Submission of
Taituarā – Local Government Professionals Aotearoa
regarding the
Water Services Entities Bill

NOTE TO THE DISCUSSION DRAFT

This document is a draft of the Taituarā submission to the Finance and Expenditure Select Committee regarding the Water Services Entities Bill. This draft has been produced for discussion with local authorities and with the approximately 1000 individual members of Taituarā.

A word about the role of Taituarā as a member managerial organisation. It is not for Taituarā as a managerial organisation to take a political stance on the legislation. And the draft that follows does not. Our role is to ensure that the consequences of the Government's policy decisions are spelt out in an apolitical and neutral way. Equally it is our role to ensure that the final policy decisions, whatever they may be, are designed in a way that they can be practically implemented to best effect.

The draft that follows is not the final Taituarā submission. The comments and recommendations that follow are not, and may never be, Taituarā policy. The final approval of this submission rests with the Taituarā Executive.

Taituarā welcomes comment on any aspect of this document – particularly those matters you consider have been missed, or where you take a different view. Of course, we will expect you to support your views with supporting evidence and argument.

There are six discussion questions throughout the document where we would particularly welcome views. These are:

1. Are there any other matters of a general nature that Taituarā should raise in Part One of its submission? If so, what are they?
2. What are the benefits and disadvantages of the shareholding model is set out in clause 16 of the Bill? Has your council expressed any views on this model of ownership or the collective model i.e. all territorial authorities are joint, several and equal owners?
3. Would you support empowering WSEs to allow for the appointment of non-voting observers from central government and/or regional councils to an RRG? Why or why not?
4. Are there linkages between this Bill, the WSEs and other legislation that you consider have been missed? If so what are they, and are these issues that must be addressed now r can they wait for the second Bill?
5. Are there any other matters that you'd like Taituarā to include in its submission on this Bill? If so, what and why is this important?
6. Are there any matters in this draft that you consider Taituarā should exclude from its final submission? If so, then what matters should be removed and why?

Providing feedback

To provide feedback on this document please email our Chief Adviser, Raymond Horan at raymond.horan@taituara.govt.nz by **5.00pm** on **Wednesday 13 July**.

All feedback must be in writing and originate from either from a valid council email address or a valid council postal address.

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LIST OF RECOMMENDATIONS

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1. **That the Select Committee separate the clause into a clear statement of purpose and a statement of how the entities should give effect to that purpose.**

Customer Relationships

2. **That the Select Committee consider how it will assure itself that customer-facing issues and matters regarding the links to land use planning will be satisfactorily resolved before it reports on this Bill.**

Privatisation

3. **That the Select Committee support entrenchment of the provisions that set out the requirements for any disposals of a WSE to proceed.**

Peer Review of the Regulatory Impact

4. **That the Select Committee commission an independent analysis of the cumulative impacts of the Bill from an expert in regulatory economics or institutional economics as part of its scrutiny of the Bill.**

Shareholding

5. **That the Select Committee amend clause 16 to clarify whether the census night population or the usually resident population counts should be used for determining local authority shareholding.**

Government Policy Statement: Water Services

6. **That the Select Committee amend clause 130(2) by adding a clause that requires the Government to explicitly state how the Government intends to support other agencies to implement the GPS:Water or explain its reasons for not providing support.**

7. **That the Select Committee amend clause 130(2) by adding a clause that requires the Minister to undertake an analysis of the costs and benefits of the objectives in the GPS:Water.**

8. **That the Select Committee amend clause 134 to read "When performing its functions a water services entity must give effect to any Government policy statement issued under section 129."**

9. **That the Select Committee amend clause 131(b) by replacing the word 'consult' with the words 'engage in a way that gives effect to the requirements of clause 202'**

10. **That the Select Committee amend amend clause 131(b) by adding local authorities to the list of named parties for engagement**

<u>Objectives of Water Services</u>

11. **That the Select Committee provide guidance that WSEs are expected to manage conflicts in an open, transparent and accountable manner either as one of the operating principles of clause 13 or in 'giving effect to the objectives clause' as per recommendation 6 above.**

12. **That the Select Committee place WSEs under an obligation to consider ways in which they can help foster the development of Māori capacity to contribute to the governance and decision-making processes of the WSE.**

<u>Regional Representative Groups</u>

That the Select Committee:

13. **add a requirement that the territorial representatives to RRGs be broadly representative of the different mix of metropolitan, provincial and rural territorial authorities to clause 32**
14. **add a requirement that appointment procedures for the territorial authority representatives for RRGs give effect to the requirements that RRG membership be broadly representative of the different mix of territorial authorities**
15. **empower WSEs to allow for the calling of a annual shareholders' meeting by amending clause 91**
16. **empower regional representative groups to, at their discretion, invite the Crown to appoint a non-voting observer to attend all group meetings**
17. **empower regional representative groups to, at their discretion, appoint a non-voting observer or observers from a regional council in entity's service area**

18. empower regional representative groups to, at their discretion, appoint alternates to perform the roles of members of the group when they are absent.

