SOLGM

Systems matter most

Submission of the Society of Local Government Managers
to the Rules Reduction Taskforce

leadinglearninglinking

CONTENTS

SUMMARY: OUR PRIORITY RECOMMENDATIONS FOR THE TASKFORCE

SOLGM thanks the Taskforce for the opportunity to submit.

While there are many regulations the Taskforce could deal with, for some short-term gain, SOLGM considers that the initiative would be better focused on the system that creates regulations. Through no fault of its own the Taskforce is attacking symptoms rather than the causes of so-called "loopy regulation".

It is for this reason that we have entitled our submission *Systems Matter Most*. Rather than repeat our recommendations holus-bolus we have chosen to use our summary to note those we deem most important. We consider recommendations 1 and 2 the most important if the Taskforce is to make a long-term contribution to New Zealand's public policy environment.

Effective regulatory design

1. The Taskforce must reinforce the principles of good regulatory design and effective regulatory implementation in its report. Without this, your report will address the symptoms rather than causes, and within five years the public will call for a repeat of this initiative.

Joint and several liability

2. Local authorities take a cautious approach to their *Building Act* responsibilities because, under present law, they stand a good chance of being held solely liable in the event that issues with design or materials are discovered downstream. In effect this means the entire ratepaying public are held financially responsible for shoddy workmanship. New Zealand needs to more fully consider proportionate liability, government backed-warranties, industry level insurance/fidelity schemes, and (in the extreme) the ability to attach liability to individual builders as opposed to corporate structures.

***Building Act* exemptions**

3. Extend the categories of work exempted under schedule 1, where the local authority is satisfied granting an exemption is unlikely to pose a risk to people or buildings.

RMA

4. The RMA should be reviewed and amended to allow for electronic transmission of documents, and this should be commended to the Government as a principle for all future legislative development.

Infringement offences

5. Allow local authorities to apply infringement fees to all bylaw offences as a lower level sanction to low-moderate level public nuisances

INTRODUCTION

The Society of Local Government Managers (SOLGM) thanks the Rules Reduction Taskforce for the opportunity to make a submission.

In this section we begin with a brief introduction to SOLGM and our reason for submitting. We also make some comments about the policy-making process. We are an apolitical organisation. The comments about the disjointed nature of the policy-making process reflect the experiences from 27 years of existence under Ministers from four different political parties.

WHAT IS SOLGM?

SOLGM is an incorporated society of chief executives, second tier managers and others with significant policy, operational or strategic responsibilities whose desire is to raise the standards of professionalism in the management of the sector. We are not a political organisation.

Our vision is "professional local government management, leading staff and enabling communities to shape their future".

It's our job to help local authorities to develop the next generation of managerial leadership. We

1. create and grow local government knowledge;
2. provide professional development and training; and
3. promote a policy and regulatory framework that supports innovation and excellence in the conduct of local governance and management.

Our submission to the Taskforce is aimed at promoting the third of these priorities. The issues we identify here provide real blockages to the community or to local government. While it may be tempting to dismiss some of the recommendations, the Taskforce must remind itself that ultimately it is the community that funds that unnecessary report here, or subsidises that application for a permit there.

THE REGULATORY SYSTEM

> *"In my view, the lesson is not that regulation or deregulation is bad, but that bad regulation is bad[1]"*
>
> *"There is limited evidence to inform the development of these proposals, and the timeframe within which the proposals have been developed has restricted the ability to assess multiple options. As a result the problem analysis and option assessment of specific proposals rely on assumptions that are not, or are only partially tested. The extent of uncertainties and risks are identified and discussed for each proposal.*

During the legislative process the Department expects feedback on the proposals, and possibly further development of the proposals. Regulatory impacts will continue to be assessed as well. The short timeframe available for formulating and drafting creates a risk that some interventions could be incorrectly aligned, and/or require subsequent amendment to address unforeseen circumstances."[2]

[1] Ferguson (2012), The Great Degeneration: How Institutions Decay and Economies Die (kindle edition)
[2] Department of Internal Affairs (2012), *Regulatory Impact Statement: Local Government Amendment Bill, page 1*.

SOLGM welcomes the initiative and has taken the opportunity to identify those pieces of legislation and regulations that it considers impose an undue compliance burden, are outdated, or are badly designed.

The Taskforce does not have an easy task in front of it. SOLGM, and other local government groups, have a concern that the submissions process could easily become a haven for the disaffected. Many of the alleged "loopy" regulations placed in front of the Taskforce will, when stripped of the emotive context, come down to officials applying and interpreting nationally set legislation.

In other cases, including many of the cases that have appeared in the media, local regulation has been made to preserve some local level amenity or priority. The Taskforce should be wary of these – often the submitter is inviting the Taskforce to substitute its policy judgement for that of elected members without full knowledge of the facts.

HOW DOES 'LOOPY REGULATION' OCCUR?

Before delving into specific rules and regulations we would like to make some comments about the policy-making process and how these become "loopy regulations". We make these comments because we are concerned that the Taskforce initiative, while useful, addresses the symptoms (individual regulations or a group of regulations) rather than causes.

The Taskforce is a lineal descendant of an inquiry conducted by the Productivity Commission into local government regulatory responsibilities, in that the Taskforce forms the centrepiece of the Government's response to the Commission. SOLGM concurred with almost all of the Commission's recommendations and the supporting commentary, and is on public record as being disappointed in the Government's response to the Commission.

In short our concerns are that there is:

- no coherent policy framework for local government
- a lack of analytical rigour in much of the advice going to central government
- no mechanism for recognising regulatory impost on the sector as a whole and
- insufficient attention to implementation needs.

