New Zealand Law Society
Te Kāhui Ture o Aotearoa

Local Government (Water Services Preliminary Arrangements) Bill

Submission of the New Zealand Law Society Te Kāhui Ture o Aotearoa

13 June 2024

1 Introduction

1.1 The New Zealand Law Society Te Kāhui Ture o Aotearoa (**Law Society**) welcomes the opportunity to comment on the Local Government (Water Services Preliminary Arrangements) Bill (**Bill**).

1.2 This submission has been prepared with assistance from the Law Society's Public Law Committee.[1] It notes the Law Society's concerns regarding the use of urgency, and makes some recommendations to improve the clarity of the Bill.

1.3 The Law Society does not wish to be heard.

2 The use of urgency

2.1 This Bill was introduced and referred to the Finance and Expenditure Select Committee under urgency on the same day. There were only 9 calendar days between when submissions were sought and the closing date for submissions, which limits the ability for submitters to review the Bill and provide properly considered comment on it. We understand the Committee is expected to report back on the Bill within a truncated 7-week timeframe. However, the Bill and supporting material do not identify why urgency needed to be accorded in this instance.

2.2 The Law Society remains concerned about the use of urgency in circumstances where it is not justified.[2] Such use of urgency undermines democracy and transparency, and significantly limits the ability of the public, select committees, and officials to meaningfully engage with, and scrutinise, legislation.

2.3 The use of urgency is particularly concerning here because:

(a) The Bill seeks to reform the delivery of water services, and "sets the foundation for future delivery and regulation of water services".[3]

(b) The Regulatory Impact Statement (**RIS**) prepared by the Department of Internal Affairs notes "due to the legislative timelines for [this Bill], there has been a relatively small amount of consultation with stakeholders during the overall policy design process" and there has been "limited time to engage and test these proposals with councils".[4] The RIS further states that, "due to timeframes, it was not possible for the Department to complete a full analysis of the costs and benefits of the four proposals beyond qualitative estimates".[5]

2.4 On the basis of the information available, it does not appear urgency is necessary or appropriate in this instance. The proposed regulatory framework could have been

1 More information about this Committee is available on the Law Society's website: https://www.lawsociety.org.nz/branches-sections-and-groups/law-reform-committees/public-law-committee/.

2 During the 53rd Parliament, 91 bills were accorded urgency at some stage of the legislative process – this is in contrast to the 24 bills which were accorded urgency during the 51st Parliament, and 78 bills accorded urgency during the 52nd Parliament. As at 4 June, 26 bills in the 54th Parliament have been accorded urgency at some stage.

3 Parliamentary Debates (Hansard) for Thursday, 30 May 2024.

4 Department of Internal Affairs *Regulatory Impact Statement: Local Government Water Services (Transitional Provisions) Bill* (March 2024) at page 38.

5 At page 38.

designed and progressed in accordance with standard policy and legislative processes which allow for better engagement and scrutiny of the proposed reforms. We note these concerns extend to Amendment Paper No 41, which was also published and referred to select committee under urgency.

3 Arrangements between territorial authorities

Meaning of "joint arrangement" (clause 5)

3.1 Clause 5 of the Bill defines the term "joint arrangement" as an arrangement between 2 or more territorial authorities to deliver water services. Section 137(1) of the Local Government Act 2002 (**LGA**) contains similar terms which also relate to the delivery of water services:

(a) "joint arrangement", which is an arrangement entered into by 1 or more local government organisations with 1 or more bodies that are not local government organisations for the purpose of providing water services or any aspect of a water service; and

(b) "joint local government arrangement", which is an arrangement entered into by 2 or more local government organisations for the purpose of providing water services or any aspect of a water service.

3.2 The use of the same term but with a different meaning, and within the same statutory framework for water services delivery, could give rise to confusion. We recommend the select committee consider whether to adopt one of the terms in the LGA, or to use a markedly different term which can be easily distinguished from the terms in the LGA.