Regional Advisory Panels

That the Select Committee:

19. place the RRGs under an obligation to seek advice from regional panels when developing a Statement of Strategic and Performance Expectations, when commenting on an infrastructure strategy, when commenting on a funding and pricing plan, and when approving a board appointment and remuneration policy

20. amend the collective duty of a regional advisory panel to advocate for the interests of its local area, having had regard to both the interests of the local area and wider WSE service area

21. provide those designing or determining regional advisory panel arrangements be with a set of statutory criteria to have regard to

22. add provision requiring the RRGs to regularly review their regional advisory panels (including provision for an initial review before the wider review of governance and accountability in clause 195).

Tenure of Office for Regional Representative Group and Panel Members

That the Select Committee

23. add a clause clarifying that RRG members hold office only while they satisfy the requirements of clause 27(3)

24. clarify that RRG and board members must notify the WSE Chief Executive as soon as practicable after ceasing to be eligible to hold office as an RRG or board member as the case may be.

Skills for the Board Appointment Committee and Entity Boards

That the Select Committee agree to:

25. amend clauses 38(2) and 57(2) by replacing the words 'network infrastructure' industries with the words 'water services industries'.

26. amend clauses 38(2) and 57(2) by adding the words 'customer service and customer engagement' to the list of skill sets.

Appointment and Remuneration Policies

That the Select Committee add further provisions to clause 40 that:

27. require that appointment and remuneration policies set out policies on the provision of training and professional development of entity board members

28. require that appointment and remuneration policies be reviewed at least once in the term of each RRG

29. require the publication of board appointment and remuneration policies on an internet site maintained by the WSE

Disqualifications from Membership

The Select Committee:

30. amend the Bill to preclude regional council members, local and community board members from membership of a WSE board

31. amend the Bill to preclude a local authority Chief Executive or an employee of a local authority from membership of a WSE board.

Transparency and Access to Meetings

That the Select Committee:

32. replace the minimum number of public meetings that WSEs must hold with a requirement that the WSE hold such meetings as are necessary for the good governance of the entity and

33. require that all meetings of the WSE be held in public except where provided for by section 47 of the Local Government Official Information and Meetings Act 1987.

Funding and Pricing Policies

That the Select Committee:

34. amend clause 150(2)(a) to set a legislative timeframe of 30 years for the FPP

35. amend clause 151 to add a requirement that the WSE boards consider affordability for individuals and groups of individuals in developing their funding and pricing plans and document the results of that consideration

36. add a requirement on the WSEs to set limits on their revenues and borrowing as part of their financial strategy

37. delete clause 151(2)(b) as redundant

38. amend clause 151(2)(c) by deleting redundant references to equity securities

39. require each WSE to supply the Commerce Commission with a copy of the funding and pricing plan.

Infrastructure Strategies

40. That the Committee add a further clause after clause 154(2) that requires disclosure of the WSE's assumptions regarding
(i) the condition and useful lives of significant assets
(ii) the levels of growth and demand for water services and
(iii) changes to levels of service.

41. That each WSE be required to publish the methodologies it uses to establish asset condition and estimate the level of growth and demand for water services.

Asset Management Plans

That the Select Committee amend the Bill by:
42. requiring WSEs to prepare an asset management plan of at least 30 years duration for its infrastructure assets and publish these
43. deleting requirements to engage on the asset management plan
44. placing the WSEs under an obligation to review levels of service for each of their water services at least once every three years and identify the major capital projects and the overall implications for maintenance, renewal and replacement programmes .

Investment Prioritisation Metholdogies

45. That the WSE Boards document their investment prioritization methodologies and publish their methodologies on an internet sire maintained by the WSE.

Employment of a Chief Executive

That the Select Committee:
46. add a clause to the Bill that sets out the statutory function of Chief Executives of the WSE and
47. that the Select Committee add a clause clearly stating that the Chief Executive is the employer of WSE staff.