Lack of a coherent policy framework for local government

There is not, and as far as we can detect never has been, a single coherent policy framework for local government. By framework we mean a clear understanding of the role that local government plays in our system of local governance, and a clear set of principles or considerations to guide allocation of responsibilities to local government. Analyses such as those undertaken in the Productivity Commission's 2013 report should form a basis from which to start.[3]

Lack of analytical rigour

The second of the quotes that opened this section has been taken from an actual Regulatory Impact Statement (RIS). The RIS applied to a Bill that, among other things, changed the purpose of local government and provided Ministers with greater powers to intervene in local government. We invite the Taskforce to reflect on whether Ministers, the Department of Prime Minister and Cabinet, and the Treasury would tolerate a statement such as that in a Cabinet paper that proposed change to a departmental responsibility.

[3] See for example section six of Productivity Commission (2013), Towards Better Local Government Regulation.

If a Minister or department were to propose itself undertaking a new regulatory role, it would have to go through quite detailed and exhaustive processes within Government to establish the financial and managerial implications at a level of detail and justify them. The case would have to be made for new appropriation, a detailed business case would be needed for any capital expenditure required, and approvals sought for the employment of additional staff. The department's planning would be scrutinized closely by the Treasury and the SSC. Other agencies would take an interest in ensuring that excessive compliance costs were not being imposed.

There is no corresponding level of scrutiny of the costs being generated by legislation allocating roles to local authorities. Our experience over many years is that the level of scrutiny applied typically extends no further than a reassurance to Ministers that "there are no fiscal implications for the Crown", and that "local authorities have the power to recover costs through the rating system or by setting fees".

There is no mechanism for measuring impost at a whole of system level

One of the unfortunate features of much of our national regulation is that, when viewed in isolation, there is often a reasonable public policy rationale for each piece of legislation. Much of the regulation that the Taskforce is focussed on has the preservation of public safety or protection from nuisance as its rationale. It is the collective impact of regulation that strangles, more than an individual piece of legislation.

SOLGM notes that there is currently no mechanism, process or agency that considers the total or cumulative impact that establishment of regulatory responsibilities or transfers of functions to local government have on the sector as whole. Some have gone so far as to suggest that central government should adopt a one in, one out approach i.e. any new requirement is matched by the removal of another.

The Department of Internal Affairs is the policy agency with lead responsibility for the system. The Department devotes substantial resources to responding to the initiatives of other government departments). However, in our experience the Department takes an initiative by initiative approach to this work with little attempt to take a whole of government/whole of system approach. The Department tends to be reactive rather than proactive – that is to say that their involvement is often once Cabinet papers are "in circulation". Our own experience is that this work is also often assigned to new analysts as a "development opportunity".

At political and legislative level, the picture is even more fragmented. Legislation affecting the sector is "owned" by a variety of departments and Ministers. This means policy issues are dealt with by different Cabinet Committees, and legislation scrutinized by different Parliamentary Committees. Cabinet and Official Committee processes are more concerned with the "politics" of a decision, and the impact on central government processes.

Inattention to implementation needs

> *"There is often limited analysis of local government's capability or capacity to implement."*[4]

Implementation concerns are often "left until last" or on occasion "glossed over". Generally, central government engagement with the sector focusses on the political (e.g. is this a good idea?) than on the more detailed design. This misses an opportunity to enhance both the overall legislative design and policy effectiveness by involving managers in the process at the early stage. This includes both the legislative detail and its effective implementation.

4 Productivity Commission (2013), *Towards Better Local Regulation*, page 5.

SOLGM's experiences with implementation of previous legislation have provided us with a set of critical principles for implementation. These can be found in the Appendix.

Risk aversion

There is one other matter that we wish to raise before moving to specific recommendations. New Zealand, as in most Western societies, is becoming more risk averse. The reasons for this are many and varied – adoption of a more litigious mind-set, a media and political culture that focuses on "blame", capture of some processes by special interest groups are just some of the factors.

Many of the so-called "loopy" rules that you have encountered in submissions owe their existence to the culture of risk aversion. The *Building Act 2004* and Building Code were spawned by so-called "leaky homes", many of the local inspection and regulation practices were a response to the public liability issue that past failings created.

We submit that the Taskforce, while a useful initiative cannot be a long-term solution to regulatory burden while two fundamental public policy issues remain unresolved.

As a society, New Zealand has not had any real debate about the balance between public safety and personal responsibility. This debate manifests itself all over the policy environment from earthquake strengthening to the settlement and resettlement of properties in areas prone to natural hazard risk. Where risk is known (as for example in the case of land information memoranda that indicate a weather-tightness issue, or location in a risk zone), to what extent should government be accountable when the risk materialises.

The second is a liability issue. We have noted that the weather-tightness issue spawned the present *Building Act*, Building code, inspection and enforcement practices. The reason for this is that it is local government and to a lesser degree, central government, that are often the only agency that those caught by building issues are able to have recourse to. In essence then, while local authority (and central government) and central government action helps prevent risks to their community as a whole, this comes at the expense of cost and compliance to the building industry and homeowners.

In 2013 the Law Commission undertook a review of joint and several liability. The response has now sat unanswered for almost a year. Options such as proportionate liability, warranties better fidelity requirements at industry level, and (even), liability lying with individuals rather than at corporate level are all worthy of consideration.

We submit that if the Taskforce wishes to make a substantive and permanent contribution to the regulatory environment it needs to make a public statement redirecting Government attention to the Productivity Commission report and that it needs to advance the review of joint and several liability to a robust and equitable conclusion.

In our view the three highest priority recommendations from the Productivity Commission are:

- development of a framework for allocating regulatory responsibilities
- development of a partners in regulation protocol between the Government and Local Government New Zealand and
- provision of government analysts with a better grounding in local government.