3.3 If the current wording is to remain, we suggest amending the definition of "joint arrangement" in order to:

(a) Clarify whether a joint arrangement solely relates to the *delivery* of water services, or whether a joint arrangement could also include other arrangements made for the purpose of *submitting* a joint water services delivery plan (**delivery plan**), as contemplated in clause 9(1); and

(b) Include a reference to clause 12(1)(d) of the Bill, which discusses the different forms of joint arrangements (and references the arrangements which can be made under section 137 of the LGA).

3.4 If a joint arrangement does not include any arrangements made for the purpose of submitting a delivery plan, we recommend using a different term in the provisions which relate to the submission of delivery plans (such as "group of territorial authorities", which is the term used in clause 20(2)(a)).

4 Wording in clause 8

4.1 We recommend replacing the reference to "stormwater network, wastewater network, and water supply network" in clause 8(1)(b)(i) with the term "water services", which is defined in clause 5, and captures the three types of water networks currently listed in subclause (i).

5 Contents of delivery plans

Information about the current state of the water services network (clause 11(1)(a))

5.1 Clause 11(1) provides that a territorial authority's delivery plan must contain a description of the "current state of the water services network" (subclause (1)(a)), as well as other information, including information about the areas which receive water services, an assessment of the current condition, lifespan, and value of the water services network, and any issues, constraints, and risks which impact the delivery of water services (subclauses (1)(b) to (n)).

5.2 It is unclear if the description of the current state in subclause (a) is intended to capture information that will not be captured by subclauses (b) to (n), as the current wording suggests subclause (a) simply requires the same information already required under subclauses (b) to (n).

5.3 We suggest amending this clause to more clearly specify what information is needed about the current state of the network, for example by:

(a) Deleting subclause (1)(a); and

(b) Amending clause 11(1) to state that a "water services delivery plan must contain *information about the current state of the water services network* in the authority's district, including…".

Other amendments to clause 11(1)

5.4 We also recommend amending the following clauses:

(a) **Clause 11(1)(b)**, which states that a delivery plan must contain a description of the "levels of water services provided". We query if this should instead refer to "levels of *service for* water services provided". If not, we suggest clarifying the meaning of "levels of water services".

(b) **Clause 11(1)(f)(ii)**, which refers to "water infrastructure". We suggest amending this clause to refer to "water *services* infrastructure".

(c) **Clause 11(1)(g)**, which requires an assessment of "the water services network". This clause should be amended to refer to "water services *networks*".

6 Requirements for joint delivery plans (clause 12)

6.1 We suggest deleting the word "additional" from the heading of clause 12, as this clause provides a separate and complete list of requirements for joint delivery plans, and clarifies that joint delivery plans must also contain the information listed in clause 11.

6.2 This heading also contains a minor typographical error – it should refer to "services" rather than "service".

6.3 We also note that clause 12(4) appears to repeat the requirement in clause 12(3)(b) relating to stormwater networks. If the select committee considers both subclauses are necessary, we suggest expressing subclause (4) as being included in the Bill for the avoidance of doubt.

7 Extending the deadlines for submitting delivery plans (clause 17)

7.1 Clause 17 empowers the Minister of Local Government (**Minister**), in certain circumstances, to extend the deadline for submitting delivery plans. Clause 17(6) requires the Minister to notify "the applicant" about any decision to grant an extension.

7.2 Clause 17(6) should be amended to also require the Minister to notify relevant territorial authorities or joint arrangements if the Minister:

(a) Receives an application, and decides not to grant an extension; and

(b) Opts to exercise the power in subclause (5) to grant an extension despite not having received an application.

8 Acceptance of delivery plans

Acceptance of a delivery plan (clause 18)

8.1 The Bill requires territorial authorities and joint arrangements to submit delivery plans to the Secretary for Local Government (**Secretary**), who will then consider whether the plan complies with the requirements in this Bill, and decide whether to accept the plan.[6]

8.2 The Bill does not require the Secretary to make a decision on whether or not to accept a delivery plan within a specific timeframe. As a result, territorial authorities and joint arrangements may be left for an indefinite period of time while they await a decision from the Secretary. This may have a chilling effect on investment and/or other decisions, which seems contrary to the intent of the Bill and broader water services delivery scheme.[7] We invite the select committee to consider if clause 18 should be amended so the Secretary is required to make a decision within a specified timeframe.

