

Towards better local regulation

Draft report – December 2012



This *Cut to the Chase* provides a summary of the Commission's draft inquiry report on opportunities to improve the regulatory performance of local government. The draft is designed to elicit further submissions to guide the Commission's thinking as it prepares final recommendations. Findings are still tentative at this stage, and the draft raises questions and is testing ideas. Submissions on the draft report are invited by 6 March 2013.

The Commission's work to date

The Commission's tentative findings have been informed by a comprehensive engagement process. This began in July with the release of the inquiry Issues Paper on which 59 submissions were received.

Information from the inquiry submissions has been supplemented by approximately 80 engagement meetings with representatives from local authorities, community groups, businesses and central government agencies. The Commission has also conducted two surveys – one aimed at eliciting the views of all local authorities in New Zealand and the other targeted at 1500 New Zealand businesses from a cross-section of industries. A number of case studies on specific regulatory areas have also been developed.

Together, these have provided the Commission with a rich picture of the regulatory issues facing local government.

What is 'local government regulation'?

Local authorities are responsible for a wide range of regulatory functions, from land and resource use under the Resource Management Act, to building construction standards, food and hygiene regulations, the control of liquor and gambling activity, and waste management. In fact, the Commission has identified some 30 pieces of primary legislation that assign regulatory responsibilities to local authorities, and many other secondary instruments.

Importantly, statutes that confer regulatory responsibilities on local government, including the responsibility to prepare district and regional plans, far outweigh the regulations made by local authorities under the powers of the Local Government Act 2002. Indeed, the Commission has found that most bylaws are made under enabling statutes rather than under the more general provisions of the Local Government Act. Overall, local authorities appear not to be using their powers of general competence to enter new areas of regulation; however, they will rigorously use existing regulatory tools to address community issues and concerns.

A 'whole of system' approach

Because almost all of local government's regulatory functions are devolved or delegated from central government, it is important to take a step back and look at the regulatory system in its entirety.

To this end, the Commission has adopted a 'whole of system' approach which recognises that local authorities are part of a broader regulatory system. It is the performance of the entire system that determines how well regulations achieve their objectives.

Adopting a 'whole of system' approach means examining the entire regulatory cycle – from policy analysis and the decision to regulate, to the design of regulation, allocation of regulatory roles, implementation, monitoring and enforcement and performance assessment.

Divergent views are creating tension between central and local government

An obvious and growing tension exists between central and local government. The Commission believes a key source of this friction is different understandings of the role of local government in New Zealand's regulatory system, and indeed in the broader constitutional context.

There is a tendency in central government to (incorrectly) view councils as simply operational arms of central agencies – subservient organisations that must be responsive to the instructions of the Minister. Local authorities on the other hand view themselves as largely autonomous organisations that have their own funding base and whose leaders are elected by, and accountable to, their local constituents.

In addition to creating confusion and frustration, the absence of a well-defined constitutional or fiscal relationship between central and local government can have implications for the design and implementation of regulations – particularly where the interests of local authorities do not align with the broader objectives of central government regulation.

The quality of regulations reflects central government processes

The Commission has found a number of shortcomings in the way that regulations are made at the central level – these include a lack of implementation analysis, poor consultation and weak lines of accountability. While these shortcomings are not universal across all agencies, they are common enough to be of concern.

These shortcomings were reflected in the Commission survey of local government (results available online) which illustrated a strong belief within the sector that central government neither understands, nor adequately considers, the impacts of new regulatory functions it assigns to councils.

This can reduce the flexibility of councils to allocate their internal resources and in doing so can draw resources away from areas with higher value to local communities.

How should roles be allocated between the tiers of government?

In principle, the Commission believes that regulatory functions should be performed closest to the community that is affected, unless there is good reason to centralise. By adopting this approach, regulatory decisions are most likely to reflect local preferences and lead to efficient outcomes.