Recommendations

That the Taskforce use this report to rearticulate the principles of good regulatory design and effective implementation.

That the review of joint and several liability be advanced as a matter of priority, and with a view to ensuring local communities bear a more equitable share of liability.

BUILDING ACT 1991 (BA)

The *BA* was written in the wake of one of the largest failures of public policy and implementation in New Zealand's public policy history. It is no surprise that the legislation represented a substantial swing of the pendulum from something that has been described as laissez-faire to something more regulatory.

In the words of one of our members:

> *"The Building Act 2004 is a poorly written piece of legislation, introduced without significant forward thinking as to implementation and ramifications. The building industry at large has struggled to come to terms with and implement all provisions of the Building Act 2004. To support this view, ten years after initial implementation, March 2005, sections of the Act have not been introduced, plus the unprecedented number of amendments (23 so far) starting in 2004."*

We consider criticisms of this *Act* and its compliance burden have more of a basis that other commonly cited regulatory frustrations. We submit that the *BA* generally represents the classic example of each of the failings in the policy process we highlighted earlier. And unlike pieces of legislation such as the *Resource Management Act*, there is a lower level of local rule-making and discretion.

Local authorities are taking proactive steps with practice to attempt to reduce costs in this area. For example, Selwyn District Council has developed a fully online building consenting system (Project Helix) which is now being rolled out in the sector (for example in Kaipara District Council).[5]

We also note that the *Building Act* and the review of joint and several liability are inextricably linked. We refer the Taskforce to our earlier comments on this.

It may be appropriate timing to look at the building legislation in total and write new consistent, clear, simple and concise legislation that includes an element of future proofing, truly reflecting the intent of the building code. It could also encompass current peripheral legislation, i.e *Fencing of Swimming Pools Act*, include training requirements for the regulatory environment and wider industry and tidy up a raft of inconsistencies.

[5] Project Helix was recognised by the sector as leading practice, with its win in the 2015 McGredy Winder SOLGM Local Government Excellence Awards.

Building Act schedule 1 exemptions

Schedule 1 to the *Building Act* exempts a range of building works from consent.

Local authorities can also exempt other works where it is satisfied the work will comply with the Building Code or where non-compliance with the building code it is unlikely to endanger people or any building.

There is a case to exempt further categories of work from the first schedule:

- detached outbuildings, currently outside the scope of Schedule 1(3) exemptions, such as stand-alone garages of proprietary design (Versatile, Skyline etc);
- carports, currently outside the scope of *Schedule 1(18)*, with a floor area of less than 40m^2 and open on at least two sides;
- residential stair lifts;
- non-habitable building work on rural zoned land greater than 1 hectare;
- single span stock bridges not exceeding 10m in length - currently outside the scope of *Schedule 1(24)*;
- public playground equipment compliant with NZS 5828;
- installation of solar water installation compliant with AS/NZS 2712;
- conservatories of proprietary design which are external to the thermal envelope of the house.

Recommendation

That the above activities be added to *schedule 1* of the *Building Act*.

RESOURCE MANAGEMENT ACT 1991 (RMA)

The *RMA* is often cited as the classic driver of compliance costs. Successive attempts to "streamline" the *RMA* have not produced the effects Parliament intended.

It is also the piece of legislation where the Taskforce needs to tread most carefully. Many of the submissions you will have received will be aimed at compromising environmental protection, or will invite you to substitute your judgement for that of elected members.

Fast tracking consents

The Government has indicated it would like to improve processing times for simple, non-notified consents to 10 days, or even in cases where environmental impacts are negligible waive a consent altogether. Both ideas have some merit but will not be easy to put into legislation.

Under the law as it stands, consent authorities have 20 working days to process non-notified applications. There is no statutory requirement, or even encouragement, to process non-notified applications that can be processed more quickly (not unlike the *Official Information Act*). That may be a more straightforward way of encouraging faster processing. References to deadlines might then be amended to read "as soon as practicable, but no later than etc etc".

Central government might further support this by looking at what disclosures go with these types of consents. We note two ideas in the Local Government New Zealand submission around

exempting applicants from full Assessments of Environmental Effects and exempting consent authorities from the need to provide an assessment of the proposal against the objectives and policies of the plan.

Unitary authorities and Regional Policy Statements

There are currently five unitary local authorities that exercise the powers and responsibilities of both a regional council and a territorial authority.[6] This includes the obligation to prepare and adopt both a regional policy statement and a district plan. In each case, the unitary authority covers a single entire district, making an over-arching RPS unnecessary. While RPS provisions are "protected" from requests for private plan changes, the same objective could be achieved in other ways.

We do not have specific amendments to recommend here, as the specification of which provisions should have the protected status is a technical one requiring further discussion amongst RMA specialists.

Recommendation

That the RMA be amended to remove requirements for unitary councils to prepare Regional Policy Statements.

Electronic transmission

Speeches from the Minister for the Environment suggest this matter may already be on the Government's work programme. The Minister's speeches make particular mention of requirements to send/distribute submissions on a plan change in hard copy, and requirements to post district plans etc online. While many local authorities do post their plan (and policy statements) online we support the notion that more can be done electronically.

Amendments to the *Local Government Act* during 2014 have recognised the power of the internet and refined notification and consultation requirements (which in the latter case apply in other legislation that relies on the special consultative procedure). This is something we would commend to the Taskforce as a general approach across other legislation.

Recommendations

That the RMA be reviewed and amended to allow for electronic transmission of documents, and that the Taskforce commend this approach to the Government as a principle for all future legislative development.

[6] A sixth local authority, Chatham Islands Council, has both sets of obligations – but is not recognised as a unitary.

