shared central-local understanding of regulatory regimes (Christchurch City Council, sub. DR 88, p. 16), and increase clarity about the purpose of regulatory regimes (Tararua District Council, p. 2, Hurunui District Council, p. 10). Regulatory overviews would also improve the efficiency and effectiveness of local government regulation by providing:

- increased clarity of purpose between central and local government, which will increase the likelihood that central and local government are working in a coordinated manner to address regulatory problems;
 - a ready-reference for councils in developing performance frameworks and performance measures; and
 - a basis for developing shared performance measures across councils, which would reduce the cost for each council of independently developing performance measures.
- **Step 2: Jointly assess existing performance information against the regulatory overview:** The health check would assemble the existing performance information on the regulatory regime, from annual reports and a range of other documents. Many types of documents may comment on regulatory performance, including court judgements and newspaper articles, so the review team will need to make judgements about what pieces of information are the most useful.

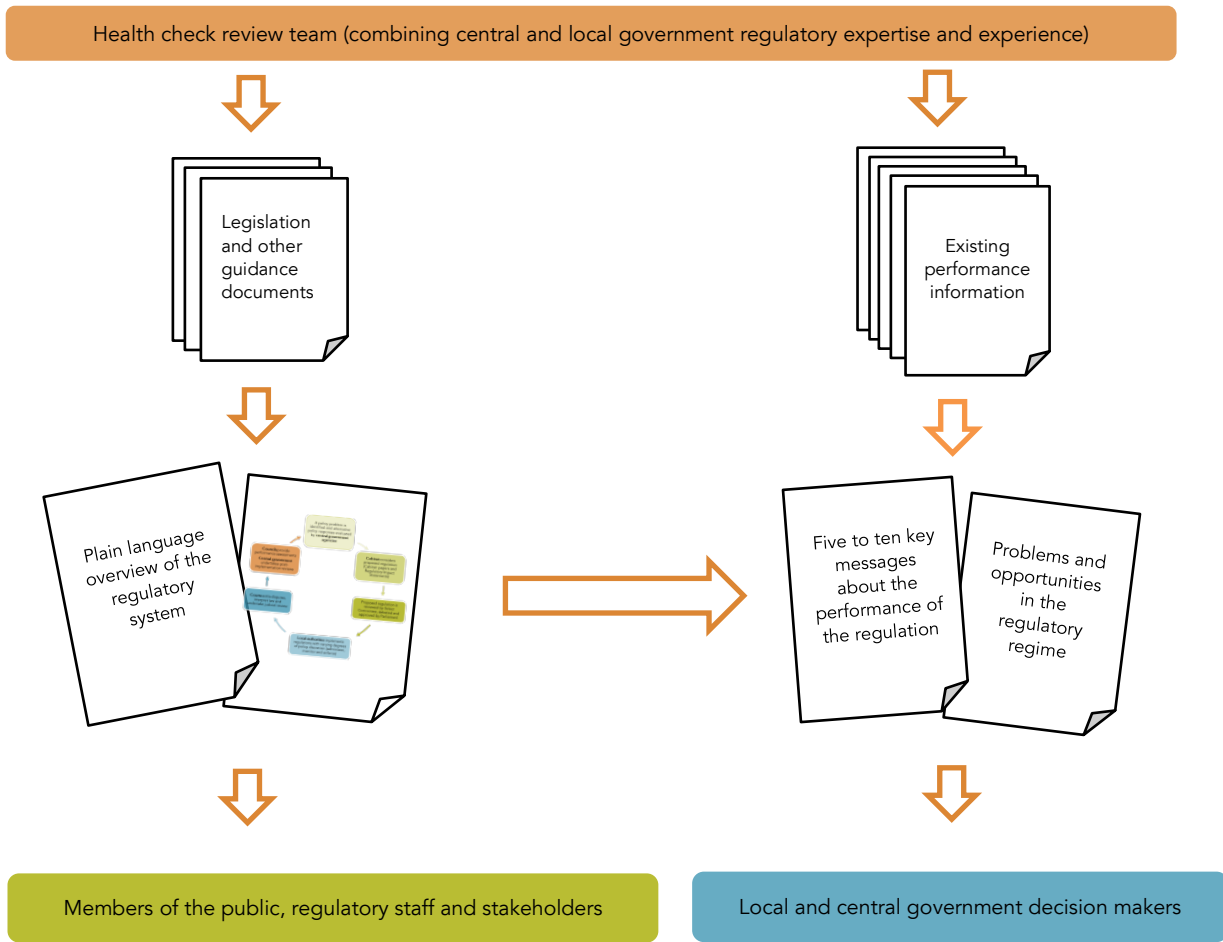
Based on these documents and discussion, the health check would identify five to ten key messages about the performance of the regulatory regime that stand out from the performance information.

This summary set of performance messages would then form the basis for identifying areas for regulatory improvement. For example, the health check may identify problems or good practices that emerge from the performance information, or it may identify that the existing performance information has large gaps. Alternatively, the health check may identify areas where there is duplication of performance reporting.

Appendix E provides an example of an observation that a health check process might make, by standing back and looking at a wide range of performance reports. The appendix reviews dog control performance measures from a set of local council annual reports, and compares this to the dimensions of performance that newspaper articles on dog control tend to discuss. The comparison reveals that while annual reports focus on speed of dog control call-outs and customer satisfaction, public attention in newspaper articles tends to focus more on the number and severity of dog attacks and the treatment of dogs and dog owners. This suggests a potential disconnect between council performance reporting and the issues that members of the public consider to be most important.

Figure 11.5 illustrates the process of a health check, noting that the two steps in the proposed health check will be valuable to different stakeholders. For example, the brief regulatory overview that is produced in step one would provide a plain language guide that could be made publically available on departmental and council websites. The overview would also be useful to policy makers and regulatory staff in understanding their role in the wider regulatory system. The findings about problems and opportunities will be of most value to decision makers such as ministers, councils and council executives, who have the ability to make improvements to regulatory processes in response to these problems and opportunities. (Again, it is also important to emphasise the role of members of the public as periodic decision makers through electoral voting systems.)

Figure 11.5 Regulatory health check process



Several submissions commented favourably on the proposal for regulatory health checks. However, submissions also indicated that to get a better sense of the costs and benefits of a health check process, it would be worth undertaking a trial health check, learning from similar processes already in place and considering the value of independence from central and local government (Box 11.4).

Box 11.4 Submission feedback on the option of a health check of regulatory activities

Support for health checks

The Invercargill City Council would support any performance assessment that endorses a partnership between Local Authorities and Central Government when drafting or reviewing legislation. The Joint Health Check option would enable both the regulator and implementer to assess the effectiveness of regulation. (Invercargill City Council, sub. DR 87, p. 4)

The Council believes that this would be a sensible approach and prove valuable in assessing the performance of regulatory regimes. It is important that there be involvement from the local government sector in this process rather than local government merely receiving the results of it. (Christchurch City Council, sub. DR 88, p. 16)

The best performance assessment system is one which facilitates regular dialogue and feedback loops between central and local government. For this reason we support the joint health check technique involving central government and local government staff working together to assess the effectiveness of regulation. (Taranua District Council, sub. 74, p. 19)

Value of a trial health check

The main cost for councils would be staff time. It may be useful first to run a trial and use this as a model. (Taranua District Council, sub. 74, p. 19)

Value of learning from similar review processes

One useful example is the Metro Building Group facilitated by the Ministry of Business, Innovation, and Employment. The group was originally proposed by the Metro Chief Executives group to have a strategic building group to meet on a regular basis with the former Dept of Building and Housing to discuss upcoming issues for their organisations. The joint working group continues to provide an insight into the needs of local government regarding any proposed changes to legislation, and also aids liaison with Local Government NZ and the Building Officials Institute of NZ.

[...] It would be helpful to take learnings from the Ministry for Environment's monitoring and review project once implemented to determine whether this could provide a model for other areas of central government. (Tararua District Council, sub. DR 74, p. 19)

The performance audits that the Office of the Auditor-General conducts serve as a useful starting point for development of a methodology – though we suspect that samples would have to be wider than is usually the case in a performance audit. We'd also suggest that there would be enough commonality in regulatory functions (or capacity to undertake them) that once developed methodologies could be refined for each case. [...] SOLGM has previously developed health checks around a local authority's capability in, and readiness for the long-term plan. SOLGM's legal compliance modules, while not universal in their coverage of regulatory functions may also help in the development of a programme of health checks in many areas. (SOLGM, sub. DR 83, p .6)

Value of independent viewpoints

Health checks would have most value if performed at arm's length from both central and local government. An appropriately resourced Office of the Auditor-General is one option for providing independence. (SOLGM, sub. DR 83, p .6)

R11.3

The Treasury, Local Government New Zealand and the Society for Local Government Managers should jointly trial the concept of a 'health check' of a regulatory regime, in which experts from local and central government would summarise the problems and opportunities in an area of local government regulation.

The role of regulatory health checks does not replace the occasional need to review regulations in more depth, and in a more systematic manner. In-depth reviews and evaluations are particularly valuable where it is clear that there is a significant problem with a regulation (or a significant opportunity to improve regulation), but it is not clear where this problem arises or what to do about it. In these cases, there is a need to dig beneath the surface of regulatory performance to reveal the underlying nature of the problem.

Such in-depth reviews and evaluations are expensive, and should only be undertaken in instances where the regulation has a significant impact on social and economic outcomes, and where there are indications that the regulation is problematic or outdated.

The key is to ensure that reviews and evaluations are undertaken before it is too late, that is, before a regulatory problem has already created significant social and economic costs. As such, part of the purpose of health checks—and a likely significant benefit of such checks—should be to assess whether a regulation requires further review or evaluation, and when this should occur.

Sending performance information to the right people to inform decisions

Recent research paints a sobering picture of the actual level of use of performance information:

The empirical research provides a generally negative view of how parliamentarians, cabinets, councils and citizens use performance information and a mixed view on usage by managers and individual politicians ... there is a marked contrast between non-use by external users, such as citizens and parliamentarians, and more mixed use by managers and politicians with direct executive responsibility

such as Ministers. There is no support from studies that legislatures actively use performance information and in some jurisdictions, such as the United States Congress, they have been actively hostile. Similarly, the few studies that are available on direct or indirect use by citizens suggest a lack of interest by citizens. (NZIER, 2011b, p. 7)

The reluctance to use performance information can be partly explained by the potential political cost to decision makers of using performance information. One of the major costs that political decision makers face is the cost of rebuke for past policy decisions. As Stern notes, “*ex post* evaluations that expose failures are usually highly unwelcome” (Stern, 2010, p. 9).

Improvements in the way performance information is collected, put into a convenient format and analysed will go a long way to making such information more useful to decision makers (including citizens deciding on who to vote for). However, there are additional ways in which central and local government can increase the use of performance information to drive continuous improvement in regulatory activities.

- **Increase the incentives of decision makers to improve performance over time:** Elected decision makers have an incentive to address widely appreciated regulatory problems and opportunities when there is strong public support for addressing the problem or opportunity. The challenge is to ensure that this incentive kicks in, by giving regulatory problems and opportunities a good airing in public.

Public benchmarking along the lines discussed in Box 11.3 is one strategy to publicise performance problems and opportunities. Another strategy is to entrust some performance assessment activities to independent institutions. Stern notes the value of agencies like the British National Audit Office and the American Government Accountability Office, “which, typically, are agencies of – and report to – the legislature rather than the executive” (Stern, 2010, p. 9). In this context, the performance audits of the OAG are valuable, as are system performance reports by the Parliamentary Commissioner for the Environment.

- **Highlight the benefits of using performance information to improve performance:** Performance reports should highlight the benefits for decision makers of using performance information. For example, if the report identifies a problem in regulatory performance, it should also provide decision makers a good estimate of the benefits of fixing this problem, in terms of cost savings or better regulatory outcomes.
- **Seek feedback from decision makers on the preferred format of performance reporting.** Decision makers have different preferences for the most useful format of performance information. Some decision makers favour visual information while others favour verbal briefings. Ideally, the format of performance reports should adapt to the decision maker of the day, by seeking feedback from that decision maker about what types of reports are most useful.

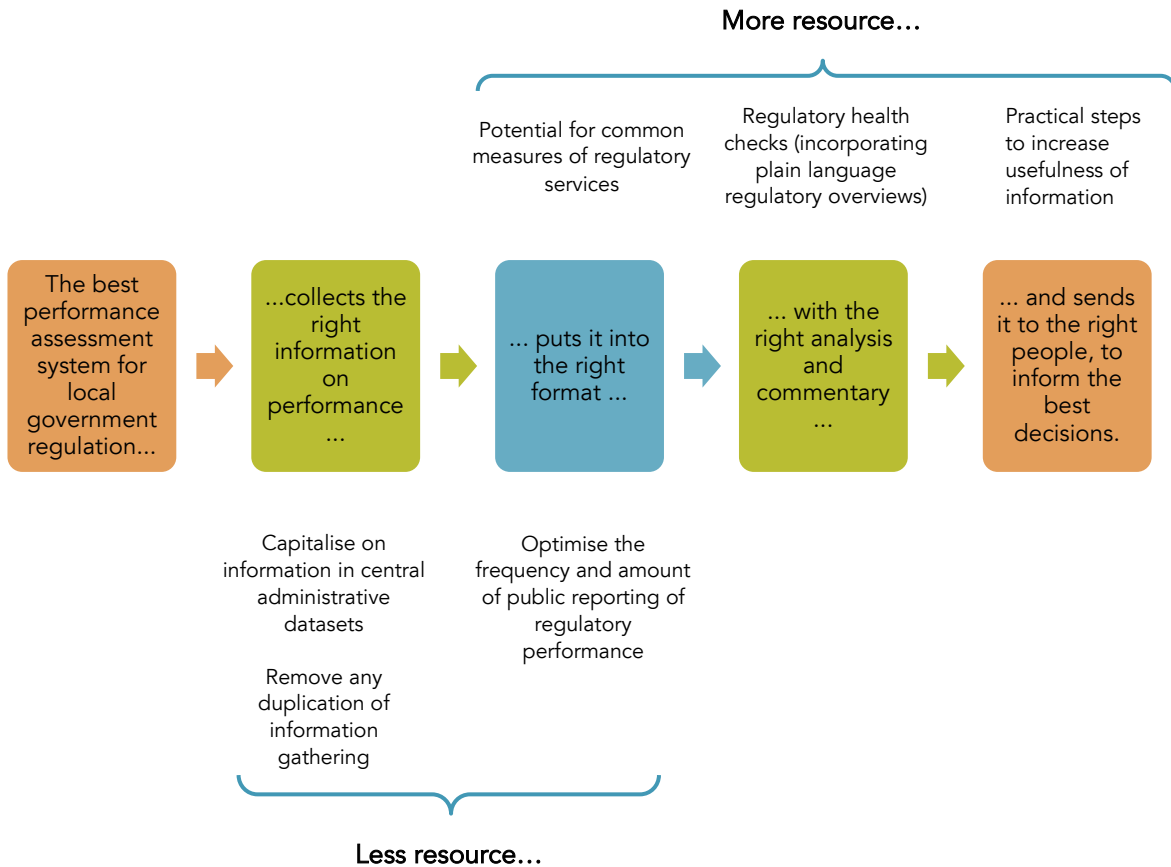
F11.3

As practical steps to increasing the use of performance information by decision makers, performance reports can highlight the benefits of using performance information to improve performance and seek feedback from local government decision makers on the preferred format for reporting.

11.5 Putting the proposals together – expected overall benefits and costs

The Commission’s recommendations for improving performance assessment aim to rebalance the use of council resources, rather than creating additional performance assessment requirements. The nature of this rebalancing of resources is indicated in Figure 11.6.