However, there are circumstances in which the efficiency of local decision making needs to be balanced against the gains from coordinating or centralising. These circumstances include:

- where the costs or benefits of regulation spill over to other jurisdictions (eg when discharges into a river in one jurisdiction create clean-up costs for downstream jurisdictions);

- where cost-savings can be leveraged;
- where jurisdictions have populations with similar preferences and demands for regulatory services (in this case duplication can be reduced without reducing the efficiency gains from reflecting local preferences); and
- where the necessary competencies, information and resources are only available centrally.

The Commission has developed a framework to guide the allocation of regulatory functions.

National standards do not necessarily improve consistency

The Commission has found that *national* regulatory standards are often inconsistently applied. The inconsistency usually stems from different understandings by local officials working on the ground. Greater consistency can be achieved through sharing good practice and coordination between local authorities, which could be facilitated by relevant departments and ministries.

Monitoring and enforcement appears to be under-resourced

There is evidence to suggest that monitoring of local regulations is under-resourced and that this is undermining the achievement of regulatory objectives. Inquiry participants suggested that statutory timeframes are resulting in councils spending more resources on processing consents than they would otherwise consider efficient. The result is that other regulatory tasks (such as monitoring and enforcement) may receive fewer resources than necessary.

There may be gaps in the enforcement tools available to councils

While local authorities generally believe they have sufficient enforcement tools at their disposal, there is a strong feeling within parts of the sector that regulations would be considerably more effective if infringement notices were made further available to councils for a wider variety of noncompliant behaviour.

Cooperation on regulatory functions is widespread

The Commission has observed a considerable level of cooperation between local authorities on regulatory functions. Cooperation can capture many of the benefits of centralisation (such as economies of scale, access to skills and expertise, and the exchange of leading practice) while maintaining the advantages of local decision making (such as the ability to cater for spatial variations in community preferences).

The intersection between Māori interests and local regulations is becoming increasingly important

Involving Māori in decision-making presents a significant opportunity and can act as a catalyst for innovation. Recent moves towards co-governance arrangements are, for those local authorities involved, one of the most fundamental changes to their nature and operations in recent times. To achieve meaningful involvement of Māori (and in particular to make co-governance arrangements effective), local authorities need to find new ways of working with their communities and carrying out environmental management.

Appropriately recognising the relationship of Māori to aspects of the environment involves effectively meshing two different systems of governance – local representative democracy, and the tikanga and kawa of local iwi. At present, this governance or ‘system’ issue is left largely up to local authorities to resolve. There are real questions about whether the current legislative framework effectively enables such relationships.

Mechanisms for assessing the regulatory performance of local government need improving

There are a number of weaknesses in the current systems used to assess the regulatory performance of local governments. These include insufficient use of performance information to identify performance improvements, the absence of feedback loops between central and local government and a lack of balance in what is measured.

The Commission is seeking feedback on a number of options for improving these performance systems.

Ways forward

In developing solutions to the issues identified to date, the Commission is focusing on a number of broad themes:

- Achieving a closer alignment of incentives among the different regulatory actors (including strengthening the accountability of central government for the quality of the regulations devolved or delegated to local government).
- Ensuring that there is adequate capability at both central and local levels to provide effective regulation and to lift the quality of analysis applied to regulatory design. This includes seconding local government staff to central government to assist with policy development and providing training to local government officers and Councillors when new regulatory responsibilities are introduced.
- Better co-ordinating regulatory activity to avoid unnecessary strains on the system (eg ensuring local authorities are given adequate lead time to prepare for regulatory change and phasing the introduction of new regulations to avoid bottle-necks).
- Improving the quality of engagement between central and local government through meaningful consultation.
- Encouraging a change of culture in both spheres of government so that they view each other as policy partners and co-regulators.
- Developing new tools to better understand how the regulatory system is performing.

To see the full version of the draft report – including information on how to make a submission – please visit our website www.productivity.govt.nz or call us on 04 903 5150.

The New Zealand Productivity Commission

The Commission – an independent Crown Entity – completes in-depth inquiry reports on topics selected by the Government, carries out productivity-related research, and promotes understanding of productivity issues.