SOLGM

Submission on Taumata Arowai – the Water Services Regulator Bill

Society of Local Government Managers – February 2020

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WHAT IS SOLGM?

The New Zealand Society of Local Government Managers (SOLGM) thanks the Health Committee (the Committee) for the opportunity to submit on the *Taumata Arowai – the Water Services Regulator Bill* (the *Bill*).

SOLGM is a professional society of 873 local government chief executives, senior managers, and council staff.[1] We are an apolitical organisation that can provide a wealth of knowledge of the local government sector and of the technical, practical and managerial implications of legislation and policy.

Our vision is:

> *professional local government management, leading staff and enabling communities to shape their future.*

Our primary role is to help local authorities perform their roles and responsibilities as effectively and efficiently as possible. We have an interest in all aspects of the management of local authorities from the provision of advice to elected members, to the planning and delivery of services, to the less glamorous but equally important supporting activities such as the collection of rates.

The Minister of Local Government has observed that *"[The Government] see[s] water as critical. Our national aspirations depend on it."*[2] Three waters infrastructure plays a vital role in the social, economic, environmental and cultural well-being of the nation. Local authorities have a major role as an owner and provider of three waters infrastructure (not to mention a funder).

This *Bill* is the first of a projected two *Bills* that will give effect to the Government's policy decisions on reform of the water services sector responding to the Inquiry into the Havelock North Drinking Water. The Inquiry found that there was inadequate system oversight both at a policy level and a regulatory level, with multiple agencies having roles and responsibilities with no overall leadership.

There are significant unanswered questions in the *Bill* as it stands – funding not least

The *Bill* is largely mechanical in that it establishes a Crown entity with a range of functions to regulate the supply of drinking water and some related services, and sets out the governance framework. Our submission suggests several amendments to provisions that, on the whole, are generally sound.

Our concerns lie more in what has been omitted from the *Bill* and the other materials in the public domain. The Government has withheld much of the information around the cost of establishing Taumata Arowai and its ongoing operations. The Cabinet Paper that sought approval to establish Taumata Arowai suggested that *"the costs of operating the Establishment Unit and Transition Board for 18 months would be between $7.2 and $8.6 million."*[3]

The Cabinet Paper and the associated business case quantified Taumata Arowai's ongoing operating costs. However, these amounts have been redacted from all documentation on grounds that it would protect the confidentiality of advice tendered by Ministers and officials. Our best 'high-level' estimate of the ongoing costs would be the mid-eight-figure range by the time Taumata Arowai is fully operational (i.e. tens of millions of dollars).

1 As at 15 February 2020.
2 Hon Nanaia Mahuta (2019a), Speech to the New Zealand Council for Infrastructural Development Conference, September 2019.
3 Hon Nanaia Mahuta (2019b), *Three Waters Review: Institutional Arrangements for a Drinking Water Regulator*, Paper to the Cabinet Economic Development Committee, page 15.

The Cabinet paper comments that *"[The Minister] consider[s] that the legislation should equip the regulator with appropriate funding tools should these be needed in future. I am seeking agreement to include provisions in the legislation that enable regulations to be made to recover the cost from third parties. . . . ."*[4] Recommendation 23 in that paper asks Cabinet to note that there are choices to be made about the funding mechanisms, including the mix of Crown and third-party revenues.

The sector accepts that many regulatory systems are funded at least in part by levies met by the regulated community (that is to say drinking water providers). We have to express some surprise that there has been no provision of any kind in the *Bill* around the funding of Taumata Arowai, even a regulation-making power. When coupled with the redaction of information in the Cabinet paper and business case it seems that the sector (and other providers) are left with no clear idea of what the impost will be on them, and how and when this might fall.

And as significant as Taumata Arowai's establishment and operating costs might be, these are minor by comparison to the financial impost that the regulations Taumata Arowai makes and the regulation it will design and enforce.