Figure 11.6 Summary of the Commission's proposals to improve regulatory performance assessment



12 Making it happen

Key points

- Local government regulation is mostly shaped by central government. To operate effectively, New Zealand's regulatory regime needs effective engagement and collaboration between the two levels of government.
- At present, there are diverse understandings and attitudes towards the respective roles, responsibilities, accountabilities and constitutional settings of the two levels of government.
- To encourage the achievement of good regulatory outcomes by local government, nine functions need to be performed, involving both levels of government. Responsibility does not appear to have been allocated for some of these functions.
- These gaps, combined with the current lack of effective engagement between the two levels of government, suggest that new organisational arrangements may be needed to bring about the effective implementation of the reform agenda proposed in this report.
- Effective relationships between leaders can improve the situation, but enduring improvement requires an effective institutional structure to give substance and support to engagement between the two levels of government.
- This structure needs to involve both politicians and officials with the support of a small secretariat. Elements of the necessary structure already exist, but require more status and priority.
- Each level of government should:
 - review whether its current organisations are capable of developing and implementing a reform programme for local government regulation; and
 - jointly consider establishing a new inter-governmental forum, the purpose of which would be to initiate, develop and monitor the implementation of significant initiatives to improve the achievement of regulatory outcomes that require cooperative action by both levels of government.

12.1 A recap

The regulatory responsibilities of local government are diverse and significant, involving areas that are fundamental to the wellbeing of New Zealanders through their impact on the environment, biosecurity, food safety, building and water quality, along with a host of other issues. The way in which local government regulates these issues is obviously important to local communities, but it will also determine whether central government can achieve its objectives in these areas for the country as a whole.

This report has identified many opportunities to improve regulation by local government in New Zealand and has set out recommendations that, taken together, would make up an ambitious reform agenda. It has highlighted that local government regulation is mostly shaped by central government (Chapter 5). A key theme is that central government should contribute to regulatory outcomes even when regulation is devolved to local government. To operate effectively, New Zealand's regulatory regime needs effective engagement and collaboration between the two levels of government. While the quality of engagement will be influenced in the short term by personal relationships, enduring inter-governmental cooperation depends on the effectiveness of supporting institutional arrangements.

The regulatory system as a whole determines the quality of regulatory outcomes. The elements of this system are interconnected and they all need to operate effectively. For example, initiating and shaping regulatory proposals—often a central government responsibility—happens before implementation, which is often the responsibility of local government. Yet regulations need to be designed with a view to how they can be implemented most effectively, and the lessons from implementation need to feed back into regulatory re-design, where necessary.

These interdependencies highlight that achieving good outcomes is an ongoing responsibility of both levels of government. When Parliament delegates or devolves regulatory responsibilities to local government, central government should have a perspective on local government’s capability to administer regulation effectively; to set up and use performance reporting systems; and to create opportunities for lessons from experience to be used to improve the regulatory system. Local government, for its part, administers and enforces many areas of regulation, often within standards determined by central government, and the report has identified ways in which it can improve its performance. However, sustained improvement is more likely if the two levels of government work more closely together than they do at the moment. Engagement between them is not effective currently and needs to be improved.

The Commission has proposed 29 recommendations that it considers would lead to more effective and efficient regulation. Both levels of government play important roles in implementing the Commission’s recommendations. At least a third of these recommendations would need to be implemented jointly by the two levels of government and engagement between them is a prerequisite for effective implementation. This demonstrates that a strong relationship between the two levels of government is essential.

This chapter considers the case for strengthening the organisational arrangements that each level of government would need to develop to implement the recommendations. It begins by describing current arrangements (section 12.2). Section 12.3 argues that they fall short in three respects. First, some functions that would need to be undertaken have not been explicitly assigned to any organisation. Second, local government issues need to be given higher priority by central government. Third, the current arrangements at either central or local level do not appear focused on effective engagement with the other level of government.

Section 12.4 considers the extent to which different organisational structures could address these weaknesses. The first option is the status quo. The second strengthens organisational capability within each level of government. This is useful, but does not address directly the current failings in engagement between the two levels of government. The third option creates new or enhances existing organisations, with the specific goal of improving the relationship between the two levels of government. The Commission considers that the case for such organisations is strong. However, it does not provide a detailed recommendation. This is because specific changes to organisational arrangements would need to be developed within the broader context of recommendations from the eight studies of aspects of local government that the Government has commissioned under the Better Local Government reform programme, to improve the legislative framework for councils.

12.2 Current organisational arrangements

The Minister of Local Government is responsible for “core policy issues relating to the constitution, structure, accountability and funding of local government” (Department of Internal Affairs [DIA], n.d., b). The Minister’s responsibilities include leading the relationship between central and local government.

The DIA assists the Minister in this work, and is the principal adviser to central government about key strategic policy issues facing the local government sector and about its regulatory and legislative frameworks. It does not have a unit dedicated solely to local government issues, unlike other units within DIA such as the Office for the Community and Voluntary Sector and Office of Ethnic Affairs. The department’s policy group works on local government issues, and works closely with other government departments that interact with local authorities, providing strategic advice as required. It has a research programme, and has worked on improving the relationship between local and central government. For example, it has developed policy development guidelines for regulatory functions involving local

government (as described in Chapter 5), and has worked on evaluating the central-local government interface in the community outcomes process (DIA, 2013b).

The Minister of Local Government also appoints members of the Local Government Commission (LGC), an independent statutory body established under the Local Government Act 2002 (LGA). LGC's main task is to make decisions on the structure of local government. It can report on matters relating to local government on its own initiative or at the request of the Minister. It also has a statutory objective under the LGA (s30 (2) (b)) to promote good practice relating to a local authority or to local government generally.

Local government has organisations that promote its interests.

- Local Government New Zealand (LGNZ) represents the local authorities of New Zealand, particularly elected members. It promotes the national interests of the local government sector, as well as good local governance.
- The Society of Local Government Managers (SOLGM) is the professional organisation for the local government sector, supporting local government chief executives and their senior managers. It promotes professional and leadership development through the SOLGM Opus Business School and a range of other partnerships.
- The Association of Local Government Engineering NZ Inc (INGENIUM) represents structural engineers and managers in the local government sector.
- LGNZ, SOLGM and INGENIUM work cooperatively to advance the interests of local government in the development of policy and regulation (DIA, 2013b).

There are three forums for meetings between the two levels of government:

- the Central Government-Local Government Forum, attended by the Prime Minister, ministers and mayors, which meets once or twice each year;
- the Central-Government-Local Government Chief Executives Forum, which was established recently to 'help improve collaboration and engagement, and to enable discussions and information sharing of issues of mutual interest' (DIA, 2013a, p.8). It is intended that it meet three to four times each year. Chaired by the Chief Executive of DIA and president of SOLGM jointly or individually, it has 12 to 15 participants, of whom 6 to 9 come from local government; and
- the Chief Executives Environment Forum (CEEF), initiated by the Ministry for the Environment (MfE) in 2004. It is a forum of chief executives from central and regional government that works on strategic environmental issues of common concern to members.

Given that performance gaps identified in this report appear to justify a reform programme, both levels of government need to consider whether the present organisational framework is sufficiently robust to support the recommendations in this report, and to contribute to build a more effective relationship between both levels of government. The basis of this relationship would be effective and well-informed engagement, leading to decisions that are focused on achieving better regulatory outcomes.

12.3 Assessment of organisational capability

This section assesses whether the current organisational arrangements are fit for purpose with regards to managing significant regulatory reform. It considers the capability of the current organisational framework from three perspectives; whether:

- the current organisations, between them, are responsible for all of the functions necessary to lift local authority regulatory performance;
- these organisations have sufficient connections, relationships and status within each level of government to effectively deliver change; and

- current organisational arrangements are capable of supporting and building the improved inter-governmental relationship that is the cornerstone of sustained improvement in regulatory outcomes.

Functional gaps

To encourage the achievement of good outcomes through regulation by local government, the following functions, involving both levels of government, need to be performed:

- **ensuring that there is a clear statement of desired regulatory outcomes**—so that both levels of government understand what regulation is expected to achieve. This is in part a regulatory design issue as to whether legislation and regulation have clear objectives (Chapter 5), and also requires definition of regulatory priorities (Chapter 7);
- **promoting effective engagement between the two levels of government**—given that the quality of the outcomes of regulation depends on the quality of the relationship between the two levels of government;
- **developing and implementing the ‘Partners in Regulation’ protocol**—if the Commission’s recommendation to develop this protocol is accepted (Chapter 5), both levels of government would need to allocate responsibility for co-development of the protocol and overseeing its implementation and ongoing maintenance;
- **implementing the new framework for allocating regulatory functions between central and local government**—the Commission is proposing the new framework for guiding the allocation of regulatory responsibilities between central and local government be a requirement when new regulatory responsibilities are contemplated or existing responsibilities are reviewed. Responsibility for managing and implementing this framework in consultation with local government would need to be assigned;
- **promoting coordination among central government interests, where regulatory issues for local government cut across portfolio areas.** These cross-cutting issues need to be addressed on a case by case basis, but this is more likely to happen if there is a process or arrangement that strengthens incentives for coordination within central government. This might involve an improved referral system; data-sharing protocols; more use of memoranda of understanding between regulators; or revisions to regulators’ roles;
- **promoting and developing regulatory capability**—local government’s capability to administer regulation effectively is a key determinant of the quality of regulatory outcomes, and there are many possible initiatives to improve capability (Chapter 7). In the longer term, skill levels need to be monitored and emerging gaps identified, especially when new regulations are being considered, and the effectiveness of initiatives to fill these gaps should be evaluated. Council chief executives are responsible for developing workforce capability. However, some initiatives require sector-wide attention and will only be addressed if responsibility for making them happen is identified clearly in both levels of government. Central government also needs to build its own regulatory design capability, so that regulations delegated to local government are fit for purpose (Chapter 5);
- **undertaking research into new regulatory methods and techniques and encouraging their diffusion**—closely related to the development of workforce capability is research into new techniques and frameworks for administering regulation (Chapter 7). Councils may pursue improvements individually, but some techniques may be developed and diffused more effectively through sector-wide approaches;
- **fostering evaluation and improvement of the enforcement of regulation**—regular evaluation encourages continuous improvement. To encourage this, the Commission has suggested that there be reviews of the regulatory performance of local government (Chapter 11), alongside the development of a more effective overall performance reporting regime. A sector-wide approach, involving both levels of government, is likely to be most effective; and
- **reviewing whether regulation enforced by local government remains fit for purpose**—for example, when deficiencies in enforcement become evident, this may be because the regulations themselves are no

longer fit for purpose. This will only become evident if there is a mechanism for reviewing the quality of regulations that local government enforces on behalf of central government, assessing whether they achieve the desired outcome and amending them as required. The Government has such a mechanism in the case of government departments, as Treasury is required to report annually on the performance of regulatory regimes against good practice principles and trends in agency performance on regulatory implementation (Regulatory Reform Minister, 2013).

Both levels of government have a natural leadership role in particular functions, but ultimately they both need to be committed to all of them for the achievement of outcomes to be durable and as valuable as possible. Not all of the functions, however, appear to have a clear home within central government's current organisational arrangements (Table 12.1). It is probable that there are similar gaps within local government. The functional gaps identified in Table 12.1 are likely to have contributed to the deficiencies in regulatory performance identified in this report. A useful task for both levels of government—using Table 12.1 as a starting point—would be to identify and define precisely the functions involved in delivering effective local regulation. There would be a need to assess whether there is a clear point of responsibility for all of these functions.

Table 12.1 Functional gaps

Necessary function	Who performs it now	Comment
Ensuring that there is a clear statement of desired regulatory outcomes		There is not a clear process for assessing joint priorities.
Promoting effective engagement between the two levels of government	Minister of Local Government	
Developing and implementing the 'Partners in Regulation' protocol	Not yet applicable	The Minister's responsibility for leading central government's relationship with local government would seem likely to include responsibility for leading central government's involvement in the proposed protocol, should that recommendation be accepted. The President of LGNZ would be the natural counterpoint in local government.
Implementing the new framework for allocating regulatory functions between central and local government	No clear assignment of responsibility within central government	DIA has already developed policy guidelines for regulatory functions involving local government, and so could assume responsibility for implementing and managing the Commission's proposed framework, in close consultation with local government.
Promoting a 'whole-of-government' approach to local government regulation	DIA	DIA's work in providing advice to other government departments that work with local government indicates that it could provide advice on issues that cut across portfolio boundaries.
Promoting regulatory capability within the local government sector	No clear assignment of responsibility within central government. A large number of organisations take on this task in the local government sector	As explained in Chapter 7, many agencies across central government have a role in improving the capability of local government, and

Necessary function	Who performs it now	Comment
		no central agency seems to take up responsibility for coordinating and developing this effort. LGNZ and SOLGM perform key capability development roles in the local government sector.
Undertaking research into new regulatory methods and techniques and encouraging their diffusion	No clear assignment of responsibility within central government	DIA has undertaken research work on local government sector-wide issues.
Fostering evaluation and improvement of the enforcement of regulation	No clear assignment of responsibility within central government	
Reviewing whether regulation enforced by local government remains fit for purpose	No clear assignment of responsibility within central government	<i>Ad hoc</i> reviews are undertaken.

Organisational profile

Central government does not have a separate group dedicated solely to local government issues. Rather, as noted above, local government issues are handled within the Policy, Regulatory and Ethnic Affairs branch in DIA, which has many other responsibilities (Box 12.1). The departmental appropriation for the local government portfolio in 2012-13 is almost \$10 million, of which about half is allocated to policy advice (DIA 2013a, p. 25). Up to 40% of the policy work undertaken by the policy group relates to local government (State Services Commission [SSC], Treasury and Department of the Prime Minister and Cabinet [DPMC] 2012a, p.4), and some of this advice is likely to be about regulatory issues.

The most recent performance improvement framework review of DIA rates its role in building the efficiency of the local government system as 'well placed' and notes that ministers are happy with the quality of policy work in DIA. However, the review also pointed to future challenges:

... in the future, Ministers will expect more innovative and strategic forward looking policy proposals in areas such as local government and gambling. This is particularly important in the area of local government given the benefits this would provide to all New Zealanders. (SSC, Treasury and DPMC, 2012a, p. 10)

... sector-wide local government policy issues will challenge it given the current stage of capability development in the Policy Group. Care needs to be taken to continue to build capability while meeting the expectations of Ministers and stakeholders. Again, this is well understood in DIA. (SSC, Treasury and DPMC, 2012a, p. 21)

Also in connection with local government regulation, it will be important for the Policy Group to take the opportunities that will become available for it to lead further reform. It should be increasingly common to see strong collaboration with local government to achieve higher levels of ownership of any potential reforms. (SSC, Treasury and DPMC, 2012a, p. 38)

Box 12.1 Responsibilities of the Policy, Regulatory and Ethnic Affairs branch in DIA.

The branch's responsibilities include:

- local government and community, voluntary and sector policy;
- local government operations;
- gambling, racing and censorship policy;
- identity policy (including policy relating to citizenship, passports and the registration of births,

deaths, marriages and civil unions);

- civil defence emergency management policy;
- policy relating to the provision and funding of New Zealand's fire services;
- general policy (including policy relating to daylight saving, public inquiries and commissions of inquiry);
- knowledge, information, research and technology policy (including library, archives and public records policy);
- strategic analysis and information;
- electronic messaging compliance (anti-spam);
- censorship compliance;
- gambling compliance;
- intelligence operations;
- financial integrity (anti-money laundering and countering financing of terrorism);
- complaints, investigations and prosecutions; and
- operational policy

Source: DIA, 2013b.

DIA is not the only central government agency working on local government issues. For example, other departments work with local government in their portfolio areas. This includes MfE (Resource Management Act 1991); Ministry of Business, Innovation, and Employment (Building Act 2004); Ministry for Primary Industries (Biosecurity Act 1993; Food Act 1981); Land Information New Zealand (Public Works Act 1981); Ministry of Justice (Sale of Liquor Act 1989); Ministry of Health (Health Act 1956); and Ministry of Transport (Transport Act 1962). This list of departments and Acts is not comprehensive (Table 2.1 provides details). It demonstrates, however, the large number of departments that interact with local government and explains the challenges involved in addressing issues that cut across portfolios and tiers of government.