LOCAL GOVERNMENT ACT 1974

Most of the *Local Government Act* was repealed on enactment of the *LGA02*. There are still parts relating to land drainage, petrol tax and roads that are still in force. Some of these are now somewhat dated in both their language and outlook. While all of these provisions are in need of review we want to highlight three issues from this *Act* for your consideration.

The Taskforce might like to consider whether a recommendation to retire the last parts of the *Local Government Act 1974* fits within its terms of reference.

Naming of roads – s319A

In 2004, the *Local Government Act 1974* was updated and *section 319A* now requires that the naming of a new road or an amendment of a name to existing road each require a formal council resolution.

A resolution is something that is decided at a formal council meeting. Before the word "resolution" was inserted, councils had the right to make a decision any way they felt was appropriate. For example, if naming a small private right of way and if the proposed name was not contentious, a council could authorise the chair of the Regulatory Committee and a ward councillor to jointly approve new names. In some cases the council allowed officers to select names from a list that the elected members had previously approved. None of these processes involves a formal resolution. The process was very efficient, fast, and worked well.

Each report prepared for council requires staff time to prepare, and senior staff time to review and approve.

Additionally taking issues of this nature to elected members can serve as a distraction from issues of a more strategic nature. A good example of this can be found at this link: Fed Up with 'Silly Debate'.

Recommendation

That section 319A be amended by replacing the word "resolution" with the words "local authority's determination".

Stopping of roads – *s342* and *schedule 10*

The legislative process under *section 342* and *schedule 10* of the *Local Government Act 1974* which provides for the stopping of roads and allows for the transfer to adjoining land is unduly cumbersome and overly bureaucratic.

To give some examples:

- all road stopping in rural areas requires the consent of the Minister of Lands (a portfolio that strictly speaking does not even exist anymore!)

- plans must be prepared, open for inspection (for at least 40 days) and the council must give public notice twice while the plan is open. Strangely the period is longer and requires more notification than processes for matters as important as consulting on a long-term plan
- signs noting the proposed stopping have to be placed at each end of the road that is the subject of the stopping proposal
- objections are heard by the Environment Court.

Many of the proposals for road-stopping are roads where no or very few people are resident, or for an unformed road that will not proceed. The requirement is out of step with modern processes for engagement. We suggest that committee might look at the obligation to consult in accordance with *section 82* of the *LGA02* as a suitable replacement. This would allow local authorities the flexibility to tailor how long, when and where notice is given, and with whom consultation occurs.

Recommendation

Repeal *schedule 10* of the *LGA 1974*, and replace with an obligation to consult in accordance with *section 82* of the *LGA02* when stopping roads.

Road encroachments (*s357, LGA1974*)

This is an example of a statutory power getting "lost in translation" during legislative amendment.

A road encroachment occurs when some individual other than the road owner occupies the road corridor. These were originally covered in *s129* of the *Public Works Act 1981*. This section has been repealed, and it is argued that encroachments are now technically covered by *s357* of the *LGA 1974*.

However, there is no proper reference or precedent established for the use of this clause to enable encroachments to be approved by a local authority, that ability is inferred only from the words "every person commits an offence who, not being authorised by the council … encroaches on a road".

The *LGA 1974* does contain other sections that permit specific encroachment types to be granted, such as *s338* (pipes underneath a road), *s340* (motor garages) and *s341* (airspace above a road or subsoil beneath a road).

Various legal opinions have been written throughout the country supporting or opposing that *s357* gives local authorities the power to approve such encroachments. Agencies such as the NZ Walking Access Commission argue that there is no clause that states explicitly that the council may grant such approval or under what conditions it may do so in the general case.

This uncertainty then leads to local authorities treating differently, and at varying costs to the community and property owners, how they manage obstructions of the legal road through private occupation. In the past such problems were relatively rare, with encroachments typically not being identified or addressed during construction activity or land transfers. With modern GIS systems such encroachments are now being identified more often, resulting in a greater

occurrence of such encroachments needing to be resolved by: potential purchasers, insurance companies, the real estate and property service industries and (of course) local authorities.

It would therefore be beneficial if there was nationally consistent:

1) clarification on what types of encroachments on public road may or may not be permitted by the local authority
2) how historical anomalies or situations that do not comply with the above are to be dealt with
3) the fee or basis on which a fee is or may be set for encroachments on a public road
4) the process by which an encroachment may be authorised by the local authority (e.g. process, timing limits, notifications, whether this needs to be a public process due to the impact this may have on public rights of access or the rights of utility operators, adjacent property owner consultation/approval requirements, notice periods, limitations on the period such authorisations may be granted for etc)
5) obligations of new property owners for historical encroachments.

LOCAL GOVERNMENT ACT 2002

Financial Disclosures in Plans and Reports (Part Six, Local Government Act and Local Government Financial Reporting and Prudence Regulations)

Funding Impact Statements

Local authorities are publicly accountable for the prudent, lawful use of the funds they raise through rates, fees and charges. It is therefore entirely proper that local authorities produce much the same financial information as any central government entity or medium to large size private sector entity. As with central government, local authorities produce a Statement of Comprehensive Income, Balance Sheet, Cash Flow Statement and Statement of Movements in Equity under accrual accounting rules.

But local authorities are also required to produce two additional account statements – known as Funding Impact Statements (or FIS). One of these is produced for the whole of council – and shows movements of flows of funding into and out of the council. The other is for each group of activities (for example roads and footpaths) – and shows flows of funding into and out of that group.