We acknowledge that the Department of Internal Affairs has commissioned a significant amount of research into the capital and operating expenditure implications of various proposals. The so-called Beca report has costed the impact of removing the 'all practicable steps' clauses of the *Health Act* and abolishing the secure groundwater classification system. Our understanding is that the additional cost of all supplies serving 25 or more people meeting these requirements is now estimated at $560-830 million and $11-21 million operating cost per annum. The cost for all other supplies is estimated at $2.4 – 3.6 *billion* capital and some $470-730 million operating per annum.

This raises a number of policy questions. For example, what are the local authorities' obligations to the self-supplier and what are the funding implications (e.g. will central government provide assistance? Will there be an expectation that local authorities fund part of the cost)? Equally, who is responsible for non-compliance and to whom?

Reports by GHD estimated costs for raising the standards of treatment at wastewater plants. There are some 48 plants that discharge to the ocean. Upgrading these is expected to cost between $1.0-1.5 billion, and operating cost $73-110 million per annum. The cost estimates for plants discharging to freshwater is now estimated at $1.5-2.2 billion capital and $45-73 million per annum operating.[5]

Recommendations

1. That the Select Committee seek and publish advice from officials on the costs of establishing and operating Taumata Arowai.
2. That the Select Committee clarify what the Government's intentions with regards cost recovery from the regulated community are and, if deemed necessary, add a power to make regulations to allow for recovery of costs.

4 Hon Nanaia Mahuta (2019b), page 14.
5 The three reports can be found at https://www.dia.govt.nz/Three-waters-review .

Processes for engagement are a second significant unanswered question

Taumata Arowai will be making regulations that promote a particularly significant aspect of public health, will impact on Te Mana o Te Wai and will have significant financial consequences. The *Bill* recognises this by requiring Taumata Arowai to engage early and meaningfully with Māori and meaningfully with stakeholders.

Beyond a high-level obligation, the *Bill* is silent on any obligations to engage. It is usual for regulation-making processes to set out some procedural minima for engagement. We suspect that the reason nothing has been specified is that there are processes for changing drinking water standards in the *Health Act*. We understand these will be repealed and some form of replacement inserted into the legislation governing Taumata Arowai.

We're not clear when this is to happen and would have been more comfortable had a procedural minima been specified in the *Bill* on introduction. That way the regulator, the regulated, and others, can see the full ambit of the legislation. As with funding, stakeholders are being asked to accept this *Bill* with significant elements being 'sight unseen'. Other clauses, such as *clauses 10(b)* and *11(e)*, have been included in the *Bill* and had commencement deferred.

The *Bill* does not make enough statutory provision for the perspectives of the regulated community

Later in this submission we focus on the capabilities that the *Bill* requires of the Board. Broadly speaking these include knowledge of regulation (or some aspects of regulation – more of that later), the principles of the Treaty of Waitangi, tikanga Māori, public health and performance monitoring and governance.

Nowhere is the Board required to have any knowledge or understanding of the operation of a drinking water supply and environmental regulation. Taumata Arowai needs an understanding at governance level of the impacts of the regulations it is proposing – practicability, capability and cost implications not least. This could be done by either requiring expertise in the provision and management of drinking water services, or by requiring appointment of at least one representative from the regulated community.

The regulations that Taumata Arowai makes will also have significant impacts at local level, affordability not least. Local government brings a knowledge both of the operation of three waters and of the perspectives of the local community. There is recent precedent for providing for the perspectives of local government on a Board of a Crown agency. The *Kāinga Ora – Homes and Communities Act 2019* provides that the Board of this agency have knowledge of the perspectives of local government.

As a further point, we can find no obligations on the responsible Minister to consult anyone when making appointments to the Board. This is highly unusual – legislation generally specifies some minimum process or requirement to consult before appointments are made.