Inter-governmental focus

The current organisational structure does not appear to focus on building the relationship between the two levels of government.

There are many and frequent contacts between the two levels of government. These develop as needs arise, and are likely to persist for as long as they are needed. Such organic developments are desirable and it would be a mistake to shoe-horn these relationships into a formal structure. Many of the issues addressed in this way, however, are likely to be specific to particular portfolios.

There will also be longer-term issues that affect the sector as a whole, requiring the participation of leaders from both levels of government, supported by broader advice. There have been instances when engagement on significant issues has been very effective. An example was the process for developing the LGA:

In undertaking the review the Government has proverbially put its “money where its mouth is” in the sense that the process itself reflects the partnership principles flagged in the Directions document. In a major departure from traditional policy making practice the Government has brought local government officials and some elected members into the problem definition and options identification stage, with Local Government New Zealand contributing a formal view on Cabinet papers as though it was another

Government department. As a gesture and indication of the Government's future intentions it has been gratefully accepted and acknowledged by the sector. (Reid, 2001)

Given the overlapping regulatory responsibilities of the two levels of government, regular and structured engagement is needed. The Central Government-Local Government Forum performs this role. However, as noted above, it meets infrequently, and does not have an ongoing work programme or a recent history of helping the two levels of government to work together on resolving issues over an extended time period.

12.4 Options for the future

This section sets out three organisational options that could be used for developing and implementing the recommendations of this report. The status quo is considered first. Other options include strengthening the organisations within each level of government, and creating a new organisation dedicated to improving the relationship between the two levels of government. The last two options are not necessarily alternatives. The best pathway for the future may include elements of both options.

The status quo

This option would increase pressure on the officials working in DIA on local government issues. Working with existing resources, these officials would manage, on behalf of central government:

- the lead agency in negotiating the 'Partners in Regulation' protocol;
- the framework for allocating regulatory functions between levels of government;
- initiatives to improve capability; and
- any increase in research into regulatory techniques.

They would also have specific tasks (some of which could be quite substantial), such as developing common performance measures of regulatory services, rationalising performance reporting by councils so that they do not provide the same information twice, and developing legislative amendments in relation to infringement notices.

DIA would not take on all of the workload of implementing the recommendations. For example, various recommendations to improve the operation of regulatory impact statements would be carried forward by the proponents of regulation, rather than by DIA. Nevertheless, DIA would experience a considerable increase in workload. Moreover, if it is to perform these tasks while building a more mature relationship with local government, it would need to devote considerable resources to increased engagement and working jointly with local government.

The current organisational arrangements would enable progress to be made with implementing the work programme, if this has the Government's support. However, progress is likely to be slower than under the other options, and may not generate sufficient momentum to capture the full potential benefits of the recommendations in this report. Moreover, this option relies on current arrangements for improving the inter-governmental relationship. Both levels of government's dissatisfaction with the state of the relationship suggests that these arrangements are not effective at the moment, and there seems little reason to expect significant improvement under current arrangements.

Strengthening organisations within each level of government

To generate more momentum for implementing the reform programme, both levels of government could strengthen their organisational capability. Central government has many options, such as:

- Keeping responsibility for advice on local government within the Policy, Regulatory and Ethnic Affairs branch in DIA, but allocating more resources to it from elsewhere would help with the additional work load. A risk with this option is that the absence of a defined local government unit might make it more difficult to develop a concentrated effort on the work required to lift regulatory performance;

- creating a separate 'Office of Local Government' within DIA—that would sit alongside two other similar entities within DIA: the Office of Ethnic Affairs and the Office for the Community and Voluntary Sector—would reduce this risk;
- the creation of a separate Department of Local Government, or a Crown entity focused on local government issues;
- moving responsibility for supporting the Minister to a new Office of Local Government within the Department of Prime Minister and Cabinet. This could add further profile and assist with the management of issues that cut across government departments. This would be similar to the approach in New South Wales, where there is a Division of Local Government within the Department of Premier and Cabinet; or
- the role of the LGC could be reoriented by giving it responsibility for the nine functional areas identified earlier.

Developing effective representative and policy development arrangements is particularly difficult for the local government sector, given the large number of authorities and the considerable diversity in their characteristics and size. Auckland Council, serving a population of almost 1.5 million, will inevitably have more frequent, high-level interactions with central government than will a rural council serving about 10,000 people. If this report does lead to increased interest in local government issues, it may well focus the local government sector's attention on whether there are options that would enable it to develop policy positions and engage more effectively.

The options for central government outlined above could improve the quality of policy advice, but they share an important disadvantage. They focus on strengthening the advice going to each level of government about how to deal with the other level, but do not sharpen the organisational focus on working with the other level. This is a significant gap.

An inter-governmental forum

This report has demonstrated that the lack of effective engagement between the two levels of government is placing the achievement of regulatory outcomes at risk. This lack of engagement is not a new problem, and considerable effort from both levels is needed to move the relationship onto a more effective footing. Personalities and attitudes are at the heart of effective relationships, but can change as the people involved move on. For that reason, some form of institutional structure is required to support the relationships and the necessary joint work of the two levels of government.

The intra-governmental arrangements discussed in the previous section have been largely focused on moving organisations to new departments or increasing their resources, but do not address the underlying incentives for expanded, constructive engagement between the levels of government. This requires more fundamental organisational change.

There are different models to consider. For example, one approach would be to establish an organisation modelled on the Government's Auckland Policy Office, whose functions include providing informed Auckland perspective in the development of central government policy; identify and develop Auckland-specific policy initiatives that will have a significant impact on Auckland and national economic growth; and coordinate a collaborative approach for central government engagement in key regional development forums/projects (Auckland Policy Office, 2013). A national version of this would adopt a country-wide perspective. This model would increase central government awareness of local government issues but would not directly lead to improved engagement, although this could be addressed to an extent by recruiting local government staff into the new organisation. However, the absence of political representation means that this model does not contribute to improved engagement between the political leaders of both levels of government that seems essential for an improved relationship.

A different model, which builds on the existing inter-governmental forums while creating a step change from the current situation, is more likely to create more effective engagement. By involving people in key

roles in engagement that can lead to important decisions, this model has the potential to strengthen substantially the rewards from engagement and, as a result, the incentives to participate in it.

New arrangements could involve:

- a forum at the political level, with ministers and mayors as members. The existing Central Government-Local Government Forum (jointly chaired by the Prime Minister and President of LGNZ) could provide the starting point. However, the proposed revamped forum would need to be quite different in terms of its profile and agenda, to be recognised as a key place where nationally significant issues are considered on an ongoing basis. It would also need a structured and continuing work programme;
- a forum of chief executives from both levels of government. The recently-established Central-Government-Local Government Chief Executives Forum is a useful model, but its work programme and profile would need to be enhanced as it would provide support to, and give effect to the decisions of, the forum of ministers and mayors. The Chief Executives Forum would have the capacity to make some decisions on its own account, but would perform an advisory role in relation to significant issues that need to be determined by the forum of ministers and mayors;
- the Chief Executives Forum could be supplemented by a set of topic-specific forums, similar to the CEEF. Alternatively, there could be one or more steering groups made of middle level managers, whose role is to ensure that tasks that are determined by either of the forums of leaders are completed; and
- adequate support from both levels of government, probably through a small secretariat, with experienced staff drawn from both sectors and funded through existing budgets.

The two levels of government should examine establishing new joint institutional arrangements, which might grow out of the existing ones but would be a step change from them in terms of status, resourcing and priority. To be effective, the new arrangements would need:

- a clearly defined role, which might be to initiate, develop and monitor the implementation of significant initiatives to improve the achievement of regulatory outcomes that require cooperative action by both levels of government. Performing this role is likely to involve the new organisations in the nine functions listed in section 12.3;
- high-level representation from both levels of government, at senior ministerial level from central government, a small representative group of mayors, and chief executives from key agencies and local government. A key role of the local government representatives would be to provide feedback to the sector as a whole;
- the authority to reach agreements, but within a framework that sets out the limits to this authority. These limits would need to be negotiated by the two levels of government, which are likely, for example, to preclude the new forum from reaching agreements that would unduly reduce their discretion to make decisions that benefit their communities; and
- the capacity to set up working groups or task forces to examine particular issues, under direction directly from one of the forums or from a steering group that they choose to set up.

The new organisations are likely to agree on a set of tasks, some of which would be undertaken by one level of government and some of which might be undertaken jointly.

Staff for the supporting secretariat should be drawn from the key regulatory agencies and key regulatory people in local government, so that the secretariat has both regulatory expertise and the perspectives of both levels of government. Selecting staff who understand the relevant regulatory issues and the significance of the central-local government interface, and are focused on achieving regulatory outcomes, would help to embed motivation to achieve improved engagement. To keep the secretariat small, there should be scope to allocate research or policy development tasks to both government departments and

local authorities or their peak bodies, or to working groups set up to examine particular issues within Terms of Reference set by the forum of ministers and mayors.

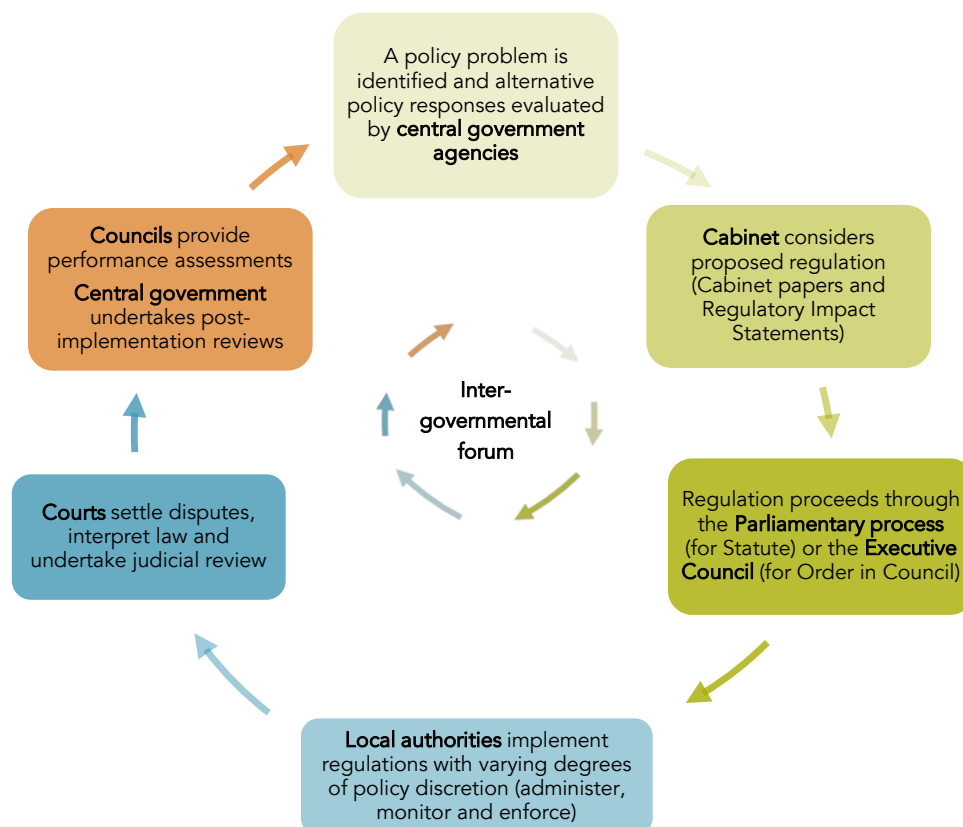
While designing a new organisation that meets the needs of both levels of government would be challenging, establishing new arrangements has the potential to be the circuit breaker that could enable the relationship between the two levels of government to move to a new level.

12.5 Implications

The functions that are required to improve the regulatory performance of local government need to be defined comprehensively and precisely and responsibility for these roles needs to be allocated. There is a persuasive case for assessing the capability of different organisational structures to undertake these functions. Current arrangements have not delivered high performance, and may not be capable of fully delivering the ambitious reform agenda outlined in this report. This chapter has put forward options for improving organisational arrangements within central government and a possible model for new inter-governmental organisations. However, the Government would need to consider changes to organisational arrangements within the broader context of the recommendations from the reviews carried out under the eight-point plan.

The Commission considers, nevertheless, that options set out in this chapter would help to inform the Government's judgement about future organisational arrangements under the Better Local Government reform programme.

Figure 12.1 How the inter-governmental forum can support the regulatory system



R12.1

Each level of government should:

- review whether its current organisations are capable of developing and implementing a reform programme for local government regulation; and
- jointly consider establishing new inter-governmental arrangements, the purpose of which would be to initiate, develop and monitor the implementation of significant initiatives to improve the achievement of regulatory outcomes that require cooperative action by both levels of government.

Findings and recommendations

The full set of findings and recommendations from the report are below.

Chapter 2 – Local government in New Zealand

Findings

F2.1

There is no inherent agency or accountability relationship between local authorities and central government simply because local authorities are established and empowered by statute. The relationship between central and local government is context-specific, depending upon the particular regulatory framework.

Chapter 3 – Pressures and challenges

Findings

F3.1

Different regulatory challenges are faced by regions experiencing population growth compared to regions experiencing population decline. Local authorities experiencing population decline face less demand for regulatory services and may have difficulty undertaking their 'service delivery' regulatory roles due to shortfalls in capability. Local authorities that are growing may face difficulties in making trade-offs in reconciling the different priorities for the use of resources.

F3.2

Increasing diversity and greater community expectations present difficulties for local authorities in reconciling different community interests and making decisions.

F3.3

There has been a steady stream of new statutes over the last decade, affecting local government regulatory activities to varying degrees.

F3.4

Councils making decisions with environmental implications increasingly need access to:

- technical information and skills in interpreting technical information;
- methods of modelling uncertain scenarios; and
- skills in engaging with communities and stakeholders on technical issues.

F3.5

Local authorities have an acute and increasing awareness the risk of exposure to legal challenge for losses where a duty of care is owed in undertaking their regulatory responsibilities.

F3.6

Delays in obtaining responses from local authorities, and the sequencing of multiple regulatory requirements and decisions by local authorities, can impose substantial holding costs on business.

Chapter 4 – Assessing the regulatory system

Findings

F4.1

Current institutional arrangements can shield central government from the full fiscal and political cost of assigning regulatory functions to local government. This can have the effect of reducing the quality of regulations.

F4.2

There is often limited analysis of local government's capability or capacity to implement regulations prior to the allocation of additional regulatory functions (or changes to existing functions).

F4.3

Central government agencies with oversight responsibility for regulations do not have knowledge of the local government sector commensurate with the importance of the sector in implementing these regulations.

F4.4

Engagement with local government during the design of new regulations is generally poor, resulting in a missed opportunity to improve the quality of policy advice from central government agencies and the resulting quality of regulation.

F4.5

The Regulatory Impact Statement process has a valuable role to play in ensuring the quality of regulations delegated or devolved to local government. However, at present this value is not being fully realised.

F4.6

While decision-making processes used by local government are generally adequate, considerable room for improvement exists in several areas.

F4.7

Businesses perceive variation to be as common in regulatory areas with national standards as in areas where councils have a level of autonomy to tailor responses to local conditions.

F4.8

There are indications of a low level of prioritisation of monitoring and enforcement resources based on risks. Constraints on the use of infringement notices—combined with the low level of fines where infringement notices can be used—can also inhibit councils' capacity to encourage compliance with regulation.

F4.9

Currently, few performance assessments provide feedback loops aimed at improving council delivery of regulatory functions. Further, there is a need for more focus on how activities across a regulatory regime fit together and influence each other.

F4.10

Local government performance measures are often dominated by timeliness and transactional measures. These measures do not provide a sufficient basis to determine whether local authorities are achieving impacts associated with their regulatory activity, or whether regulation is achieving its intended outcomes.