The FIS is prepared on a subtly different basis to other financial information. The measurement and recognition principles are identical to those that apply under Generally Accepted Accounting Practice. However the FIS includes only monetary transactions – so transactions in kind (e.g. vested assets) and transactions that "only adjust the value of assets and liabilities" (such as depreciation) are not included. The policy-makers who designed the FIS claim that this approach is:

> *" … more consistent with the way households and businesses manage their finances, and therefore will be more understandable to most people[7]."*

The rationale that policy makers offered for the FIS was that most ratepayers do not understand accrual accounting and therefore find local authority financials hard to understand. There is some merit in this, as anyone who has ever tried to explain that a surplus in a Statement of Comprehensive Income does not necessarily mean there is cash for a rate cut will confirm.

But we are unconvinced that the application of accrual accounting principles is the sole or even the primary cause of the lack of transparency in financial reports. We suspect that the

[7] Department of Internal Affairs (2011), Cabinet Paper: *Local Government Financial Reporting Regulations, page 2.*

complexity of accounting standards has also created issues. In any case, we are unconvinced that having two sets of financial information each prepared on a slightly different basis[8] actually provides transparency for the reader. After the 2012 LTPs local authorities reported confusion as to why reporting formats had changed or why their local authority had prepared a second set of financial statements.

For example:

> *"We didn't receive any submissions on the information in the FIS or quoting information in the FIS. We did however have a member of our community ring up our (local TV news) show and ask why they were set out differently from previous years cost of service statements, how they compared with financials that are prepared subject to standard accounting practices and why we had changed them. He felt that they didn't offer consistency with what we had previously done (although noting we had provided the 2011/12 comparisons) and that creating things in two different formats, such as we did was not helpful to the community."*
>
> An LTP project manager

> *"I was contacted by a couple of our elected members who complained that they couldn't understand the FIS at all. That bothers me just as much as the public not understanding it (in fact more so!)."*
>
> A finance manager in a small local authority

SOLGM agrees that more could be done to promote "plain English" financial reporting. Preparing a second set of financial information on a different basis does nothing to promote this objective.

Many of the best annual reports (as identified by awards) tend to be so identified because of their narrative descriptions and other tools for presenting financial information simply and usefully. We consider that this is the best approach – SOLGM is intending to do further work in this area once the 2013 changes to accounting standards have had an opportunity to "bed in".

In the meantime we see no justification for a second set of financial statements and submit the preparation and audit of these is being treated as compliance for compliance's sake.

Financial Prudence Reporting

The second half of the FRR requires that local authorities compile and disclose their planned and actual performance against a set of seven fiscal prudence benchmarks. These are intended to operate as a kind of early warning of local authorities that may have potential fiscal problems.

The presentation of these benchmarks is tightly regulated to encourage standardised reporting of performance. A sample of a disclosure statement for the long-term plan can be found at this link.

That is to say, that regulations disclose the exact form of the wording local authorities must use in the statement (with limited variations only permitted) and even that benchmarks that are achieved and not achieved must be shown in green and orange respectively.[9]

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8 Local authorities must present a funding impact statement for the council and a GAAP based Statement of Comprehensive Income. Local authorities also must present funding impact statements for each group of activities, but many also chose to present the same GAAP based "cost of service statements" they always had.

9 In September 2014, SOLGM was contacted by a local authority that wanted to know the Pantone numbers for the colouring because they had been told by their audit provider that they were required to match the exact shades of green and orange in the regulations. While this proved to be an overzealous interpretation of the regulations it serves as an example of the compliance focus overregulation can promote.

Local authorities completed their first round of disclosures against the benchmarks last October. The Department of Internal Affairs recently completed an analysis of the first round of results.

We understand that its conclusions are that:

- there was no poorly performing council identified, where issues had not already been detected by external parties (such as the Department and the Office of the Auditor-General). To that extent, the Department concluded that local authority finances are transparent with those issues that exist, being already well known
- none of the reporting showed any local authority that was or is about to "hit the wall". Some have identified challenges, but again these are already well known. To this extent the benchmarks may serve as an external "wake-up" call.

The first round of reporting also required publication of five years trend information for some indicators[10]. We understand that this data has likewise not revealed the existence of any prudence or sustainability issues that were not already known. The benchmarks are not directly connected to any other legislative or regulatory requirements[11] and other agencies monitor similar information.

We therefore submit that if compilation of this information serves no direct legislative or regulatory purpose, and the results reveal no new insights, then this is the very definition of "loopiness".

The Pre-Election Report (*s99A*)

The 2013 local authority elections marked the first time that local authorities were required to prepare and distribute a pre-election report (PER). A PER is a report on the outgoing council's financial stewardship, together with the main expenditure issues for the coming triennium. This requirement was one of the so-called "TAFM" reforms of 2010.

The regulatory impact statement that accompanied the legislation justified the PER on the following grounds:

> *"Information about the future decisions a council has to make would help provide context for local elections. It would encourage candidates to express views about these issues, thereby allowing voters to elect representatives that best express their preferences.[12]"*

SOLGM supports a more informed local election debate. We are disappointed, but not entirely surprised, that in post-election surveys one in five non-voters stated that their reason for not voting was they did not know enough about the issues. Further, one in seven suggested that their vote would make no difference to the way their community was run.

SOLGM is on public record as having been unconvinced that the PER would feature in many local election debates. Our 2012 submission to the Efficiency Taskforce suggested that the PER should be reviewed for effectiveness after the 2013 local elections.

The Department of Internal Affairs did a post-election review of the effectiveness of the PER. It found that roughly one in four PER received coverage in national or provincial media (i.e. the "dailies") – more may have featured in community newspapers. In most instances the media

[10] Two indicators involve publication of two years historic data as they draw on information that wasn't available prior to 2013.
[11] For example, while a failure to manage financial dealings prudently can give rise to a "problem" as defined in section 256 of the *Local Government Act*, there is no mention of these benchmarks. The Minister is free to use the results, or use some other test or advice as s/he sees fit.
[12] Department of Internal Affairs (2009), *Regulatory Impact Statement: Improving Local Government Transparency, Accountability and Financial Management*, page 17.

reporting replicated the council's press release – the sole exception contained a statement from the Mayor describing the PER as a "waste of time and money".

