

Submission

to

Governance and Administration Select Committee

on

Water Services Entities Amendment Bill

5 July 2023

1. Introduction

1.1 Communities 4 Local Democracy - He hapori mō te Manapori (“C4LD”) welcomes the opportunity to submit on the Water Services Entities Amendment Bill (“the Bill”).

1.2 C4LD has made three previous submissions (to the Finance and Expenditure Select Committee) on the suite of Bills introduced by the Government to advance its poorly evidenced, and ill-thought through, reforms to the Three Waters sector. Had the Government listened to the concerns previously expressed by C4LD, and adopted the modified reform proposal C4LD set out in its first submission¹ on the Water Services Entities Bill (now Act), then 3 Waters reform might have achieved both widespread public support and bipartisan support in Parliament. To achieve a stable investment climate in respect of such long-lived assets, this ought to have been a sensible and attainable objective. Instead, the opposite is true.

1.3 The matter will now be decided at the upcoming General Election. If the Opposition parties are successful at the General Election then this Bill (if passed prior to Parliament rising for the General Election), and the previous legislation it purports to amend, is likely to be repealed within 100 days of the new Government taking office.

1.4 The Government’s reforms continue to be widely opposed in the local government sector and in the broader community. C4LD’s reform proposals advanced a model that would have respected council property rights and better preserved local voice. It is some consolation that the Opposition parties have adopted in their Three Waters policy many aspects of C4LD’s model. Given the substantial amount of work that has gone onto developing the C4LD model, we consider that a new Government should be able to move quickly to advance a new regime based on that model.

1.5 Given the useful assistance of an independent adviser to the Finance and Expenditure Select Committee’s consideration of the Water Services Legislation Bill, C4LD recommends that the Governance and Administration Select Committee engages independent advisers to advise it on the submissions it receives on this Bill.

1.6 The remainder of this submission:

- a. Briefs the Governance and Administration Select Committee on C4LD;
- b. Summarises the key points of C4LD’s critique of the Government’s approach to Three Waters reform;
- c. Summarises the key elements of C4LD’s proposals; and
- d. Comments briefly on some aspects of the Bill.

1.7 A delegation from C4LD wishes to appear before the Select Committee to speak to its submission.

¹ https://www.parliament.nz/resource/en-NZ/53SCFE_EVI_124081_FE7723/db2bba70192d02fe61e1a1b1c857397aaaa71a0d

2. Background

2.1 C4LD is a coalition of like-minded territorial and unitary local authorities formed to develop and propose a set of reforms to Three Waters policy settings that will deliver similar outcomes to those proposed by the Government whilst respecting community property rights and local voice.

2.2 The 30 participating councils are:

1. Far North District Council;
2. Kaipara District Council;
3. Whangarei District Council;
4. Matamata-Piako District Council;
5. South Waikato District Council;
6. Thames-Coromandel District Council;
7. Waipa District Council;
8. Kawerau District Council;
9. Opotiki District Council;
10. Whakatane District Council;
11. South Taranaki District Council;
12. Central Hawke's Bay District Council;
13. Napier City Council;
14. Wairoa District Council;
15. Horowhenua District Council;
16. Manawatu District Council;
17. Ruapehu District Council;
18. Tararua District Council;
19. Masterton District Council;
20. Upper Hutt City Council;
21. Marlborough District Council;
22. Grey District Council;
23. Westland District Council;
24. Ashburton District Council;
25. Hurunui District Council;
26. Kaikoura District Council;
27. Mackenzie District Council;
28. Timaru District Council;
29. Waimakariri District Council; and
30. Waimate District Council.

2.3 All participating councils are the current owners of Three Waters assets on behalf of their respective communities. These assets have been bought and paid for by these communities over many generations. In all cases, C4LD participating councils wish to retain meaningful control and influence over the property that they own on behalf of their communities.

2.4 To be clear, C4LD supports reform of the Three Waters sector. Our disagreement with the Government is centred on its approach to asset reconfiguration in the sector. We do not disagree with achieving appropriate health and environmental outcomes nor do we disagree with ensuring local iwi and hapū have appropriate input into Three Waters decision-making at a local level.