F4.11

Performance assessments are often seen by councils as a compliance exercise for central government rather than as a means of improving their own performance.

F4.12

To appropriately involve Māori in decision making, councils must effectively mesh two different systems of governance – local representative democracy, and the tikanga of local iwi.

F4.13

The current system for involving Māori in resource consent decisions is often mismatched to the capability of Māori. On the strength of evidence from business, Māori and local authorities, the current system for involving Māori in consent decisions does not appear to be working well for anyone, due largely to the costs and timeframes involved.

F4.14

The lack of effective interaction between central and local government is having a detrimental impact on New Zealand's regulatory system. The uneasy relationship between the two spheres of government is rooted in divergent views and understandings of the nature of their respective roles, obligations and accountabilities.

Chapter 5 – Improving regulatory design

Recommendations

R5.1

Central and local government should work together to develop a 'Partners in Regulation' protocol. The protocol should develop an agreed set of principles to govern the development of regulations that will have implications for the local government sector.

R5.2

The Government should add the requirements of the 'Partners in Regulation' protocol to the Cabinet Manual. A Cabinet directive should be given for all agencies to act in accordance with the protocol. Progress towards implementing the protocol should be included in the performance assessments of central government agencies.

R5.3

A review of the 'Partners in Regulation' protocol should be conducted a suitable amount of time after it is introduced. The review should be undertaken by an independent party appointed by the Minister of Local Government in consultation with LGNZ.

R5.4

The 'Partners in Regulation' protocol should include a provision that local authorities include a 'statement of intent to comply' in their annual plan.

R5.5

Central government agencies should develop strategies to increase, and then maintain, their knowledge and understanding of the local government sector.

R5.6

The trigger for involving the Treasury's Regulatory Impact Assessment Team in scrutinising Regulatory Impact Statements should be amended to explicitly cover proposals that have a significant impact on local government.

R5.7

The Government, in consultation with local government, should develop and publish a regulatory change programme that signals areas of local government regulation that may come under review in the coming 12-24 months.

Chapter 6 – Allocating regulatory responsibilities

Recommendations

R6.1

The allocation framework should be used by central government agencies when recommending new regulation or amendments to regulation where local government is involved. This would be achieved through updating the Regulatory Impact Analysis Handbook and the requirements in the Cabinet Office Manual.

R6.2 Agreement to use the allocation framework should be part of the proposed regulatory protocol between local and central government.

R6.3 The allocation framework should be used to review existing regulation, such as reviews undertaken as part of government agencies' regulatory review programmes. The framework should also be used where there are issues with capability or there is evidence of poor regulatory outcomes.

Chapter 7 – Improving local government regulatory capability

Findings

F7.1 Responses to the Commission's survey of councils indicate that, while there may be room for improvement and reprioritisation of effort, there is a significant amount of formal and informal cooperation, coordination and sharing of resources occurring amongst local authorities, which is generally seen as successful.

Recommendations

R7.1 The guidelines for preparing Regulatory Impact Statements should be amended, to require departments sponsoring regulation that will be delegated to local government to include in their statements—following reasonable consultation with local government—the costs of improving to an acceptable level the capabilities in local government to administer and enforce the regulation.

R7.2 The Government should use existing forums, or develop new ones, to:

- ensure that both levels of government understand the regulatory outcomes that central government is seeking and their relative importance; and
- identify resource and capability gaps that may prevent councils from achieving these outcomes, and determine how they will be addressed.

R7.3 Relevant departments should consult with local government about the adequacy of guidance material and the potential benefits and costs of options for improving it.

R7.4 The Government should work with local government to develop a process for reviewing the regulatory practices of local government that is voluntary, and involves self-assessment and publication of findings.

R7.5 The Government should provide sufficient lead-in times for new regulation in order to ensure that councils have time to consider opportunities for local cooperation in administering and enforcing the regulation.

Chapter 8 – Local authority regulatory processes

Findings

F8.1

While processes have been found to be adequate, there remains considerable room for improvement in local government decision-making processes, specifically in regard to more specific tailoring of regulatory objectives to local conditions, better options analysis and better implementation analysis.

F8.2

Regulatory decisions made by local government would benefit from the use of templates that ensure that the key components of the analysis underpinning the regulatory decision, and information used in making decisions, is set out in a standardised format.

F8.3

Participants in local authority processes under the Resource Management Act are usually not incentivised to hold back information they already have, but there are incentives to only gather information and evidence once the main issues in contention are clarified. Currently, clarification is more likely to happen after the submissions hearing process.

F8.4

Evidence from the success of mediation processes suggests that participants are prepared to compromise and participate constructively in the Resource Management Act decision-making process, if this process is run well.

F8.5

The quality of engagement and the initial Resource Management Act decision-making process can reduce the likelihood of appeals.

F8.6

Providing more guidance can help reduce inconsistent administration of regulation in some instances, but reducing inconsistency will often be achieved by the local authority concerned improving its management practices.

F8.7

Local authorities may have very limited ability to diverge from the recommendations made by independent hearings panels. The requirement to use a hearings panel weakens the accountability of councillors to the community for the decisions made.

F8.8

The inclusion of councillors on independent hearings panels can call into question the impartiality of such panels. However, accredited councillors can play an important role on hearings panels and any perceived lack of independence can be managed through strong principles for managing conflicts of interest, quality processes for running hearings panels and competent chairing of hearings panels.

Recommendations

R8.1

Councils should make publicly available on council websites, using a standardised template format, the key components of the analysis underpinning regulatory decisions and the information used in making decisions, to improve transparency.

R8.2

The Local Government Act 2002 should be amended to enable local authorities to take an approach to consultation proportionate to the level of discretion they have to regulate, and the significance of the issue.

R8.3

The Ministry for the Environment should consider the feasibility of making the Environment Court's mediation capability available to support local authority plan-making processes earlier.

R8.4

The Department of Internal Affairs should begin the process to strengthen the statutory requirements on local authorities to separate prosecution decisions from political involvement.

R8.5

The Ministry for the Environment should consider the impact of expanded requirements to use independent hearings panels on the decision-making role of councils, and councils' accountability to their communities for the resource management decisions they make.

Chapter 9 – Local regulation and Māori

Recommendations

R9.1

Local authorities should aim to support Māori who are involved in decision making with sufficient inclusion of tikanga Māori in plans, policies and regulations to be able to meaningfully adjudicate whether particular proposals align with tikanga Māori.

Chapter 10 – Monitoring and enforcement

Findings

F10.1

Strategies that councils can use to maintain monitoring and enforcement priorities while meeting statutory timeframes include:

- allocation of consent processing and consent monitoring responsibilities to two different teams; and
- a ring-fenced budget for monitoring and enforcement activities

Recommendations

R10.1

To promote risk-based allocation of monitoring and enforcement resources in councils, the Department of Internal Affairs, Local Government New Zealand and the Society of Local Government Managers should identify opportunities to pool regulatory experience and databases among councils and central government regulators, to identify trends and patterns in compliance. This work should involve the Privacy Commissioner in order to protect the integrity of private information.

R10.2

Territorial authorities should formally coordinate with other monitoring and enforcement agencies, including the police, when administering, monitoring and enforcing liquor licensing.

R10.3

Agencies responsible for regulations that local government enforces should work with Local Government New Zealand to identify regulations that could usefully be supported by infringement notices and penalty levels that need to be increased.

R10.4

Section 259 of the Local Government Act 2002—relating to the empowerment of infringement notices—should be amended to enable regulations to be made for infringement notices for similar kinds of bylaws across local authorities, rather than on a council-specific and bylaw-specific basis.

Chapter 11 – Improving regulatory performance assessment

Findings

F11.1

There are several leading practices in relation to local government regulatory performance assessment, including:

- Society of Local Government Managers guidance material;
- some local authority annual reports that have moved away from transactional performance measures toward outcome-based, impact-based, and service-based measures;
- International Accreditation New Zealand auditing processes for Building Control Authorities;
- the Ministry for the Environment biennial Resource Management Act performance survey; and
- auditor/local authority interaction.

F11.2

Performance assessment should be most frequent when there is evidence of performance shortfalls and when the potential for performance improvements is the greatest. For regulations where performance improvements would not add significant value, assessment may not need to be so regular.

F11.3

As practical steps to increasing the use of performance information by decision makers, performance reports can highlight the benefits of using performance information to improve performance and seek feedback from local government decision makers on the preferred format for reporting.

Recommendations

R11.1

The Department of Internal Affairs should work with local authorities to:

- remove any instances where authorities provide the same data to more than one department; and
- make central government administrative datasets available to local authorities to assist in the assessment of regulatory performance.

R11.2

The Department of Internal Affairs should work with Local Government New Zealand and the Society for Local Government Managers to assess the case for common measures of regulatory services, and prepare a framework for implementation.

R11.3

The Treasury, Local Government New Zealand and the Society for Local Government Managers should jointly trial the concept of a 'health check' of a regulatory regime, in which experts from local and central government would summarise the problems and opportunities in an area of local government regulation.

Chapter 12 – Making it happen

Recommendations

R12.1

Each level of government should:

- review whether its current organisations are capable of developing and implementing a reform programme for local government regulation;
- jointly consider establishing new inter-governmental arrangements, the purpose of which would be to initiate, develop and monitor the implementation of significant initiatives to improve the achievement of regulatory outcomes that require cooperative action by both levels of government.

Appendix A Public consultation

Submissions

INDIVIDUAL OR ORGANISATION	SUBMISSION NUMBER
Airfoam Wall Insulators (Palmerston North) Ltd	046
Ashburton District Council	040
Auckland Council	054, DR097
Bay of Plenty Regional Council	DR071
Bill Malcolm	018
Central Hawke's Bay District Council	DR113
Christchurch City Council	057, DR088
Civic Futures Ltd	007
Clutha District Council	032, DR070
Cottages New Zealand	DR064
David Willmott	DR107
Dunedin City Council	056
Electricity Networks Association	012, DR102
Environment Canterbury Regional Council	DR099
Environment Southland	028
Far North District Council	055, DR100
Federated Farmers of New Zealand	026, DR111
Fonterra Co-operative Group Limited	029
Gisborne District Council	001, DR112
Gordon George	013
Grass Roots Institute of NZ Inc, Jay Weeks, Gordon Levet & Sandra Goudie	014
Greater Wellington Regional Council	037, DR089
Hamilton City Council	DR103
Hastings District Council	041, DR085
Hauraki District Council	059
Hawke's Bay Regional Council	DR067
Horizons Regional Council	053
Horowhenua District Council	042, DR091
Hurinui District Council	043, DR096
Hutt City Council	051
Invercargill City Council	DR087
IPENZ Engineers New Zealand	017
Jay Weeks	DR098
John Mellars	022
Local Government Centre – Auckland University of Technology	DR062
Local Government Forum	015
Local Government New Zealand (LGNZ)	049, DR109
Mackenzie District Council	021
Manawatu District Council	038
Matamata-Piako District Council	DR110
Miles Hayward-Ryan	020
Napier City Council	044

Nelson City Council	DR108
New Plymouth District Council	058, DR072
New Zealand Council for Infrastructure Development	025
New Zealand Public Service Association	023
New Zealand Wind Energy Association	DR090
Noelene Buckland	008
Northland Regional Council	DR077
Opotiki District Council	036, DR106
Otago Regional Council	DR066
Palmerston North City Council	034, DR079
Phil McDermott	DR060
Porirua City Council	DR105
Property Council New Zealand	DR093
Queenstown Lakes District Council	052
Rangitikei District Council	035, DR073
Richard Fisk	019, DR076
Rotorua District Council	011
Ruapehu District Council	024, DR080
Russell McVeagh - Environmental and Resource Management Group	DR094
Society of Local Government Managers (SOLGM)	048, DR083
South Taranaki District Council	039, DR068
Southland District Council	005, DR101
Standards New Zealand	DR084
Taranaki Regional Council	DR075
Tararua District Council	027, DR074
Tasman District Council	006, DR061
Tauranga City Council	002, DR065
Te Rūnanga o Ngāi Tahu	DR104
Thames-Coromandel District Council	DR078
Waikato District Council	016
Waikato Regional Council	045, DR092
Waimakariri District Council	030, DR063
Wairarapa Chamber of Commerce and Manawatu Chamber of Commerce	031
Waitaki District Council	DR086
Waitomo District Council	009, DR095
Wanganui District Council	003
Water New Zealand	004
Wellington City Council	047, DR069
Western Bay of Plenty District Council	033, DR082
West Coast Regional Council	050
Whangarei District Council	010, DR081

Engagement meetings

INDIVIDUAL OR ORGANISATION

Association of Non-Governmental Organisations of Aotearoa
Auckland Chamber of Commerce
Bay of Plenty Regional Council
Canterbury Earthquake Recovery Authority
Cottages New Zealand
David Shand
Department of Conservation
Department of Internal Affairs
Electricity Networks Association
Environment Canterbury Regional Council
Environmental Protection Authority
EziBuy
Federated Farmers of New Zealand
Foodstuffs New Zealand
Forest and Bird
Grow Wellington
Hawke's Bay Master Builders
Health Quality and Safety Commission
Heritage Hotels
Higgins Contractors
Homeworx Design and Build Limited
Hospitality New Zealand
Ian Gordon
Land & Water Forum
Lion
Local Government Forum
Local Government New Zealand
Manawatu Chamber of Commerce
McCain Foods Limited
McDonald's
Ministry for Primary Industries
Ministry for the Environment
Ministry of Business, Innovation, and Employment
Ministry of Health
Ministry of Social Development
Morgan Slyfield
New Zealand Historic Places Trust
New Zealand Institute of Economic Research
Ngā Hapū ō Ngāruahine Iwi Incorporated
Noelene Buckland
Office of the Auditor-General
Peter McKinlay
Powerco
Progressive Enterprises Limited
Silvereye Communications
Society of Local Government Managers

South Taranaki District Council Māori Committee
Standards New Zealand
State Services Commission
Te Rūnanga o Ngāi Tahu
The Mill Liquor
The National Wetlands Trust of New Zealand
The New Zealand Initiative
The Treasury - Regulatory Impact Analysis Team
Waikato Regional Council
Wellington Regional Chamber of Commerce
WHK Hawke's Bay
Wind Energy Association
ANGOA – Marion Blake
Professor Tim Hazeldine
Vernon Rive

CLUSTER MEETINGS

Manawatu-Whanganui region:

Palmerston North (host)
Horizons Regional Council
Horowhenua District Council
Manawatu District Council
Rangitikei District Council
Taranua District Council

Taranaki Region

New Plymouth District Council (host)
South Taranaki District Council
Stratford District Council

Hawke's Bay

Hastings District Council (host)
Hawke's Bay Regional Council
Napier City Council
Wairoa District Council

Wairarapa District Councillors meeting

Carterton District Council
Masterton District Council
South Wairarapa District Council

Wellington Regional Mayors forum

Upper Hutt City Council (host)
Carterton District Council
Greater Wellington Regional Council
Hutt City Council

Kāpiti Coast District Council
Masterton District Council
Porirua City Council
South Wairarapa District Council
Wellington City Council

South Island Strategic Alliance – Core Group

LGNZ ZONE MEETINGS

Zone 1 : Local authorities in the Auckland and Northland regions
Zone 2 : Local authorities in the Bay of Plenty and Waikato regions
Zone 5 & 6 : Local authorities in the South Island