Bylaws

48. That clause 214 be amended as set out on pages 45 and 46 of this submission.

Funding and Accountability

49. That the Select Committee include a provision in this Bill ensuring that WSE charges are assessed and invoiced separately from local authorities.

Linkages to Other Legislation

50. That the Committee agree that any charges levied by WSEs should be included within the ambit of the Rates Rebate Scheme and amend the Bill accordingly.

51. That the Select Committee amend the Bill by adding a requirement for the WSEs to conduct an assessment of drinking water, sewage treatment and disposal and drainage works in their area

52. That the Select Committee add a consequential amendment to recommendation 51 repealing sections 125 and 126 of the Local Government Act.

53. That the Select Committee amend section 101A, Local Government Act 2002 to require local authority financial strategies to disclose:
(a) the financial implications and drivers for meeting the existing levels of service/accommodating new requests
(b) the local authority's self set limits on rates and debt
(c) the local authorities targets for its financial securities and equity investments and its rationale for holding these assets.

54. That the Select Committee amend section 101B, Local Government Act 2002 to align the required disclosures of local authority financial strategies with those the Bill would place on WSEs (and as amended by our recommendations above

55. That the Select Committee recommend the repeal of the requirement that the Secretary for Local Government set mandatory performance measures under section 261B, Local Government Act.

56. That the Select Committee note that many LTP requirements have flow on impacts to the annual plan and annual report requirements and will need to be address now, or in the second Water Services Entities Bill.

57. That the Select Committee seek assurance from officials that the interface between the WSEs and the following legislation will be addressed in

development of the second Water Services Entities Bill: the Public Works Act 1981; the Resource Management Act 1991 and successor legislation; the Land Drainage Act; the Kainga Ora – Homes and Communities Act 2019 and the Infrastructure Funding and Financing Act 2020.

PART ONE: THE WATER SERVICES ENTITIES BILL – AN OVERVIEW

What is Taituarā?

Taituarā — Local Government Professionals Aotearoa thanks the Finance and Expenditure Committee (the Select Committee) for the opportunity to respond to the Water Services Entities Bill (the Bill).

Taituarā — Local Government Professionals Aotearoa (formerly the NZ Society of Local Government Managers) is an incorporated society of almost 1000 members drawn from local government Chief Executives, senior managers, and council staff with significant policy or operational responsibilities. We are an apolitical organisation. Our contribution lies in our wealth of knowledge of the local government sector and of the technical, practical, and managerial implications of legislation.

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 election management and the collection of rates.

We offer the perspectives of a critical adviser.

Taituarā is a managerial organisation as opposed to a political one. Our role therefore is to advise on consequence, and to assist policymakers to design a policy for best results and for effective implementation. We participated (and continue to participate) in the Three Waters Steering Group to provide these perspectives, many of which are expanded on in this Bill. That is to say this submission takes the perspective of a 'critical friend' in the review process – supportive of the need for affordable, sustainable three waters services

The remainder of our submission is in three parts. The remainder of this Part provides some general perspectives on the Bill including some commentary on the overall package, what's left to do, and some commentary on the degree to which the Bill has achieved the objectives the Government set for the reforms.

Part B contains our detailed comments on this Bill. We approach this theme by theme, or area by area rather than attempting a clause-by-clause analysis. The bulk focus on the governance and accountability arrangements. Part C traverses the linkages between this legislation and other system legislation. We proffer these thoughts to provide the

Committee with a list of the flow on impact of this legislation on other local authority responsibilities and duties.

Effective water services are fundamental to the wellbeing of local communities and the nation generally.

Water services, like other network infrastructure, is the servant of the community. It is provided to generate and support a wide variety of wellbeing objectives and outcomes. While most will generally associate drinking water, wastewater and stormwater with public health and environmental outcomes, water services also support:

- housing and urban development outcomes e.g. access to a water supply is a condition of a consent and building around trunk infrastructure sets
- climate change mitigation and adaptation outcomes
- economic growth and transformation – some businesses and industries are dependent on access to a water supply. Primary industry and related manufacturing (such as food processing) are reliant on access to potable water

Local authorities have long been charged with the responsibility of delivering water services. Local government in this country essentially started life as a series of entities delivering roads and footpaths with an associated stormwater disposal component. Around the turn of the 20th century public health interests came to fore and the role expanded into the delivery of water and wastewater services. The Health Act 1956 further strengthened legal requirements. Today's three water services represent more than a century's worth of investment by and on behalf of local authorities.