3. Recommendation

3.1 C4LD opposes the Bill and recommends that it not proceed any further pending the outcome of the 2023 General Election (currently set down for 14 October 2023).

3.2 The Government's Three Waters policy is widely opposed by communities in New Zealand. The breadth of the assault on community property rights by first, the Water Services Entities Act 2022, then the Water Services Legislation Bill (awaiting its second reading), and now this Bill, has never received an electoral mandate from the people of New Zealand. With less than 100 days until advance voting opens for the General Election it is appropriate that a pause now occur and that any further work on the establishment of the water service entities ("WSEs") cease until either the Government receives an electoral mandate for its policy or a new Government has the opportunity to recalibrate policy settings.

4. Critique of Government's Three Waters Reform Approach

4.1 Appendix 5 of our original submission (link provided in footnote 1 to this submission) set out a critique of the Government's proposals. This was prepared by Castalia on behalf of C4LD. Castalia has a 40-year history as the world's pre-eminent advisors on reform in the water sector. Castalia is headquartered in New Zealand and has a global presence. Castalia is expert in the major institutional structures for water (French, British, and US), and has advised on more than 300 water projects in over 96 countries.

4.2 Castalia noted that there are five key flaws in the Government's proposals, namely:

- i. The belief that massive investment is needed in New Zealand water services. Unfortunately, the analysis it relies upon is flawed, as numerous case studies illustrate. (see section 2 of Appendix 5). Neither the present Bill nor its predecessors alter in any way that analysis;
- ii. There are high risks of higher water charges. This is because the Government's claimed cost savings are highly implausible, and its institutional structure will be ill-suited to managing costs (see section 3 of Appendix 5). Neither the present Bill nor its predecessors alter in any way that analysis;
- iii. Critically, the proposed water service entities will be unaccountable to the public and communities of interest, which undermines their long-term sustainability (see section 4 of Appendix 5). This Bill belatedly acknowledges this fact by introducing six more

water entities and providing for a mechanism known as a “Community Priority Statements.” However, these measures do not address the expropriation without compensation of councils assets. Ownership control remains the most potent way to ensure local community wants and needs are addressed;

- iv. The reforms also increase fiscal risk because the Crown is providing a fiscal backstop for the water service entities who will become some of the largest corporates in New Zealand. Given the weak accountability framework, the risks are elevated and it is possible that the Crown takes a more direct governance interest in the entities over time, further weakening local involvement, as has occurred overseas where similar reform models were experimented with (see section 5 of Appendix 5). Neither the present Bill nor its predecessors alter in any way that analysis. In fact, the present Bill acknowledges this risk and tries to mitigate it by creating a new funding mechanism to raise debt finance (essentially spreading the risk associated with that debt across all 10 entities), and specifically stating that the Crown is not a guarantor of that debt but allowing the Crown to provide capital to the entities if it chooses to do so. The approach of the ratings agencies to this will be interesting to watch. It is possible that they will assume that despite the non-guarantor clause in the Bill that the Crown, in economic and political actuality, is nonetheless providing an implicit guarantee. This sets up the risk noted in C4LD’s original submission²; and
- v. Finally, because of the Government’s critical process flaws, available alternative reform options were not properly considered. Moreover, the evidence base the Government used was skewed towards a high-risk reform option (see section 6 of Appendix 5). Neither the present Bill, nor its predecessors, alter in any way that analysis.

4.3 The full critique is set out in Appendix 5 to C4LD’s original submission and we encourage Select Committee members to read it.