8.3 We also note the Bill now classifies a failure to have a water services delivery plan accepted by the Secretary within a reasonable period as a 'problem'.[8] A prescribed timeframe could assist in determining whether a 'problem', has in fact occurred.

Decision to not accept a delivery plan (clauses 18 to 31)

8.4 If the Secretary is not satisfied that a delivery plan complies with the requirements in this Bill, clause 18(3) requires the Secretary to:

(a) Advise the territorial authority or joint arrangement as to why the Secretary is not satisfied with the delivery plan, and to require the territorial authority or joint arrangement to amend the plan and resubmit it by a specific date (subclause 3(a)); or

(b) Decide not to accept the delivery plan (subclause 3(b)).

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6 Clause 18.

7 See Department of Internal Affairs *Regulatory Impact Statement: Local Government Water Services (Transitional Provisions) Bill* (March 2024) at page 1.

8 Clause 28(2)(b). 'Problem' is defined in section 256 of the LGA.

8.5 Clause 18(5) then requires the Secretary to notify the territorial authority or joint arrangement about whether they have accepted the delivery plan (subclause 5(a)), and if not, the reasons for that decision (subclause 5(b)).

8.6 There appears to be some overlap between these provisions, and the Bill does not clarify what happens if the Secretary decides not to accept a delivery plan – i.e.:

(a) Whether territorial authorities and joint arrangements will have the opportunity to submit a new delivery plan, and if so, the timeframe for submitting a new plan; or

(b) Whether the Minister can (or is expected to) exercise their powers under clause 23 to appoint a Crown water services specialist immediately after the Secretary decides not to accept a delivery plan; and

(c) If so, what processes are in place to ensure the Minister is immediately notified of a decision made by the Secretary to not accept a delivery plan (noting clause 18(5) only requires the Secretary to notify the territorial authority or joint arrangement of that decision).

8.7 We recommend amending the Bill to clarify these points.

9 Appointment of Crown facilitator (clause 20)

9.1 Clause 20(2)(b)(i) provides the Minister may appoint a Crown facilitator if the Minister believes on reasonable grounds that territorial authorities are unlikely to submit a delivery plan "in accordance with this subpart". This appears to be a typographical error – this clause should instead refer to "subpart 1", which contains the provisions relating to delivery plans.

10 Appointment of Crown facilitators and Crown water services specialists

Notice of appointment (clauses 21(1)(c) and 24(1)(c))

10.1 Clauses 21(1)(c) and 24(1)(c) require the Minister to give notice of the appointment of a Crown facilitator or a Crown water services specialist in the *Gazette*. While the *Gazette* is a public newspaper, we query whether notice should be given in a form that is more readily accessible to the public (for example, as set out in clause 61(4) of the Bill, which requires Watercare to give public notification on an internet site maintained by, or on behalf of, Watercare, and in a format that is readily accessible).

Notice of change in membership (clauses 21(3) and 24(3))

10.2 Clauses 21(3) and 24(3) require the Minister to notify territorial authorities about any changes in the membership of their Crown facilitator or Crown water services specialist.

10.3 Where the Minister has appointed a panel to be a Crown facilitator or a Crown water services specialist, the Minister should also be required to notify other members of the affected panel about the change in membership. We recommend amending the Bill to this effect (and note these amendments could be modelled on clauses 21(1)(a) and 24(1)(a), which include a similar requirement).

10.4 We also recommend amending clause 21(3) to include a requirement for the Minister to notify any change in membership by notice in the *Gazette*. This amendment would align the wording of this clause with clause 24(3), which similarly requires the Minister to notify a change in the membership of a Crown water services specialist by notice in the *Gazette*.

10.5 We also suggest amending clauses 21(3) and 24(3) to require the Minister to notify the public in a form that is more readily accessible to the public (as provided in clause 61(4) of the Bill).