LGNZ SECTOR MEETINGS

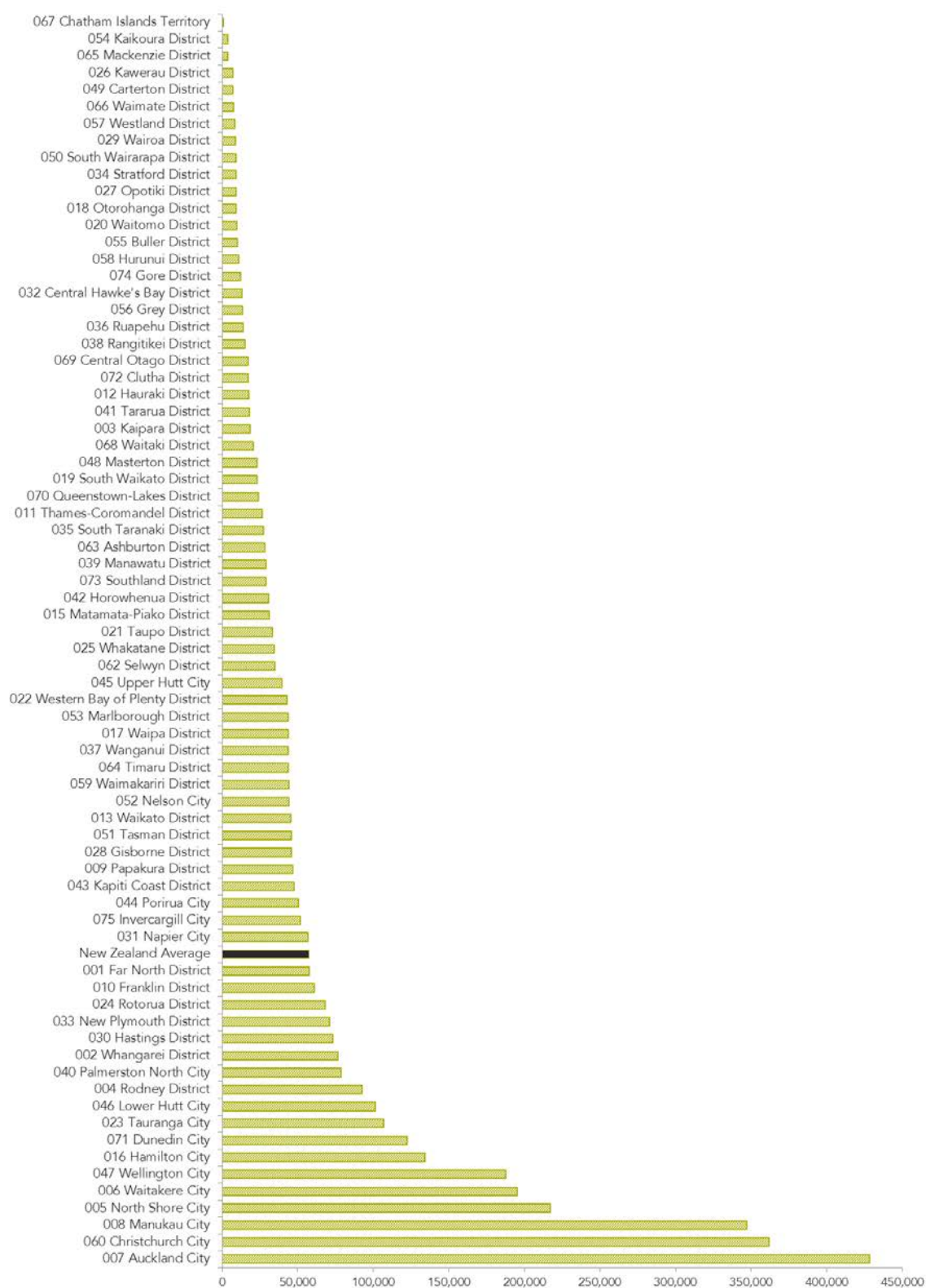
- Metro
- Regional
- Te Maruata Māori Committee

CONFERENCES

Society of Local Government Managers – Auckland	09 Sept 2012
Local Government New Zealand Conference – Queenstown	16/17 July 2012

Appendix B Local authority diversity

Figure B.1 Population of New Zealand's territorial authority areas, 2006

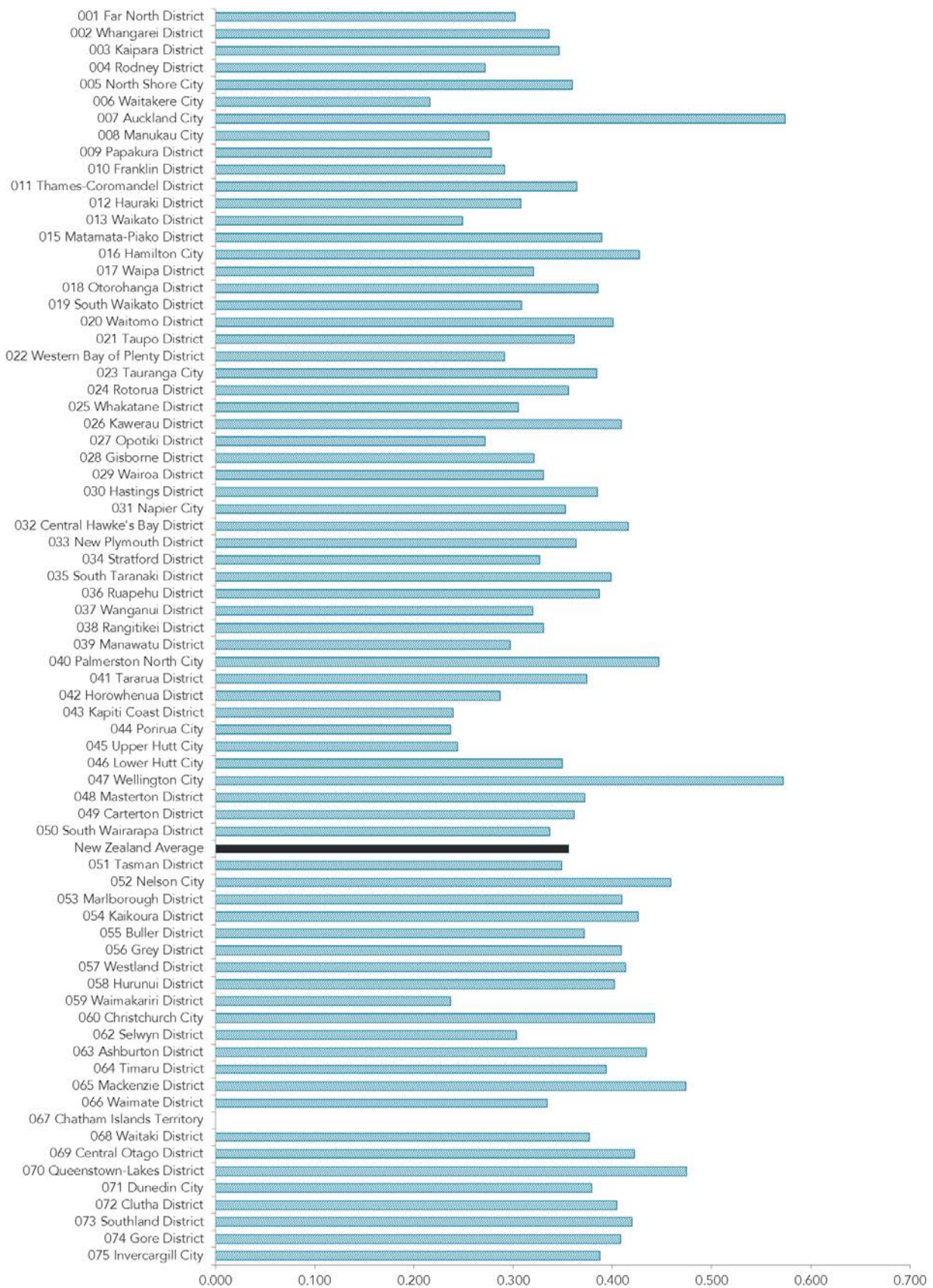


Source: Statistics New Zealand, 2006.

Notes:

1. Numbers "14" and "61" are not included as they refer to territorial authorities no longer in existence. The "New Zealand average" is the arithmetic mean.
2. The Auckland Council has taken over the functions of the Auckland City Council, Manukau City Council, Waitakere City Council, North Shore City Council, Papakura District Council, Rodney District Council and most of Franklin District Council.

Figure B.2 Employment rate in New Zealand territorial authority areas (jobs per head of population)

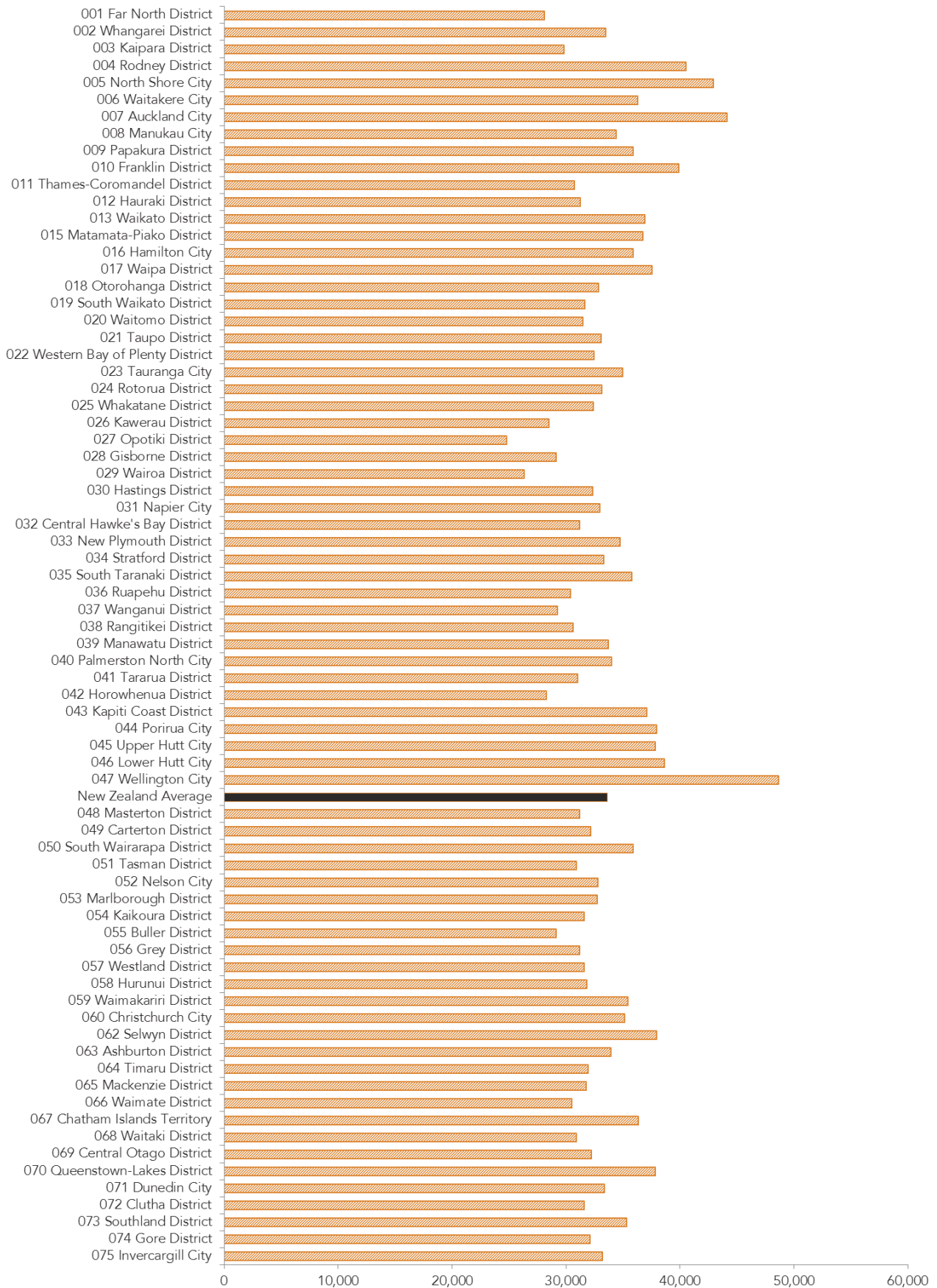


Source: Statistics New Zealand, 2006.

Notes:

1. Territorial authorities are arranged according to the Statistics New Zealand territorial authority index, which indexes territorial authorities geographically from north to south. Numbers "14" and "61" are not included as they refer to territorial authorities no longer in existence. The "New Zealand average" is the arithmetic mean.

Figure B.3 Mean annual income of 25-44 year olds across New Zealand's territorial authorities, 2006 (\$)

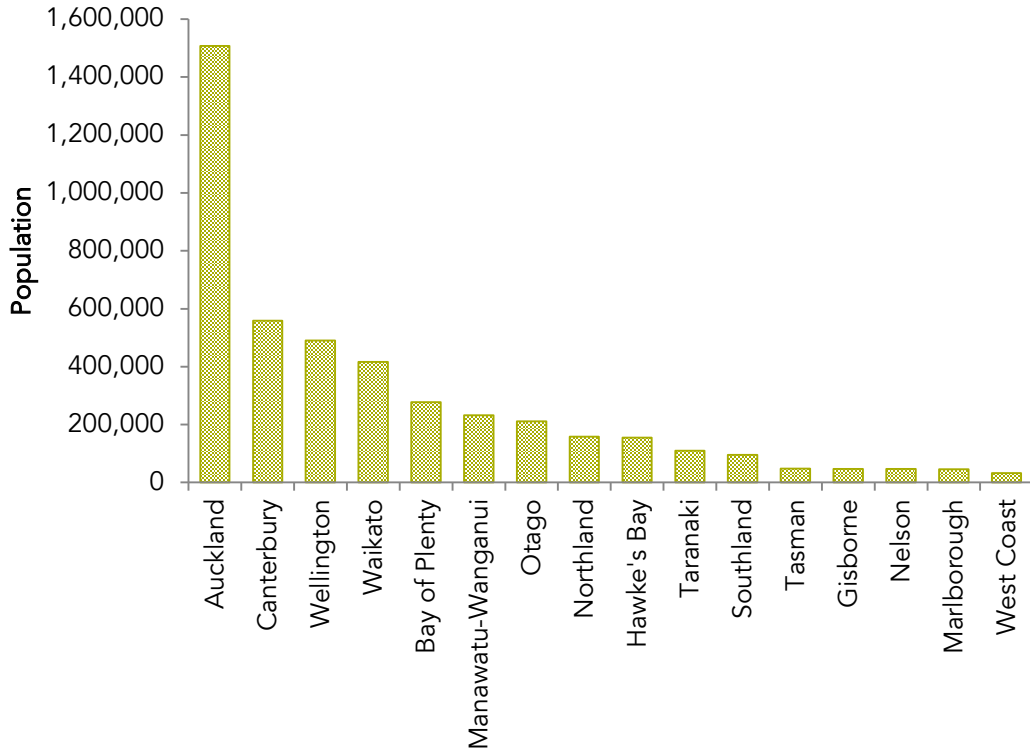


Source: Statistics New Zealand, 2006.