In a similar vein, it appears that the candidates did not make much use of the 2013 set of PER. While many of the mayoral candidate profile statements did make some reference to issues, this could not necessarily be attributed to the PER, much of the issues related content was very general and appeared to relate to matters that were already in the public domain. We are aware that some incumbents did make use of the PER in cases where the information supported them "running on their record". Candidates for other offices tended to focus more on personal attributes and vague generalities such as "I will work to contain rates".

Neither DIA nor we reviewed the use that electors made of the document. SOLGM thought it unlikely that individual voters would use the document – the existing research base suggests voters tend to vote for those candidates they know or have met personally.[13]

Those that vote on "the issues" tend to focus on their "pet issues" or "flavour of the month".

The PER itself is a collection of information which is largely drawn from other sources, such as the annual report and long-term plan. DIA's review suggested that many councils found the cost of preparing this document was somewhere in the mid-high four figures in direct cost, plus staff time.

Recommendation

That *section 99A* of the *Local Government Act 2002* be repealed.

Assessments of water and sanitary services (*s125-126*)

Territorial authorities must undertake an assessment of water and sanitary services (other than privately owned services) within their city or district. This includes the following:

- water supply
- wastewater disposal
- "works for the collection and disposal of refuse, nightsoil, and other offensive matter[14]"
- public toilets and
- cemeteries/crematoria.

The assessment is essentially a document that assesses the:

- quantity and quality of the supply (whether public or private) of services provided
- likely future demand for the services and the options for meeting those demands (including any role the territorial authority has) and
- risks from the provision or non-provision of any service.

Legislation is now silent on the process for these assessments, who must be involved, whether privately owned and operated services must be included or even how often the services must be assessed.

[13] A post-election survey conducted by Horizons research suggested that 35 percent of non-voters cited not knowing the candidates as a reason for their decision not to vote.
[14] *Section 25 (c) Health Act 1956*

The only statement of policy rationale for this requirement we are aware of appears in the Select Committee report on the *Local Government Bill* which noted that:

> *"Territorial authorities have a duty under the Health Act 1956 to improve, promote and protect public health within their districts. This requirement implies that councils need to identify the essential service needs of their communities … The Bill makes this role explicit.[15]"*

and:

> *"We consider that the assessment and reporting provisions bring the information on water and sanitary services into the public domain … This is in accordance with the Government's statement of policy direction which says communities should have greater scope to make their own choices about what local authorities do and how they do it.[16]"*

While it is correct to say that local authorities have the *Health Act* responsibility identified above, the same is equally true of the Ministry of Health (see *section 3A* of the *Health Act 1956*) and of the District Health Boards (DHB) (*section 22(1)(a)* of the *New Zealand Public Health and Disability Act 2001*). *Section 22(1)(h)* also sets out another objective for DHBs, namely:

> *"to foster community participation in health improvement, and in planning for the provision of services and for significant changes to the provision of services".*

In and of itself the *Health Act* offers no justification for the allocation of this responsibility to local government.

Further the obligations and powers placed on DHBs seem to suggest that assessing the state of water and sanitary services seems to fit more within the scope of these organisations. *Section 23(1)(g)* of the *New Zealand Public Health and Disability Act 2001* requires DHBs:

> *"to regularly investigate, assess, and monitor the health status of its resident population, any factors that the DHB believes may adversely affect the health status of that population and the needs of that population for services".*

An assessment of water and sanitary services sits more logically inside what appears to be a wider process of identifying health needs and risks. While we do not disagree that territorial authorities will hold information that is relevant (such as growth forecasts, water quality indices and the like) this is best viewed as an input to the process not as an excuse to place this requirement on local authorities. DHBs appear to have a wider and more appropriate range of powers regarding the collection of information to prepare an assessment.
The rationale also made much of placing information about these services in the public domain. This requirement predated both the statutory compulsion to undertake asset management planning[17], and the so-called 30 year infrastructure strategy (covering drinking water, and wastewater)[18]. Taken together these two requirements, and the practical necessity of preparing physical asset management plans make an assessment unnecessary.

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15 *Local Government and Environment Select Committee 2002, Report* on the Local Government Bill, page 26.
16 Local Government and Environment Select Committee 2002, pp 26-27
17 *Section 14(1)(g), Local Government Act 2002* (as amended in 2014)
18 *Section 101B, Local Government Act 2002* (as added in 2014)

Recommendation

That *sections 125* and *126* of the *Local Government Act* be repealed.

Bylaws and infringements

The *LGA* allows the Minister to make regulations that set out which breaches of bylaws that are infringement offences, along with an infringement fee.

Without these regulations no bylaw breach is considered an infringement offence, and no infringement fees are payable. Consequently this means that breaches of bylaws under the *Local Government Act* must either be prosecuted through the courts or ignored altogether.

The former is a time-consuming and costly enforcement tool, which makes prosecution inappropriate for all but the most significant of breaches. An infringement notice is a more appropriate remedy for what is often no more than a moderate public nuisance, where the perpetrator generally has no criminal intent, and where the media might very well lambast the council concerned for prosecuting.

Regulations prescribing infringement offences have not proceeded in part due to difficulty with the wording of *section 259* of the *Act* which sets the scope of the regulation making power. As council bylaws differ to suit their local situation, the possible breaches of bylaws will differ from local authority to local authority.