Other regulatory agencies establish advisory groups that provide the regulated community with a more formal vehicle for engagement over and above specified processes. Often this is a voluntary rather than a statutory requirement. We submit that establishing a committee in statute would build the confidence that the sector (and other providers) in the regulator – especially as there are currently no procedural minima and only a loose requirement to engage early and meaningfully.

Recommendations

3. That *clause 12(2)* be supplemented with an additional subclause requiring that the Board have knowledge of either: the operation of drinking water supplies or the perspectives of local government (our preferred option).

4. That the *Bill* make provision for a statutory Drinking Water Advisory Group drawn from providers.

The *Bill* may not have clearly implemented the Cabinet's decisions around the degree of statutory independence of the regulator

The Cabinet papers giving approval for the legislation made a number of important decisions about the relationship between the Crown and Taumata Arowai. In particular, recommendation eight saw Cabinet agree that *"the legislation enable government policy statements to be issued to the regulator and require the regulator to give effect to these statements, where these do not interfere with the regulator's statutory independence in carrying out its compliance, monitoring and enforcement activities."*[6] There are also several references in the Cabinet paper to the regulator being established as a *Crown agent* which as we understand must therefore give *effect* to government policy (emphasis supplied).

It is not clear that this decision has been translated into the *Bill* as drafted. For example, *clause 9* establishes Taumata Arowai as a Crown entity. According to our reading of the *Crown Entities Act 2004*, a Crown agent is actually a specified subset of Crown entity.[7] It is wise to be clear about the level of direction the Crown provides in the *Bill* – it avoids later debates.

The Cabinet paper suggests that the regulator would have statutory independence in respect to its compliance, monitoring and enforcement activities. We've been unable to locate any provision in the *Bill* that sets out that the regulator has statutory independence from Ministers and over which functions.

As an example, we refer the Select Committee to *section 95(2)* of the *Land Transport Management Act* (the legislation establishing the New Zealand Transport Agency). This provision relates to quite a different set of functions from those that the Water Services Regulator will perform. We submit Ministers ought not be intervening in compliance, monitoring and (particularly) enforcement decisions – legislation should clearly specify those functions where Taumata Arowai is expected to act independently.

6 Mahuta (2019b), page 27.
7 See *section 7, Crown Entities Act*

Recommendations

5. That the Select Committee consider whether the Taumata Arowai's establishment as a Crown entity provides sufficient clarity that it exists to give effect to government policy.
6. That the Select Committee add a provision setting out the functions where Taumata Arowai has statutory independence from Ministers.

The Board's required skill sets need further specification

Clause 12(2) lists the desired knowledge, experience and skill sets that the Board must possess as a collective. It appears that the five matters currently listed have been translated word for word from the Cabinet paper.

We consider that this set of requirements falls short of the full list of capabilities the governing body of a water regulator should possess. While we agree that the Board should have competencies in the compliance, monitoring and enforcement activities of regulatory agencies, this grouping of competencies all relates to activities after regulations have been made. Taumata Arowai has been created to regulate the provision of drinking water – the Board should have some knowledge of processes for making effective regulation.

Taumata Arowai will be making regulations that promote a particularly significant aspect of public health, will impact on Te Mana o Te Wai and will have significant financial consequences. The *Bill* recognises this by requiring Taumata Arowai to engage early and meaningfully with Māori and meaningfully with stakeholders. It seems incongruous then that there is no obligation that the Board to have some expertise in community engagement. We consider this a must have among the Board's desired set of capabilities.

We also take the opportunity to reiterate our concerns that there is no current requirement that the Board have any knowledge of the operation of drinking water services or other perspectives of the regulated community.

Recommendations

7. That the Select Committee amend *clause 12(2)(a)* to read *"the regulation-making, compliance, monitoring and enforcement activities of regulatory agencies"*.
8. That the Select Committee add a new *12(2)(f)* that requires the Board to have knowledge of effective engagement processes.

Note: recommendations 7 and 8 are additional to recommendations 3 and 4 above.

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