Notes:

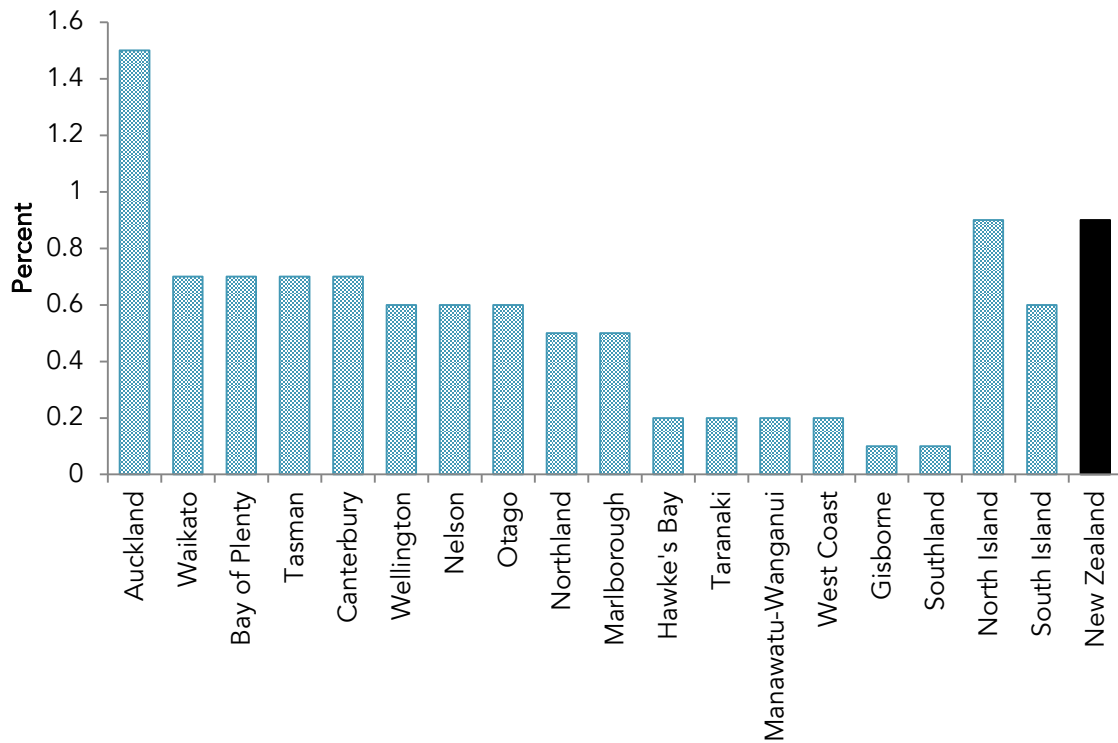
1. Territorial authorities are arranged according to the Statistics New Zealand territorial authority index, which indexes territorial authorities geographically from north to south. Numbers "14" and "61" are not included as they refer to territorial authorities no longer in existence. The "New Zealand average" is the arithmetic mean. Figures based on self-reported census data.

Figure B.4 Estimated population by region, 2012



Source: Statistics New Zealand, 2012b.

Figure B.5 Projected average annual population growth by region, 2006-2031

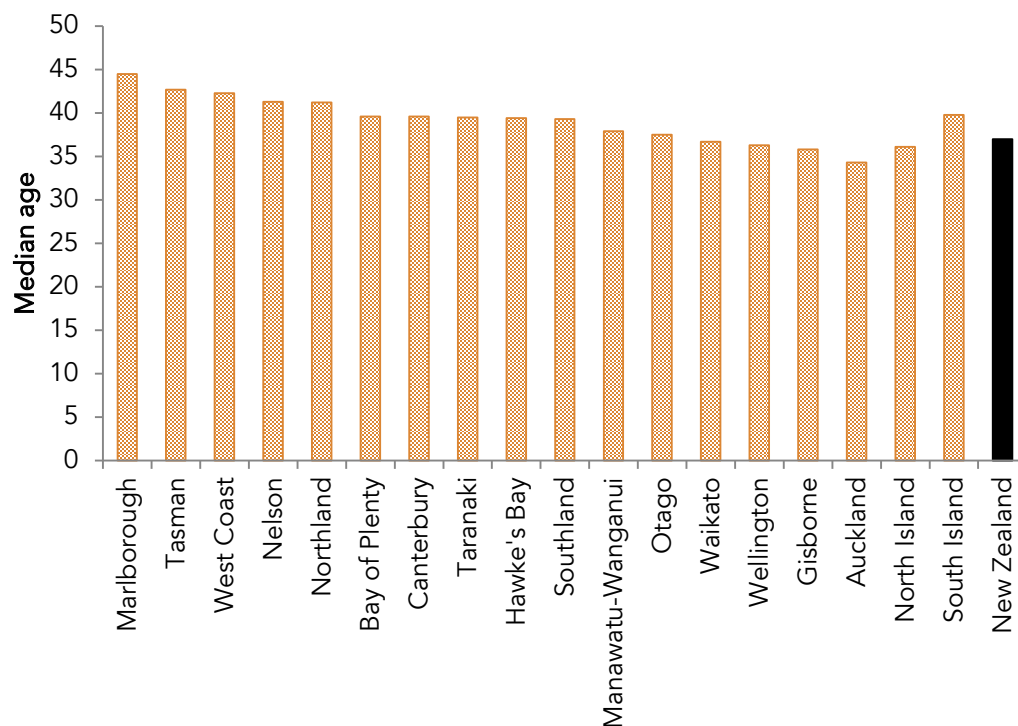


Source: Statistics New Zealand, 2012a (medium population projections)

Notes:

1. Unitary authority and regional authority areas are both included in this graph.

Figure B.6 Median age by region, 2012



Source: Statistics New Zealand, 2012b.

Notes:

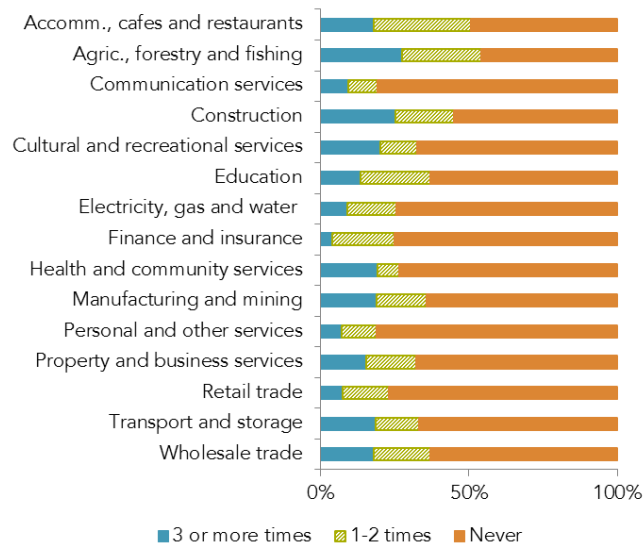
1. Unitary authority and regional authority areas are both included in this graph. Figures based on Statistics New Zealand subnational population projections.

Appendix C The impact of regulation on different businesses

In general, most regulations impact on at least some businesses across a number of industries. For example, 'planning, land use or water consents', 'building and construction consents' and 'parking and traffic control' impact on businesses operating in all industries (Figure C.1 and Figure C.2).

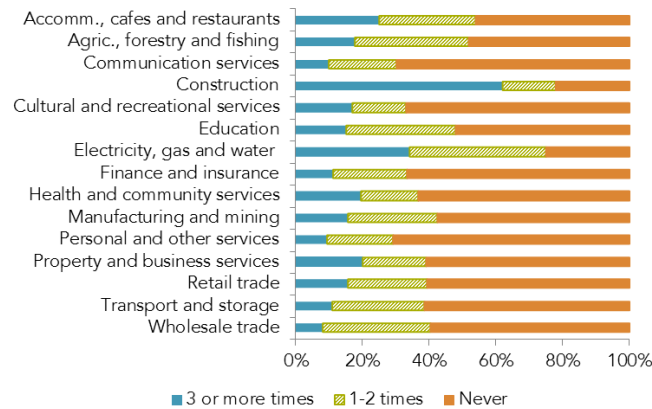
However, in addition to these generally applicable regulations, the survey results indicate that the impact of particular regulations falls on businesses in certain industries disproportionately. For example, 'food safety' regulation falls disproportionately on businesses in the accommodation, cafes and restaurants industry whereas 'water quality and monitoring' regulation predominantly influences businesses in the agriculture, forestry and fishing industry.

Figure C.1 Survey result: Number of times your business had contact with a local council for planning, land use or water consents in the past three years (% by industry)



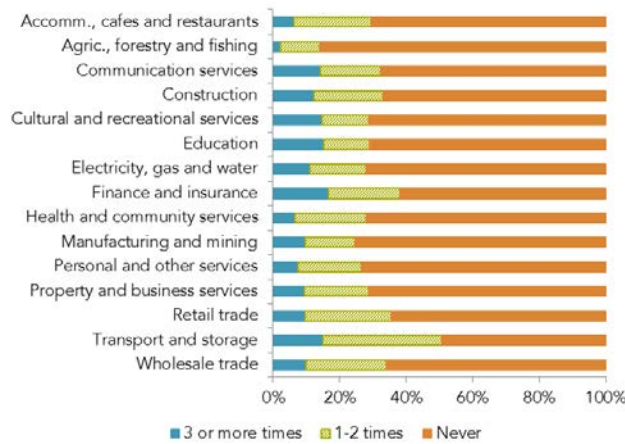
Source: Productivity Commission, 2012b.

Figure C.2 Survey result: Number of times your business had contact with a local council for 'building and construction consents' in the past three years (% by industry)



Source: Productivity Commission, 2012b.

Figure C.3 Survey result: Number of times businesses had contact with a local council for ‘parking and traffic control’ in the past three years (% by industry)

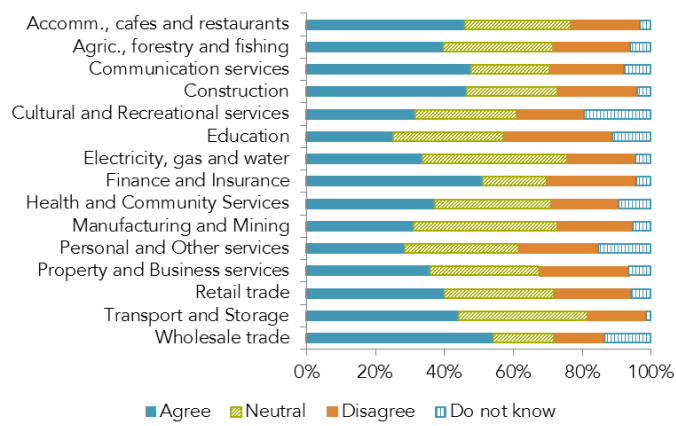


Source: Productivity Commission, 2012b.

The survey results indicate that ‘planning, land use or water consents’ and ‘building and construction consents’ have the greatest cost impact on businesses (Figure C.4). Specifically, of the businesses that assessed local government regulations (not rates) as financially burdensome, 41% and 19% ranked ‘building and construction consents’ and ‘planning, land use or water consents’ respectively as having the greatest financial impact.

Both of these local government regulatory areas are typically associated with new projects such as expanding or building something new. High costs in these areas may have a ‘chilling effect’ on investment. As such, the survey may underestimate the true financial impact of council costs on businesses, given that compliance costs may discourage some businesses from undertaking new projects and thereby avoid contact with local councils.

Figure C.4 Survey result: Local government regulations (not rates) place a significant financial impact on my business



Source: Productivity Commission, 2012b.

Appendix D Assessment of local decisions

This appendix summarises the results of the Commission's evaluation of local government regulatory decision-making processes. Three types of decision-making processes are reviewed—land allocation, waste management and minimisation and dog control. A background and evaluation of decisions across a range of councils is provided for each of these regulatory processes.

D.1 Land allocation decisions

Councils are empowered under the Resource Management Act 1991 (RMA) to issue planning documents that control the use of privately owned land for different purposes (broadly for residential, commercial or industrial use). These decisions are often referred to as zoning or rezoning decisions, and aim to achieve consistent land use within an area to reduce the risks of negative impacts (such as noise pollution and discharges to air and water). If a party proposes to use land in a way that is not permitted under the plan, then the party needs to seek a plan change.

The Commission assessed a total of nine land allocation decisions made as part of planning processes carried out by territorial authorities. These decisions affected possible residential, commercial and industrial developments, and were either initiated by the council itself as part of a plan review or requested by a private property owner. Although, in most cases, private requests were taken at the initiative of owners, in one decision that was reviewed, the council first made its intention clear to redevelop the land, and then asked for proposals to suggest ways of achieving this land use.

The main reasons for proposing a change in land allocation can be grouped into two types.

- The current land allocation in the plan is no longer deemed appropriate to meet the needs or aspirations of the local population.
- A better use of the land was proposed through a plan change request. This does not necessarily imply that the status quo was inappropriate, but rather that alternative uses for the land were proposed that were deemed to be more suitable or of higher overall value.

Land allocation changes are required to be assessed under section 32 of the RMA. This section requires an explicit evaluation of whether or not the options being considered are the most appropriate way to achieve the objectives set by the council, regarding the effectiveness and efficiency of the options assessed. The section 32 compliance reports issued by councils provided useful information for assessing of the decision-making process.

A number of the land allocation decisions that were reviewed adopted the Special Consultative Procedure under the Local Government Act 2002. A variety of consultation methods were used by councils, including surveys, open public days, council workshops and meetings with affected parties.

A summary of the evaluation of land allocation decision-making processes is provided in Table D.1

Table D.1 Summary of evaluation of land allocation decisions

Land allocation decisions										
Council	Large councils			Midsized councils				Small councils		
	A	B	C	A	B	C	A	B	C	
Issue identification	Timing of when the problem would crystallise is unclear	Interaction with neighbouring areas not assessed					Unconvincing relationship with wider district needs			
Objective							No specific objectives identified		Too many objectives with no weighting	
Options analysis	Full impacts not evaluated	Alternative sites considered in issues paper, but no options	No alternatives considered	Mostly complete, but analysis of intermediate options is unconvincing	Two levels of detailed analysis carried out		Options and analysis incomplete	Negative impacts not fully assessed	Limited reporting seems to have taken place	
Implementation and monitoring	Specific concerns were identified, but not addressed		Potential impacts on neighbours not addressed		Incomplete			Review of outcome not considered		Not clear how the development would be managed to meet amenity requirements
Consultation			No response to objections of submitters							
Key:	Incomplete or unconvincing		Partially complete and convincing		Complete and convincing					

D.2 Waste management and minimisation

Following the passing of the Waste Minimisation Act 2008 (WMA), councils have been required to develop new Waste Management and Minimisation Plans (WMMPs). In addition, several councils have also issued bylaws that control the management of solid waste within their territorial boundaries. A sample of recent WMMPs and waste bylaws have been evaluated.

The overall purpose of the WMA is to encourage waste minimisation and reduce waste disposal to protect the environment, and provide social, economic, cultural and environmental benefits. The WMMPs required under the Act effectively replace previous requirements to develop waste management plans under the Local Government Act 1974. All previous waste management plans are required to comply with the new Act. Bylaws can be created under the WMA, but need to be consistent with the local WMMP. Bylaws typically regulate the collection, transportation, and manner of disposal of waste, or prohibit certain activities in relation to the management of waste.

The WMA provides some guidance on the process that is expected to be followed to prepare a WMMP. The Act specifies that each WMMP must have regard to the New Zealand Waste Strategy and must describe the:

- objectives and policies for achieving effective and efficient waste management and minimisation within that authority's district – suggesting that Parliament intended local factors to influence the specific objectives of each plan;
- methods for achieving the above objectives – again recognising that a “one size fits all” is unlikely to be appropriate in the solid waste sector; and
- funding planned for implementation of the WMMP – to ensure that the plan is financially sustainable and efficient.

The Commission observed substantial variation in the way that councils discharge their responsibilities under the WMA. A number of councils have conducted full waste assessments. The requirements for waste assessments are described in the Act, and generally provide a useful stocktake on solid waste composition and issues in the region. Other councils have placed less emphasis on gathering data on waste in their area, and appear to have largely incorporated existing waste management practices into the WMMP.

Variation on how local communities are engaged during the process of preparing a WMMP was also observed. This is somewhat surprising, given that councils are required under the Local Government Act 2002 to consult with members of their community that may be affected by the proposed decision. Some councils engaged directly with key stakeholders in affected industries – such as industries generating significant quantities of waste.

A summary of the evaluation of waste management and minimisation decision-making processes is provided in Table D.2.