5. Key Aspects of C4LD’s Reform Model

5.1 On 12 December 2019, the Productivity Commission publicly issued its 30 November 2019 report on “Local Government Funding and Financing.” Chapter 11 of that report dealt specifically with the Three Waters sector. The Productivity Commission made the following observations and recommendations:

- i. The Three Waters sector has substantial room for improved performance;
- ii. A key contributing factor to this state of affairs is a poor regulatory framework governing water quality (health and environmental);

² For further expert commentary on the nature of these fiscal risks, see the submission to FEC by Mr. Pat Duignan https://www.parliament.nz/resource/en-NZ/53SCFE_EVI_130199_FE12049/216d893fb02d48f81f786913f3ac31be11b95a94

- iii. The Government should encourage (but not direct) aggregation and improved governance over 3 Waters service delivery;
- iv. The performance of the three-waters sector would substantially improve by using an approach that:
 - rigorously enforces minimum performance standards; and
 - is permissive about the way councils structure and operate their three- waters businesses;
- v. The Government should consider also having backstop arrangements to deal with councils that fail to lift performance sufficiently to meet minimum health and environmental performance standards; and
- vi. Financial assistance to communities will likely be needed to assist deprived communities meet minimum health and environmental standards. The assistance needs to be designed to avoid rewarding past inaction and instead reward action for sustainably lifting the performance of water providers to these communities.

5.2 These recommendations followed approximately 18 months of analysis and evidence gathering (the inquiry commenced on 16 July 2018). C4LD supports the Productivity Commission’s analysis and recommendations. In contrast, the Government’s approach departs from the Productivity Commission’s recommendations in significant respects, most notably asset configuration.

5.3 C4LD’s approach to Three Waters reform is built upon, and extends, the Productivity Commission’s recommendations. Accordingly, C4LD’s approach is neither frivolous nor unusual. Most importantly it is based on expert analysis carried out not only by our own contracted experts in water services infrastructure reform, but also on the Government’s own expert body on regulatory and economic reform matters.

5.4 C4LD took the Productivity Commission’s approach and produced a 10-point Three Waters reform plan. C4LD’s alternative Three Waters reform plan is centred around this 10-point plan. Its components are:

- i. As a foundation principle, community property rights in Three Waters assets should be both respected and meaningful;
- ii. The Government should agree to amend its current reform process and allow time for the revised approach to be reflected in draft legislation;
- iii. With respect to investment decision-making, asset owners should actively seek to initiate authentic discussions with mana whenua at a local level that consider co-design and partnership arrangements that acknowledge and enable Te Tiriti based pathways at a local and regional level;

- iv. Asset owners agree to commit to meeting health and environmental standards, once regulatory and performance standards are in place, within an appropriate time frame, for example five years;
- v. The regulatory framework should specify a “backstop” provision that identifies a set of circumstances which would justify future Crown intervention if an asset owner was not making acceptable progress towards meeting those regulatory requirements;
- vi. Progress should be reported on annually by asset owners and be benchmarked across the sector;
- vii. To further incentivise sector progress, a formal process might be established that requires an asset owner to prepare a plan that would map out the steps it proposes to take to meet the required standards in a financially viable and sustainable manner;
- viii. A process to finance and allocate funds to areas that will require financial assistance be designed that is national in application and independently administered according to objective and transparent criteria;
- ix. This subsidy scheme will be designed to meet investment shortfalls until such time as sufficient progress has been made. At which point the scheme will cease and asset owners will finance matters on a business-as-usual approach; and
- x. A sector-wide sector best-practice improvement process be created and membership made compulsory.

5.5 This 10-point plan remains C4LD’s position. C4LD is pleased that Opposition parties have adopted many of its components.

5.6 The full detail of this 10-point plan may be read in C4LD’s original submission and we encourage Select Committee members to do so.

6. Comments on Current Bill

6.1 C4LD welcomes the Government’s belated recognition that its original four entities model lacked any appreciable community support. Indeed, C4LD welcomed the Government’s decision to include its Three Waters policy into the “reset” that the Prime Minister announced in the early part of 2023.

6.2 Unfortunately, the “reset” falls short of the key elements of C4LD’s proposals. C4LD does acknowledge that the present Bill is a slight improvement on what went before, but the improvement does not move the policy dial far enough. Given that the Government’s amendments are designed to address some of C4LD’s critique of its policy position, a better outcome would have been for the Government to properly embrace the C4LD 10-point plan. For this reason, we encourage the Select Committee to appoint independent advisers so that it can receive advice that can look at the issue with fresh eyes.