11 Failure by a territorial authority or group of territorial authorities (clause 28)

11.1 Clause 28(2) clarifies that a 'problem' (as defined by section 256 of the LGA) includes a failure by a territorial authority or group of territorial authorities to do anything listed in subclauses (2)(a) to (d). The select committee could consider expanding this list to include circumstances where a territorial authority, or a group of territorial authorities have been directed under clause 18(3)(a) to amend their plan by a specified date, and they have failed to do so.

12 Subpart 3 – Foundational information disclosure requirements (clause 32)

12.1 Clause 32(1) states that the purpose of subpart 3 of the Bill is to "promote the long-term benefit of consumers of water services provided by territorial authorities". However, clause 33(1)(a) clarifies that subpart 3 applies to a broader list of entities specified in clause 33(1) (which includes territorial authorities). Therefore, the references to "territorial authorities" in clause 32 may not be entirely appropriate. We recommend replacing those references with the term "specified entities" (which is defined in clause 34).

12.2 Clause 32(2)(a)(iii) states that subpart 3 achieves the purpose in clause 32(1) by promoting outcomes which incentivise territorial authorities to provide water services at a quality that reflects consumer demands. We suggest amending this clause to clarify this is subject to compliance with all regulatory requirements.

13 Pecuniary penalties (clauses 42 and 43)

13.1 Clauses 42 and 43 authorise the High Court to order individuals within local authorities to pay a pecuniary penalty of up to $500,000 if they fail to meet the information disclosure requirements in the Bill, or fail to comply with a High Court order to disclose information. The objective of these provisions, and the significant penalty amount, is presumably to incentivise individuals to ensure their organisation complies with any relevant legislative requirements.

13.2 These personal liability provisions are likely to be a significant change for individuals within local authorities. While these provisions are not objectionable, the select committee may wish to consider whether they are in fact needed, in addition to the corporate liability provisions, to ensure compliance with information disclosure requirements. There may be some merit in testing whether the corporate liability provisions in clauses 42 and 43 are capable of encouraging compliance on their own, and inserting the personal liability provisions at a later stage if additional incentives are deemed necessary.

13.3 We also note the pecuniary penalty provisions in the Bill appear to be modelled on the pecuniary penalty provisions in the (now repealed) Water Services Economic Efficiency and Consumer Protection Act 2023. However, the following key provisions in that Act, which relate to the pecuniary penalty regime, are not included in this Bill:

(a) Section 85, which sets out the matters which must be considered by the Court when determining the amount of a pecuniary penalty; and

(b) Section 93, which clarifies the rules of civil procedure and the civil standard of proof apply to proceedings brought under the Act.

13.4 It is not clear why the Bill does not contain any equivalent provisions. We recommend the select committee consider if similar provisions should be inserted into the Bill.

14 Appointment of a Ministerial body (clause 48)

14.1 Clause 48 of the Bill amends section 255(2) of the LGA to clarify the Minister may appoint a Ministerial body to a territorial authority, a group of territorial authorities, or a joint arrangement. We query whether this amendment is needed, as section 255(1) already permits the Minister to appoint a Ministerial body to a local authority or to a local board (noting, in this context, a 'local authority' means a regional council or territorial authority).[9]

14.2 It may be that this amendment is intended to capture the entities specified in clauses (33)(1)(b) and (c). If so, we suggest amending clause 48 of the Bill to expressly refer to the entities specified in those clauses.

15 Alternative information requirements (clause 54)

15.1 Clause 54 requires territorial authorities to publish information about options for delivering water services. If an authority chooses to rely on the alternative information requirements in clause 54(1)(b)(i), the authority must publish, at the very least, "the options identified under section 51(2)(a) and (b)".

15.2 We query whether this clause should instead refer to "sections 51(2)(a)*(i) and (ii)"*, as those subclauses refer to the two key options for delivering water services, and subclause (b) simply refers to additional options for delivering such services. We invite the select committee to seek advice on this point, and make any necessary amendments to clause 54(1)(b)(i).