Table D.2 Summary of evaluation of waste management and minimisation decisions

Waste management and minimisation decisions							
Council	Large councils*		Midsized councils*		Small councils		
	A	B**	A**	B	A	B	C
Issue identification	Issue of council control of waste scheme not articulated						
Objective	No analysis of economic/ environmental trade-offs			<ul style="list-style-type: none"> Unclear on vision and objectives Options rather than objectives 	Local issues not considered	Too many objectives. No hierarchy	Objectives lack specificity
Options analysis	Final plan moved away from all options presented in waste assessment	Non-bylaw options not fully explored	<ul style="list-style-type: none"> Minimal analysis with incomplete options Options not addressing objectives 	Complete set of options, but incomplete analysis	Complete options but unconvincing analysis	No analysis undertaken	Several options examined individually, but not compared
Implementation and monitoring	No detail on implementation risks				Implementation issues not considered	Not clear how it will be implemented and enforced	Implementation issues not addressed
Consultation							
Key:	Incomplete or unconvincing	Partially complete and convincing	Complete and convincing				

Notes:

- * A third evaluation could not be completed due to a lack of information provided
- ** Bylaw decision

D.3 Dog control decisions

The third type of regulatory decision considered was dog control policies and bylaws. A range of councils have undertaken reviews of their dog control policies and/or bylaws, or created new bylaws, over the past eight years.

All territorial authorities are required to have a dog control policy under the Dog Control Act 1996 (DCA). Territorial authorities may also develop dog control bylaws, which give them legal powers to enforce any dog-related regulations, and achieve the objectives of the policy. The purpose of the DCA is to make better provisions for the care and control of dogs, and to make provisions in relation to the damage caused by dogs.

The content of dog control policies needs to respond to the factors listed in section 10 of the DCA, which include:

- identifying any public places in which dogs are to be prohibited;
- identifying any public places in which dogs need to be on a leash;
- identifying areas to be designated as dog exercise areas in which dogs may be exercised at large;
- stating whether menacing dogs are required to be neutered; and
- specifying dog registration fees, enforcement policies, and penalties.

The dog control policies reviewed essentially describe the council's approach to controlling and caring for dogs within their community. The standard process followed by councils starts by identifying issues that are specific to their community. Councils then develop specific objectives for their policy and/or bylaw to ensure that it meets the needs of their communities more appropriately than broad objectives in the DCA.

While some councils conduct their reviews separately, others choose to review their policy and bylaw through a parallel process to minimise the costs, and to streamline consultation with dog owners and the wider community. There is typically considerable community involvement in the decision-making process, which is not surprising given the high proportion of New Zealanders that are dog owners and the broader impacts of animal welfare in the community.

A summary of the evaluation of dog control decision-making processes is provided in Table D.3.

Table D.3 Summary of evaluation of dog control decisions

Dog control decisions											
Council	Large councils			Midsized councils				Small councils			
	A	B	C	A	B	C	A	B	C		
Issue identification								No local issues considered		No local issues considered	
Objective	No locally specific objective	Unconvincing local objective	Main objective too broad					Trade-offs between objectives not considered		No local objectives	
Options analysis		Specific options not analysed	Options not analysed	Specific options not analysed	Partially complete	Options entirely based on consultation		Incomplete options and analysis	Options listed but not analysed		
Implementation and monitoring				Implementation not considered					Implementation not considered	Implementation not considered	
Consultation											

Key:	Incomplete or unconvincing	Partially complete and convincing	Complete and convincing
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Appendix E A dog control regulatory overview document

E.1 Overview of New Zealand's dog control system

Introduction

This document describes the dog control regulatory system in New Zealand. It sets out the roles of different players, the benefits and costs the system creates, the information base for regulators and who has responsibility for maintaining an overview of the dog control system.

The document provides both a visual and a table-form overview of the dog control system. The visual overview illustrates the key steps in dog control regulation, and shows where the different key players play a role in this system (Figure E.1). The table provides a more in-depth description of the system (Table E.1).

Figure E.1 Overview of the dog control system

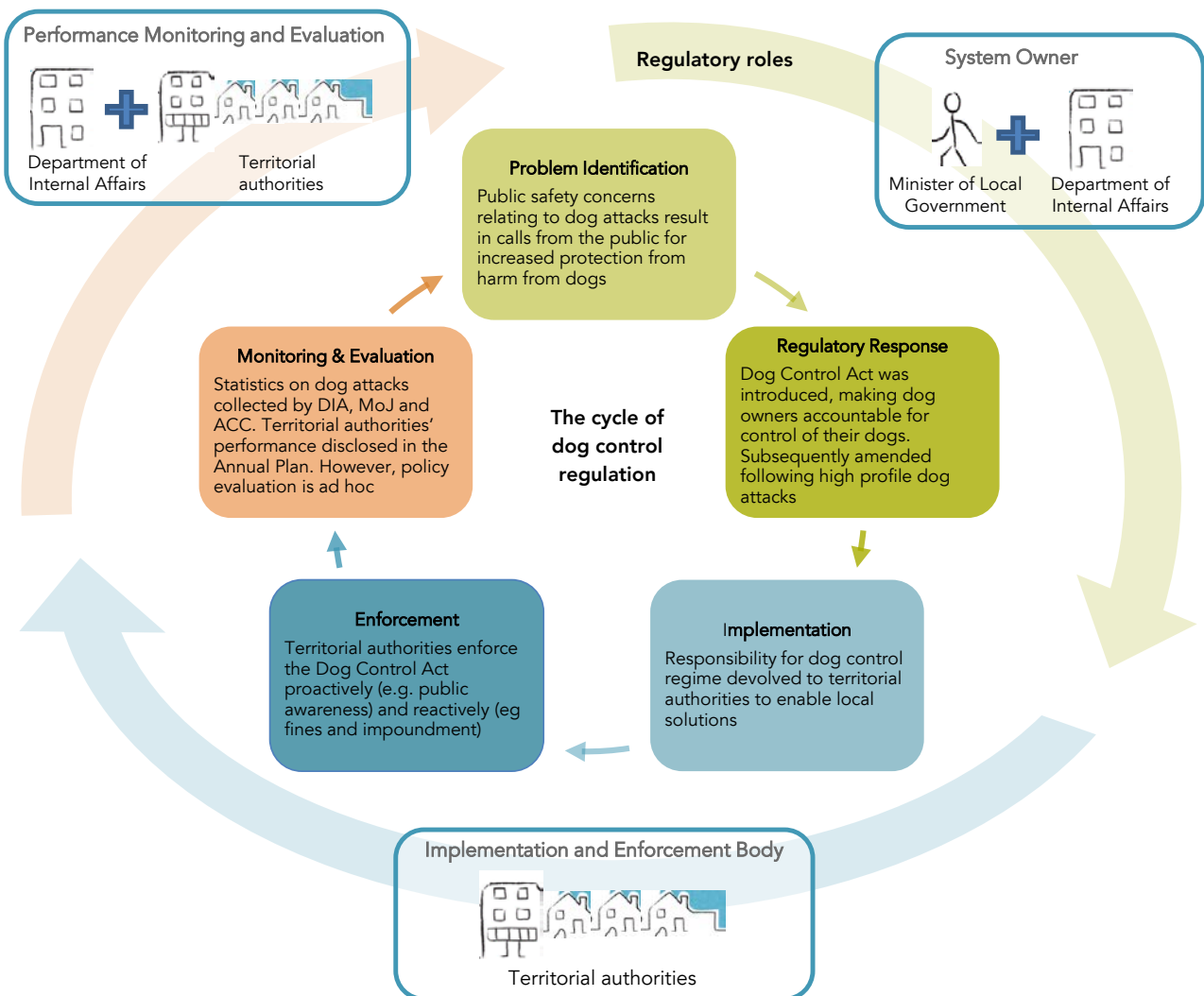


Table E.1 Overview of the dog control system

Regulatory framework					
Original case for intervention	The current dog control regime was introduced after a major review of dog control in the mid-1990s, following increased public concern relating to dog attacks. The Dog Control Act 1996 saw dog control shift from a focus on enforcement to dog owners being held accountable for the control of their dogs through a series of obligations, backed by enforcement.				
Policy objectives	The objective of Dog Control Act is to balance the interests and freedoms of responsible dog owners with the need to protect the general public from harm from dogs.				
Costs and benefits	<table style="width: 100%; border: none;"> <thead> <tr> <th style="text-align: left; width: 50%;">Costs</th> <th style="text-align: left; width: 50%;">Benefits</th> </tr> </thead> <tbody> <tr> <td style="vertical-align: top;"> <ul style="list-style-type: none"> • central and local government policy costs • monitoring, reporting and evaluation costs • animal control operating costs for local councils • compliance costs for dog owners </td> <td style="vertical-align: top;"> <ul style="list-style-type: none"> • increased amenity • community health and reduced health care costs associated with dog attacks • public safety • environmental protection • animal welfare </td> </tr> </tbody> </table>	Costs	Benefits	<ul style="list-style-type: none"> • central and local government policy costs • monitoring, reporting and evaluation costs • animal control operating costs for local councils • compliance costs for dog owners 	<ul style="list-style-type: none"> • increased amenity • community health and reduced health care costs associated with dog attacks • public safety • environmental protection • animal welfare
Costs	Benefits				
<ul style="list-style-type: none"> • central and local government policy costs • monitoring, reporting and evaluation costs • animal control operating costs for local councils • compliance costs for dog owners 	<ul style="list-style-type: none"> • increased amenity • community health and reduced health care costs associated with dog attacks • public safety • environmental protection • animal welfare 				
Legislation	<p>Dog Control Act 1996, Dog Control Amendment Acts 2003, 2004, and 2006</p> <p>The intention of the Act is to improve public safety around dogs by making provision for the control of dogs, including requiring registration of dogs, special provisions in relation to menacing and dangerous dogs, and imposing obligations on owners designed to ensure dogs do not cause nuisance to any person or cause harm to any person or animals and wildlife. The most significant changes to the Act have been the banning of the importation of dangerous breeds and classification of 'menacing dogs' (2003) and the requirements for owners to microchip their dogs (2006).</p>				
Regulations	<p>The Dog Control (Certifying Organisations for Disability Assist Dogs) Order 2010 provided the ability for two additional organisations to certify dogs for public access, as well as providing public access for training purposes to dogs under section 75 of the Act.</p> <p>The Dog Control (Microchip Transponder) Regulations 2005 prescribe the kinds of microchips that must be implanted, where they must be implanted and how this must be done.</p> <p>The Dog Control (National Dog Control Information Database Levy) Order 2006 prescribes the formula for cost recovery of the National Dog Database from territorial authorities.</p> <p>The Dog Control (Prescribed Forms) Regulations 1996 prescribe the form of various notices and applications under the Act (for example, infringement notices, notification of seizure).</p>				
Local government powers	Territorial authorities are required to adopt dog control policies, maintain the dog registration system and enforce the Act. Dog control has been devolved to territorial authorities to enable local solutions for local circumstances. Territorial authorities are given powers under the Act to enforce their respective dog control policies through infringement notices, impounding and prosecutions. Territorial authorities can implement their powers through in-house, out-sourcing or shared service arrangements.				

Roles and responsibilities		
Entities	Department of Internal Affairs (DIA)	Territorial authorities
Responsibilities	The Department provides advice to Ministers on policy issues relating to dog control and the regulatory and legislative framework governing dog control.	Territorial authorities are required to enforce dog control legislation, respond to complaints and enforce owner responsibilities for the care and control of their dog(s).
Activities	Policy development and evaluation, maintenance of the National Dog Database and provision of public education for dog owners, parents and children (online information).	Policy and bylaw development, registration of dogs, animal control services (for example, complaint response, impoundment, adoption and euthanasia), proactive field work, prosecutions. Report to DIA on dog control policy, practices and provide statistical information
Relationship	<p>Central government has devolved significant responsibility for dog control to local government. Territorial authorities make significant regulatory decisions relating to dog control, but within the scope of the prescribed legislation.</p> <p>There are no prescribed requirements for central government to develop national dog control policy with territorial authorities. However, central government engaged widely with territorial authorities (surveys and formal submissions) in the 2003 and 2007 reviews of dog control.</p> <p>In terms of monitoring, section 10A of the Act requires each territorial authority to report on its dog control policy and practices and provide a breakdown of specified statistical information to DIA.</p>	

Resources	
System owner	The resources and effort required by the system owner to maintain the regulatory system relate to policy advice (DIA, Policy Group) , public safety material (dogsafety.govt.nz) and National Dog Database (monitoring).
Implementation and enforcement	<p>The resources and effort required by local government to implement the regulatory system include:</p> <ul style="list-style-type: none"> • policy and bylaw development (as part of their wider policy and planning role); and • operating costs – animal management services, including monitoring, inspections and enforcement, communications and public relations. <p>The range of expenditure varies depending on the size of territorial authority—using a sample of known council dog control costs and extrapolating on a per capital basis, the estimated cost of dog control across New Zealand is in the range of \$30 million to \$40 million per year.</p> <p>The balance of costs for maintaining the dog control regime rest with local government. These costs are recovered through a mixture of rates subsidy and user charges. Costs recovered are dependent on the territorial authority's revenue and finance policy (a sample of councils found the range of user charges recovery between 50% and 100%).</p>

Performance monitoring and evaluation

System owner performance monitoring	<p>DIA Statement of Intent – does not specifically report measures on dog control.</p> <p>Dog Safety and Control Report 2009/10 – second in a series of reports (requested by Cabinet) using data from the National Dog Database, supplemented with information from the Accident Compensation Corporation (ACC) on dog bite claims and Ministry of Justice prosecutions.</p>
Implementation and enforcement	<p>In general, performance measures for local authorities are reported in the Annual Plan. Common measures include:</p> <ul style="list-style-type: none"> • timeliness of response to incidents; • customer satisfaction; • decrease in the number of annual complaints and response times for complaints; • percentage of costs recovery from user charges for animal management activity; and • hours spent on public education activities.
System wide performance monitoring	<p>As part of a package of dog control measures approved by Cabinet in October 2007, DIA was directed to pursue work on enhancing the data available on dog safety and control. Since then, DIA has produced two Dog Control and Safety Reports, the last being in 2009/10.</p> <p>This report provides some analysis of data from the National Dogs Database, supplemented by information from ACC dog bite claims and Ministry of Justice prosecutions. It provides a snapshot as of May 2010. DIA has noted it is difficult to build an overall picture of the effectiveness of the dog control regime from administrative data alone, in large part due to data quality issues in the National Dogs Database.</p> <p>In 2009, the Minister of Local Government signalled a first principles review of the dog control regime would take place in 2011, including a review of the registration system, banning dangerous breeds and microchipping. However, the review has been put on hold following the Christchurch earthquake.</p>
Evaluation process	<p>Judging by recent evaluations and policy reviews, the evaluation processes for dog control at the central government level appear to be on an <i>ad hoc</i> basis and in response to high profile dog attacks.³⁴</p>
Evaluation activities	<p>The last major evaluation of dog control policy was in 2007, in response to a death as a result of a dog attack. The review examined dog control under the Dog Control Act 1996, its implementation and explored options to improve public safety (in particular strengthening provisions relating to dangerous breeds). The review found:</p> <ul style="list-style-type: none"> • little systemic information was collected or monitored on dog attacks, making it difficult to assess the effectiveness of the regime and develop policy; • inconsistent approaches to enforcement by local councils; • unregistered dogs are a disproportionate source of problem behaviour; and • there is little evidence to suggest that breed-based systems to assess dog safety risks are effective (reliant on owner disclosure of breed). <p>The review resulted in several changes to the dog control regime:</p> <ul style="list-style-type: none"> • establishment of the National Dog Database to enhance monitoring; and • enhancing voluntary measures and regulations (consistent public messages on dog safety and the banning of the importation of certain breeds). <p>The review also resulted in the introduction of a Bill to amend the Act to:</p> <ul style="list-style-type: none"> • require the mandatory neutering of dogs classified as menacing; • give the government the power to enact regulations to specify additional policy matters that councils must consider in the development of their dog control policies; and • simplify the process for adding more breeds to the import ban.