The practical solution is for the infringement regulations to be based on categories of offences, rather than specifying every offence in every council bylaw. We support a category approach and understand that Crown Law has confirmed that a category approach can be taken under *section 259* but that this is not supported by other government advisers. Clarification in *s259* would assist. An alternative would be to amend *s259* to specify any bylaw breach as an infringement offence (this is the approach in the *Dog Control Act 1996*) or to amend *s259* to enable local authorities to specify their own infringement offences (this is the approach in the *Litter Act 1979*).

Ironically, this is an example where the "loopiness" lies in the lack of regulation.

Recommendation

Amend *section 259 LGA02* to specify that all bylaws are infringement offences.

Chief executive contracts (*clause 34, schedule 7*)

Clauses 33-35 of *schedule 7* of the *LGA* regulate the employment of chief executives. Like a departmental chief executive, a local authority chief executive is appointed for a term of up to five years. Unlike a departmental chief executive, the council cannot reappoint a chief executive without publicly advertising, though it can provide a one-off extension to a contract for up to two years. No less than six months out from the completion of a five year term the council must complete a review of the chief executive's employment including an assessment of performance and the incumbent's skills and attributes. The purpose of this review seems to be for determining whether there will be a two-year extension to the contract or not. We submit that the purpose of this review should be to determine whether the chief executive will continue to have skills and knowledge that will fit with the future requirements of the council. If the answer is "yes" then the council should have the authority to offer a new contract to the chief executive. If the answer is "no" then the council will be free to public advertise the vacancy.

The current requirement to advertise regardless of circumstance creates an additional (and quite unnecessary) cost on communities. A council that does nothing other than advertise can expect a cost in the low five figures, a council that gets outside assistance with a search can expect a bill of around $50,000 (a very significant impost for a smaller community).

The nature of the current employment process also makes it more difficult to retain chief executives. To give an example, we are aware of a former chief executive who advised his council that as they were required to go to the market, he would also be doing so. The council went through the recruitment process and offered the position to the incumbent, only to find that he had found an alternative chief executive's position. Thus the council, and the sector, lost an extremely competent chief executive for no reason other than the council had to adhere to a legislative requirement.

A requirement to advertise in all circumstances can cause a period of managerial and political instability, which may impact on a council's performance. Instability at the chief executive level often reflects in organisational instability at the second tier level.

Last but not least, this provision is inconsistent with the general intent of the *Local Government Act*. Local authorities are empowered to promote community wellbeing, and in pursuit of that purpose make day to day decisions involving millions of dollars (including powers to tax, borrow, build or acquire assets). How does this sit with a provision that effectively says that they cannot be trusted to assess their chief executive's performance and attributes?

To be clear, we are not advocating that chief executive positions should be a "job for life". We are advocating for parity with the public service and state sector, in that a council that wishes to reappoint an incumbent chief executive should be permitted to do so without having to go to the cost of creating a "vacancy" and advertising. We think that the requirement to review the employment of the chief executive six months before the end of the contract is appropriate, and at that point council should have the choice to either appoint their incumbent on a new term of up to five years, or to advertise the position. And we agree that doing this well means that there can be no automatic expectation of reappointment.

What we are advocating for is that councils be given the same discretion as the State Services Commissioner to appoint or advertise.

Recommendation

That *clause 34, schedule 7*, be amended to provide councils with discretion to advertise or reappoint at their discretion, having completed a review of employment.

Volumetric charging for wastewater

Section 19 of the *Local Government (Rating) Act* (the "*Rating Act*") allows local authorities to set a rate for water supply that is based on a measurement of water used by or supplied to each rateable property. This is known as volumetric charging, or "metering" by the general public. About 20 local authorities make use of this power, in some individual cases up to 20 percent of the rate take comes from this particular tool.

However, the *Rating Act* does not contain a similar provision allowing local authorities to assess rates for wastewater disposal on the same basis. A volumetric charge may be a more equitable mechanism than other alternatives such as a pan charge or a value-based rate in that it is tailored to actual use[19]. Volumetric charging for both water and wastewater can also provide local authorities with incentives to manage the entire water cycle in an integrated fashion.

It is common in overseas jurisdictions for wastewater disposal to be charged on the basis of water consumption (a usual proxy is that wastewater costs are recovered on the assumption that a volume of 80 percent of water consumed on the property eventually leaves the property via the sewage systems). However, technology is available to meter wastewater disposal directly – thus the legislation should be future-proofed to allow for recovery on either basis.

Recommendation

That the Local Government Rating Act 2002 be amended to allow local authorities to charge wastewater disposal on a volumetric basis.

Fee-setting powers

A wide variety of regulatory statutes provide local authorities with powers to set fees and charges for licences, inspections or permits. Most statutes empower local authorities to set fees on an actual and reasonable basis.

There are a small number of cases where the actual fee is constrained by legislation and is not frequently reviewed. We are aware of a local authority where an inspector was required to make a round trip of four hours to inspect an amusement device and could only recover $12. The empowering regulations , the Amusement Devices Regulations have not been reviewed since 1978.[20]

[19] For example, a volume based charge would reflect some of the equity concerns faced by schools, if a school is indeed largely vacant for 12-16 hours a day, and for 13 weeks per year, then this should reflect itself in use.
[20] These are set under authority of the *Machinery Act 1950* and fall within the purview of the Minister of Labour.

SOLGM is aware of two other examples where fees are set in regulation. These are the:

- *Sale of Supply of Alcohol (fees) Regulations 2013* – the most recent review did at least separate out licence fees based on an assessed category of risk, and
- *Heavy Motor Vehicle Regulations 1974* – which bars overweight vehicles from travel on the road network unless the vehicle owner first receives a permit from the road controlling authority. Fees under these regulations were last reviewed in 1987 and range from $18.18 to $63.64 (depending on the nature of the permit, and the time available to process the application).