16 Amendment Paper No 41

Hierarchy of obligations in Te Mana o te Wai (clause 101)

16.1 Amendment Paper No 41 inserts new Part 5 into the Bill, which amends the Water Services Act 2021 (**WSA**). Clause 101 of the Amendment Paper amends section 138 of the WSA, and provides that Taumata Arowai must not have regard to the hierarchy of

9 LGA, s 5.

obligations in Te Mana o te Wai when making wastewater environmental performance standards.[10]

16.2 The RIS for the Amendment Paper states many iwi and Māori are concerned about this proposed change, "predominantly due to concerns about potential impacts on freshwater quality, as well as impacts on customary rights, and Treaty settlement commitments for some iwi".[11] The RIS also notes concerns about inadequate engagement processes "for reasons including insufficient information, lack of time, and that decisions appeared to have already been taken",[12] and concludes "in light of the limited engagement and the issues identified above, it is difficult to assess whether or not the Treaty principles of partnership and active protection have been met".[13]

16.3 These concerns are likely heightened by the accordance of urgency to the Bill, and the limited timeframe for making submissions. The amendments do not seem necessary for fulfilling the purpose of the Bill, which is to "establish a framework for local government to manage and deliver water services".[14] We invite the select committee to consider whether it is necessary and appropriate to include these provisions in the Bill.

Repeal of provisions by Order in Council (clause 102)

16.4 Clause 102 allows the provisions in the Amendment Paper to be repealed by the Governor-General by Order in Council. Such provisions, which allow primary legislation to be amended or repealed through an executive order, are known as 'Henry VIII' clauses. Henry VIII clauses are usually objectionable as they raise significant rule of law issues and have the potential to undermine the separation of powers.[15] They should be used infrequently, and only where absolutely necessary.

16.5 The Departmental Disclosure Statement for the Amendment Paper notes the use of a Henry VIII clause is appropriate because the amendments are intended to be temporary and to provide a transition to an updated National Policy Statement for Freshwater Management (**NPSFM**).[16] It further notes the power to repeal by Order in Council is an efficient way to realign the Water Services Act 2021 with an updated NPSFM under the Resource Management Act 1991 for consistency.[17]

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10 Te Mana o te Wai refers to the fundamental importance of water and recognises that protecting the health of freshwater protects the health and well-being of the wider environment – see clause 1.3(1) of the National Policy Statement for Freshwater Management 2020 (NPSFM). Clause 13(5) of the NPSFM explains the hierarchy prioritises: first, the health and well-being of water bodies and freshwater ecosystems; second, the health needs of people; and, third, the ability of people and communities to provide for their social, economic, and cultural well-being, now and in the future.

11 Ministry for the Environment *Regulatory Impact Statement: Excluding the hierarchy of obligations within the National Policy Statement for Freshwater Management from resource consenting* (April 2024) at [62].

12 At [62].

13 At [65].

14 Clause 3 of the Bill.

15 Legislation Design and Advisory Committee *Legislation Guidelines* (2021) at 15.1.

16 Department of Internal Affairs *Supplementary Departmental Disclosure Statement* (May 2024) at page 3.

17 At page 3.

16.6 We disagree with this assessment, and do not believe the use of a Henry VIII clause is justified in circumstances where there has been limited public consultation, and where there is no ability for Parliament to review, approve or disallow the Order in Council.

16.7 We acknowledge the need to progress the proposals in the Amendment Paper while the NPSFM is under review, as well as the need to realign the WSA with the Resource Management Act. However, we are concerned there may be a presumption the NPSFM review will soon be completed, when the Ministry for the Environment has indicated that final decisions regarding the NPSFM have not yet been made.[18] It is not appropriate to use a Henry VIII clause as a temporary or transitional provision here, unless it is apparent the NPSFM review will be completed in the near future.

16.8 The use of the Henry VIII here is, in our view, an inappropriate delegation of Parliament's law-making powers. We therefore recommend deleting clause 102.

Jesse Savage
Vice-President

18 See https://environment.govt.nz/acts-and-regulations/national-policy-statements/national-policy-statement-freshwater-management/#upcoming-work.