Appendix F Case studies of performance assessment: Dog control, building control and departmental assessment

This appendix reviews three instances of performance reporting. It finds that there is a lack of balance in dog control and building control performance measures, and there is room for improvement in the way departments assess performance.

Dog control reporting

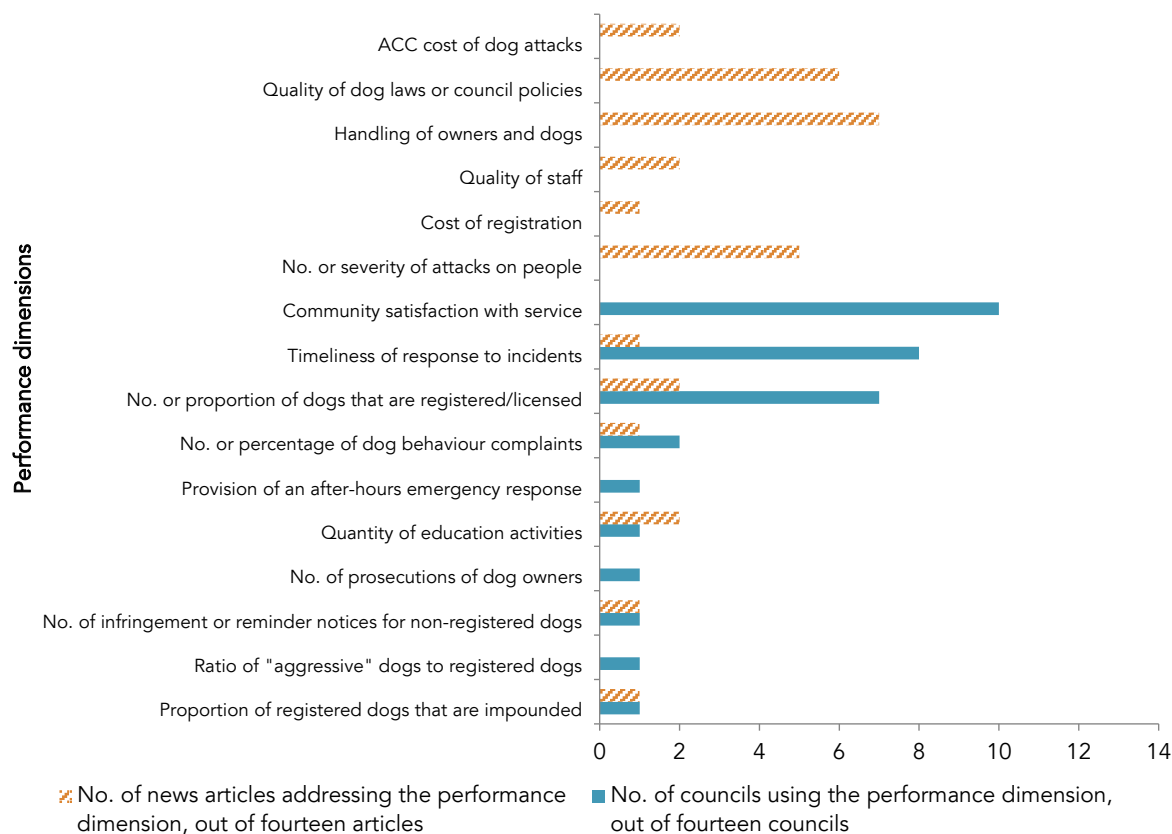
There is a lack of balance in dog control performance measures

Territorial authorities report on the performance of their dog control activities in annual reports to their communities under the Local Government Act 2002 (LGA). A review of 14 council annual reports indicates that the three most common measures of dog control activities are customer satisfaction through surveys, the speed with which councils respond to dog control incidents and the number of dogs that are registered or licensed.

Measures of customer satisfaction, timeliness and numbers of registrations are certainly valuable performance measures, but they do not provide a sufficiently broad picture of the performance of dog control regulation in achieving its objective, which is to balance the interests and freedoms of responsible dog owners with the need to protect the general public from harm from dogs. This is not to argue for more dog control performance measures, but it does suggest that the balance of performance measures may not reflect the needs of the community.

To test the proposition that dog control performance measures may not reflect community needs, the Commission reviewed 14 news articles on dog control from national, regional and local newspapers. Provided that the news articles are a good indication of what their readers care about, it appears that communities care about a wider range of performance indicators than is reported in annual reports. Indicators in news articles include the number and severity of dog attacks, the quality of dog laws or council policies and the handling of dog owners and dogs. Figure F.1 provides a comparison of the 14 annual reports with 14 news articles.

Figure F.1 Indicators of dog control performance reported in territorial authority annual reports, versus indicators of performance mentioned in news articles



Sources: Fourteen local authority annual reports for the 2011/12 financial year (Ashburton District Council; Auckland Council; Central Hawke's Bay District Council; Central Otago District Council; Christchurch City Council; Dunedin City Council; Far North District Council; Grey District Council; Hastings District Council; Horowhenua District Council; Invercargill District Council; Napier City Council; Porirua City Council; and Wellington City Council).

Fourteen news articles on www.stuff.co.nz (Dog control needs 'immediate improvements', Whangarei Leader, 3/09/2007; Canine boom hits capital, Dominion Post (Paul Easton), 27/02/2012; Council warns dog owners to register, Southland Times, 28/09/2007; Apology over advice that led to death of dog, Eastern Courier (Auckland), 9/08/2007; Hide plans review of 'onerous' regulations, The Press (Keith Lynch), 8/10/2009; No change to dog laws despite 27,000 injuries, Dominion Post (Sam Boyer), 1/10/2012; Hutt City takes over dog control services, The Wellingtonian (Nicholas Boyack), 3/10/2012; Calls for tougher dog control laws re-ignited, Stuff (Marty Sharpe, Dave Burgess & Amanda Fisher), 27/01/2010; Family alleges assault in dog control incident, Manawatu Standard (Vicki Waterhouse, 23/07/2012); Animal Control response on hold, Christchurch Mail, 25/01/2013; Dog control policy review, Marlborough Express, 16/01/2012; Unwanted dogs shot to save money on vets' bills, Stuff (Seamus Boyer), Last updated 26/10/2012; "Dog needlessly shot", resident claims, Auckland Now (Dubby Henry), 21/11/2012; A dog's life in Picton, Marlborough Express (Sonia Beal), 13/04/2012).

An important caveat to the finding that dog control performance reporting is not broad enough is that there are other forms of dog control reporting. In particular, section 10A of the Dog Control Act 1996 (DCA) requires territorial authorities to report annually on the administration of dog control policies and dog control practices and a variety of dog control related statistics. Councils must give public notice of the report and send a copy of the report to the Secretary for Local Government within one month after it has been formally adopted. Some of these DCA reports provide a broader set of performance measures than those reported in annual reports under the LGA. For example, the Matamata-Piako District Council's 2012 dog control report notes an average of 10 street patrols were undertaken each month in each of the three main towns. The report explains that regular street patrols will ensure that animals are kept off the streets, and that this will improve the health and wellbeing of residents. In addition, 600 property visits were carried out per year, to ensure that people are taking quality care of their animals (Matamata-Piako District Council, 2012, p. 5).

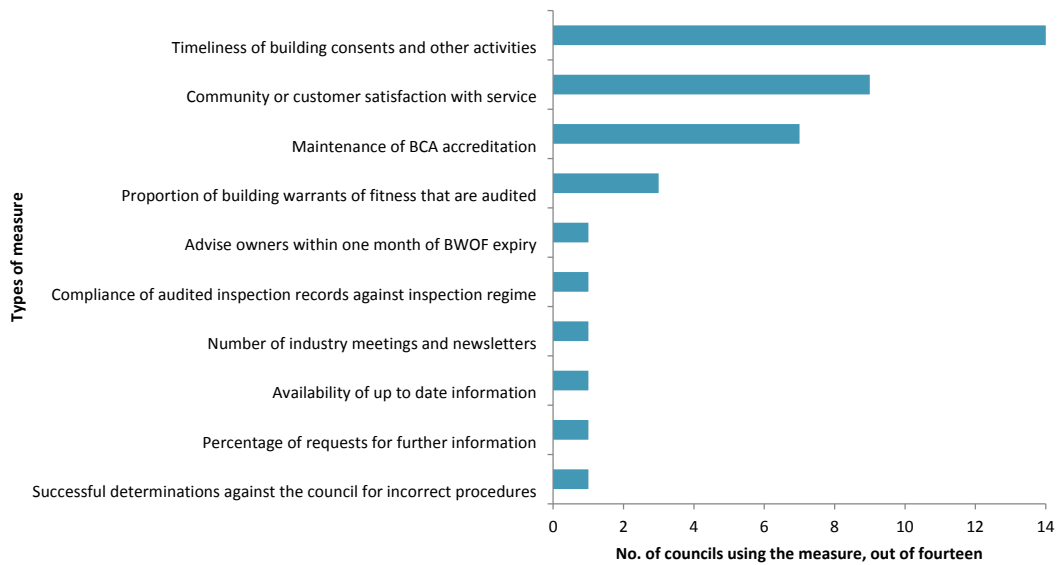
Building control

There is a lack of balance in building performance measures

As with dog control, territorial authorities report on building control performance in their annual reports under the LGA. An analysis of 14 annual reports indicates a focus on timeliness and community satisfaction

(Figure F.2), at the expense of measures of the quality of building control such as the availability of up-to-date building control information.

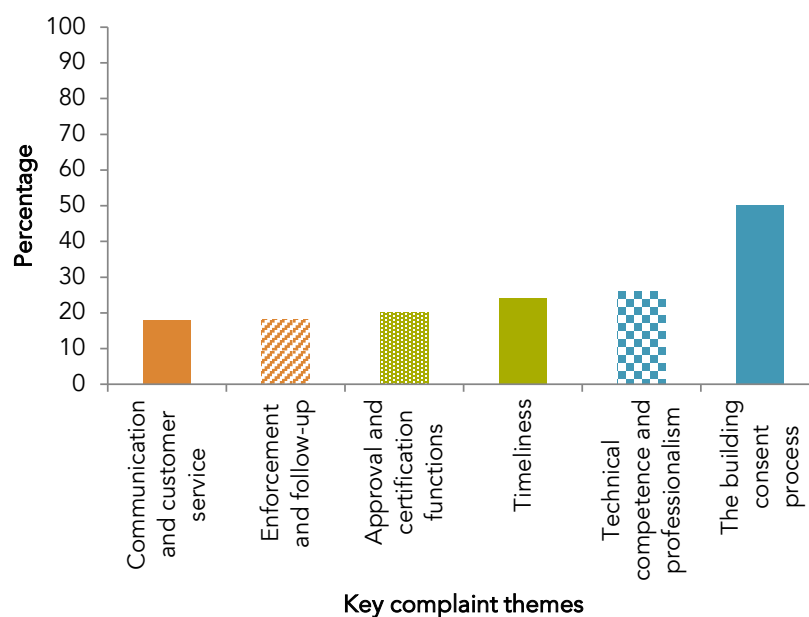
Figure F.2 Indicators of building control performance in territorial authority annual reports



Source: Analysis of 14 local authority annual reports for the 2011/12 financial year (Ashburton District Council; Auckland Council; Central Hawke's Bay District Council; Central Otago District Council; Christchurch City Council; Dunedin City Council; Far North District Council; Grey District Council; Hastings District Council; Horowhenua District Council; Invercargill District Council; Napier City Council; Porirua City Council; and Wellington City Council).

The importance of quality in building control as well as timeliness is demonstrated in a survey of complaints to the former Department of Building and Housing (DBH). DBH analysed complaints to the department about building control authorities (DBH, 2010b). As with the analysis of news articles above, the analysis of complaints provides a useful perspective on the issues that parts of the community care about in respect of building control. The DBH report indicated, for instance, that there were twice as many complaints about the building consent process as there were about timeliness (Figure F.3).

Figure F.3 Building control authority complaints received by the Department of Building and Housing May 2006 to December 2009



Source: DBH, 2010b.

The quality of performance measures is important, not the quantity

The Office of the Auditor-General (OAG) reported on the quality of building consent performance measures in 2010 (OAG, 2010). The OAG's findings support the Commission's conclusions that there is a lack of balance in performance reporting, while emphasising that the answer is not necessarily a greater number of measures:

Ensuring that buildings are safe is an important process, but we saw only two better performance measures that assessed inspection and compliance services. (p. 36)

In our view, there should be more emphasis on measuring services that provide assurance on construction quality and building maintenance. (p. 37)

It is the role of local authorities' to apply the appropriate enforcement action to breaches of the Building Act. We found only two enforcement performance measures, and assessed one as better because it included a timeframe for investigating illegal activities and unauthorised work. (p. 37)

A large number of performance measures were often included in each activity. It is the quality of the performance measures that matter and not the quantity. (p. 16)

The performance measures that a local authority chooses should provide a balanced picture of the important aspects of the levels of service that it provides and the purpose of that activity. (p. 17)

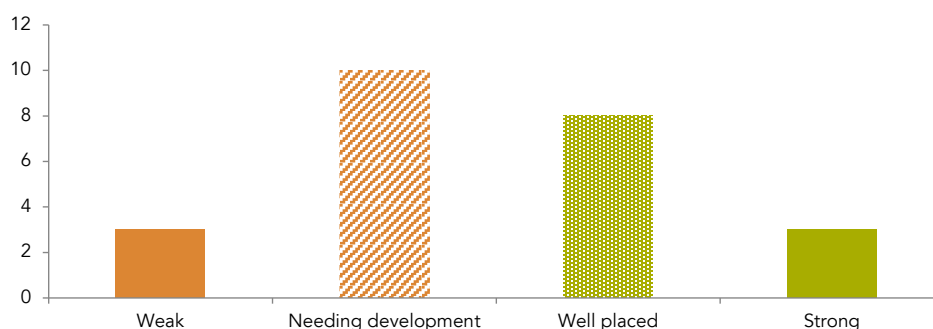
Performance assessment by departments

There is room for improvement in the way departments assess performance

As noted in Chapters 5 and 11, departments have an important role to play in the assessment of local government regulatory performance, by providing advice on the objectives of regulation, monitoring the performance of councils under some regulations, and undertaking post-implementation reviews of regulations.

Over the last three years, the State Services Commission and the Treasury have facilitated Performance Improvement Framework (PIF) reviews of departments in New Zealand. The reports of these reviews are available online and provide an evidence base for assessing how well departments undertake performance assessment activities in general (ie, not just regulatory performance assessment). The results in Figure F.4 and Table F.1 indicate that there is room for improvement in the way departments assess performance.

Figure F.4 How well do 24 government agencies monitor, measure and review their policies, programmes and services to make sure that they are delivering their intended results?



Source: Analysis of twenty-four Performance Improvement Framework reviews of government agencies (Ministry for the Environment; Department of Internal Affairs; Ministry of Health; New Zealand Customs Service; Department of Corrections; New Zealand Police; Ministry of Defence; Ministry of Justice; Education Review Office; Ministry of Economic Development; Statistics New Zealand; Crown Law Office; Ministry of Pacific Island Affairs; Ministry of Women's Affairs; Ministry of Education; Inland Revenue Department; New Zealand Trade and Enterprise; New Zealand Transport Agency; Ministry of Social Development; The Treasury; Land Information New Zealand; Te Puni Kokiri; Department of Conservation; Ministry of Foreign Affairs and Trade). Reviews available at www.ssc.govt.nz/pif-reports-announcements.

Table F.1 How well do seven agencies with regulatory roles monitor, measure and review their policies, programmes and services to make sure that they are delivering their intended results?

Agency	Performance rating
Ministry for the Environment	Needing development
Department of Internal Affairs	Needing development
Ministry of Health	Needing development
New Zealand Customs Service	Needing development
Ministry of Justice	Needing development
Ministry of Economic Development	Strong
The Treasury	Well placed

Source: Performance Improvement Framework reviews (www.ssc.govt.nz/pif-reports-announcements).

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