All regulations allow for the recovery of the full economic costs of undertaking the function or providing service. This includes not only the direct cost of the function itself, but those costs associated with maintaining the capacity to deliver the function.

The Taskforce might take the view that addressing these issues increases compliance costs for the businesses that are regulated under these statutes. There is an element of truth to this.

However, regulation of fees in this way acts as a subsidy from other ratepayers to the businesses concerned. Few would argue that a fee last reviewed in 1978 would bear any resemblance whatsoever to the real cost of providing the inspection today. Economic theory tells us that if providers of an activity do not face the true cost of providing an activity then more will be provided than is economically efficient. In the event the whole economy suffers. It is therefore surprising that these examples have survived the reforms of 1985-1993.

Sale and Supply of Alcohol Act 2012 (SSA)

The new Sale and Supply of Alcohol legislation is complex, especially around the development of local alcohol policies. We recognise that this is both a complex and emotive issue, and that like all new requirements it takes time for case law to accrete. On the other hand it serves no real benefit to the economy or the community to have decisions overturned with the frequency and lack of clarity in decision making that there is.

Obtaining temporary authorities

All applications for a temporary authority must be granted by a three-person committee. These cannot be decided by the chair alone, or by staff acting under a delegation (even when uncontested). This requirement can act as an impediment in some circumstances – for example where an existing business changes hands. It also imposes additional workload on the District Licensing Committee members, including slowing down the process for approving licences.

We submit that either *section 191* be amended to allow for the chair of committee to make decisions on uncontested applications for temporary authorities (in effect allowing the chair to make decisions as a quorum of one as is allowed in the case of other uncontested applications). Alternatively these decisions could be delegated to staff (the committee chair's time is valuable too).

Recommendation

Amend the *SSA* to allow for delegations of decisions on uncontested applications for licences.

Obtaining a Manager's Certificate (s221)

Applicants for Manager's Certificates (and renewals) are often, but not always, drawn from among the lower income. Any steps that can be taken to make the process most timely and cost effective would be welcomed by applicants, the hospitality industry and local authorities.

At present all original applications for, and renewals of, a Manager's Certificate have to be decided by either the chair or a three-person committee. While this might be appropriate where an application or renewal is opposed by the Police or inspector, for many this adds an extra step in the process which takes longer and costs more. Decision-making on uncontested applications and (especially) renewals should be delegable to the DLC secretary.

Recommendation

Amend *section 221, SSA* to allow for delegations of decisions on uncontested applications and renewals for Manager's Certificates.

APPENDIX: EIGHT PRINCIPLES FOR EFFECTIVE IMPLEMENTATION

The following eight principles, if properly applied, should provide for effective implementation of any new legislative or regulations:

1. *Start early* – Officials should not turn up in the office the day after the enactment of the legislation and start thinking about what to do about implementation. While the roll-out of implementation support programmes necessarily follows enactment (which in turn follows the policy advice), the design and development of the implementation programme should start earlier. Elements of this should be concurrent with the policy and legislative processes. Indeed it is difficult to see how a rigorous assessment of policy options can be undertaken without commencing the identification of the costs and practicalities of their being implemented.

2. *Work with the stakeholders* – For any legislative initiative impacting on local government there will be a range of groups with a stake in successful implementation. This includes not only the national sector organisations such as Local Government New Zealand and SOLGM but also related professional organisations, and a variety of occupational institutes and associations. Engagement with these stakeholders can do a lot towards achieving effective implementation.

3. *A separate process* – SOLGM has been pleased to see the increasing willingness of central government to engage with local government during the process of policy development. While engagement with local government on implementation is likely to involve many of the same stakeholders, it should be set up as a separate project.

4. *A single shared plan* – SOLGM and other sector stakeholders will often see it as part of their role to support the implementation of the new legislation by local authorities (they may for instance have existing good practice guidance they will need to revise). If the actions of central government agencies and local government sector organisations are not co-ordinated in some way however, then there are risks that some work on some issues will be duplicated while others fall between the cracks. A single agreed common plan of action around the implementation process avoids these risks and is likely to lead to the most effective use of the available resources.

5. *Use the proven technology* – Stakeholder organisations will generally have the established and effective channels of communications with their constituents within local authorities. They may already have tools and guidance material that are widely known, recognised and used within local authorities. Government agencies should be encouraged to use these rather than establishing competing channels and tools.

6. *Clarity about audiences and needs* – In implementing legislative change affecting local government there are a range of audiences, spanning elected local authority members, managers, and hands on practitioners in the specific affected areas of work. Their needs and the best means of addressing them are likely to differ. For instance, we would argue that the technology developed by our Legal Compliance Programme would often be best available technology for meeting the needs of managers and practitioners, but it does not address the needs of elected members.

7. *Linkage to Select Committee process* – If work on developing guidance material as part of an implementation programme is started early enough there are opportunities for this to feed back in a positive way into the Select Committee process. This reflects our experience with the development of the legal compliance programme modules. The detailed work undertaken to identify the practical means of complying with legislation sometimes highlights technical shortcomings in the legislation that is being worked on – gaps and disconnects, inconsistencies and contradictions, and areas of clarity. If the effort is made to start this work early there is the opportunity for these sorts of issues to be addressed prior to enactment.

8. *Take a life-cycle approach* – Once legislation is enacted there is a necessary ongoing maintenance task for the administering department. New issues may arise, areas of uncertainty or contradiction may come to light, provisions may be interpreted in unexpected ways by either practitioners or the courts or both. The ability of a department to respond effectively and properly maintain the legislation depends on the strength of its feedback systems from users. Engaging openly with stakeholders on implementation can assist this by establishing the foundation of relationships that can ensure open information flows into the future.

SOLGM

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