6.3 Given the extremely compressed timeframe in which to prepare, and then have mandated a submission, our specific comments on the Bill are short. Our focus is on the broader policy framework which this Bill does not alter in any meaningful sense. Nonetheless the following specific comments are made.

Community Priority Statements

6.4 The Bill introduces a new mechanism known as “Community Priority Statements.” Under this mechanism, community groups may make statements about investment priorities to an entity’s Regional Representation Group (“RRG”).

6.5 The Bill requires that the RRG forward such a statement to a consumer forum to be established by the relevant entity. Additionally, the RRG may consider it in its own work when preparing a statement of strategic and performance expectations for the entity, and may consider it as part of any comments that the RRG may make on the entity’s planning and reporting documentation. These latter two matters are discretionary, that is, they are not required. Such an approach, whilst better than the previous approach, is still far short of giving effective voice to local views through ownership control.

Number of Entities

6.6 The Bill increases the number of entities from four to ten. This better allows the entities to align with the communities in their respective geographical areas. This is an improvement.

6.7 The Bill’s additional requirement allowing for all territorial authorities to be represented on the RRG also is an improvement on the previous model.

6.8 The Explanatory Note to the Bill describes territorial authorities as “owners” of the entity. However, clause 10 of the Bill (quite correctly) does not use the term “owners” or “ownership.” This position is correct (the word “representative” is used) because territorial authorities property rights in their water infrastructure assets are being expropriated by the Crown without compensation. In other words territorial authorities will not be owners any longer because expropriation entails, by definition, a transfer of ownership (note, however, section 37 of the Water Services Entities Act 2022 does use the word “owner”, but that section predates the decision of the High Court noted below).

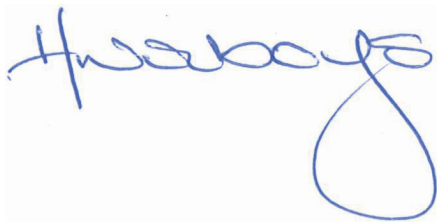
6.9 This position was confirmed in the recent judgment of the High Court in *Timaru DC and others v Minister of Local Government* [2023] NZHC 244, where the Court observed at paragraphs 144 and 179 that “*the Three Waters reforms involve a form of expropriation*”, and that the Crown’s own literature failed to directly acknowledge “*that local councils will lose central incidents of ownership that they presently hold, nor that local councils’ ability to control their use of assets will be materially diluted ... nor that local democratic accountability for the provision of the Three Waters services in local communities is essentially lost*”.

6.10 Increasing the number of entities does not alter the fact that the Crown is expropriating without compensation the assets of communities held by their local authority.

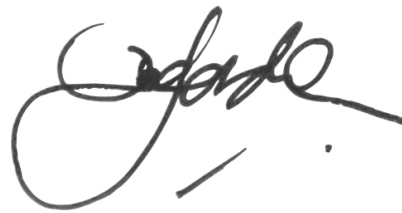
7. Conclusion

7.1 As noted earlier, C4LD's **recommendation** is that the Bill not proceed any further pending the outcome of the 2023 General Election (currently set down for 14 October 2023).

Ngā mihi nui,



Mayor Helen Worboys
Chair
Manawatu District Council



Mayor Dan Gordon
Deputy Chair
Waimakariri District Council



Mayor Vince Cocurullo
Whangārei District Council



Mayor Craig Jepson
Kaipara District Council



Mayor Adrienne Wilcock
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Mayor Len Salt
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Mayor Susan O'Regan
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Mayor Alex Walker
Central Hawke's Bay District Council

Mayor Weston Kirton
Ruapehu District Council



Mayor Bernie Wanden
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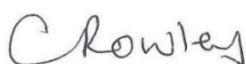
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Mayor Gary Petley
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Mayor Craig Little
Wairoa District Council

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