Clause 11 sets out the objectives of a WSE which are broadly in line with the wellbeing outcomes that New Zealanders expect from their water services. However, clause 11 as currently drafted, muddles the objectives that a WSE is expected to achieve with some aspects of **how** we might expect them to behave in doing so.

Specifically, clause 11(d) requires that the entities operate in accordance with commercial and best practices. While we agree that the WSEs should be operating in this way, this paragraph duplicates the first (would a WSE entity that is operating with commercial/business practice be systematically acting in an inefficient way). Efficiency is also replicated in clause 12 – the functions of WSEs. Surprisingly efficiency and operating in accordance with business practice don't feature in the operating principles set out in clause 13.

Clause 11(e) requires the WSEs to act in the best interests of current and future consumers and communities. Once more we accept that 'as read' but note that once again, this is muddling the what WSEs do with the how we expect them to do it.

The authors of the Local Government Act faced a similar issue and chose to overcome this with a separate 'what' and 'how' provisions. In the WSE context this might be done by moving 11(d) and 11(e) to a separate clause that might read, for example:
"In meeting the objectives set out in (clause number) each water entity shall
(a) operate in accord with best commercial and business practice and

(b) act in the best interests of present and future consumers."

Recommendation

2. That the Select Committee separate clause into a clear statement of purpose and a statement of how the entities should give effect to that purpose.

This Bill represents the less complex half of the overall water reform package. There is a great deal more to do.

This is a relatively straightforward, though very contentious piece of legislation. This Bill essentially:

- creates the water services entities and their high-level powers and duties
- sets up the framework through which the entities will be governed and be hold accountable by their customers and communities
- gives effect to the Treaty partnership in a three waters context and
- sets out the general principles for the transition of assets, liabilities, revenues, and staff s well as processes for addressing the rest.

While these are important matters, the lessons from the Auckland reforms tell us end users of three waters services are likely to reserve judgement on the success (or otherwise) of the reforms until the first week that the entities are operating. That is to say that for the end users the true test of the reforms will lay in the quality of the services they receive, the entities response to issues at local level, what they pay for water services, and (of course) the other ways in which the entity impacts on their daily lives.

This Bill speaks to those issues only at a very broad level. The real 'bread and butter' issues are still undergoing further policy development. These include:

- the links between these reforms and land use planning and sustainable urban form – in other words how do these reforms align with the RMA reforms and support the rights of communities to determine what happens in their local places. To take an example, is a developer going to need to interact with another agent as part of the development process
- the operational powers of the entities. For example, when and under what conditions might a WSE legitimately enter private property or suspend services
- economic regulation – what controls will be placed on how and what the entities can charge for their services.[1] This is particularly important as the long-term affordability of water services has been cited as the driver for the reforms, and initially at least, it seems very likely that the bulk of WSE revenues will be collected by local authorities via the rating system
- consumer protection regulation – for example what happens with unresolved or unsatisfactorily resolved customer services complaints and

[1] The Committee might be interested to know that current proposals would extend the economic regualtion of water services to stormwater treatement and disposal. We are advised that no other jurisdiction has economic regulation for stormwater treatment and disposal.

- linkages between water reform and other legislation – for example, should local authorities be required to undertake the so-called assessments of water and sanitary services, should charges for water services fall within the Rates Rebate Scheme (they currently wouldn't).

That is to say, Parliament has been asked to start the reform process without full knowledge of how these reforms will actually impact customers and communities on a day to day basis. As we understand it, the Government intends to present the second Water Services Entities Bill to Parliament around the end of September. There will be some time for the Select Committee to consider the above as it prepares the report on this Bill, but for example, it may not have had the benefit of submissions on the second bill.

The Select Committee should consider how it provides itself with assurance that the consumer-facing issues are being satisfactorily resolved. For example, that might occur by seeking an extension to the report back date for this Bill to allow the Committee to receive, read and perhaps hear some key submissions on the second bill. We have flagged some of our concerns in Part C of this submission, the Committee might seek advice as it hears submissions on the current bill and so on.

Recommendation

2. That the Select Committee consider how it will assure itself that customer-facing issues and matters regarding the links to land use planning will be satisfactorily resolved before it reports on this Bill.

Will the objectives of reform be realised?

The Government set itself four bottom lines as it developed the proposals in this Bill. We refer to them using the following shorthand terms: balance sheet separation, the promotion of the Treaty partnership and Māori concerns, public ownership and good governance. The following is our assessment of the Bill against each.

Balance sheet separation is achieved, but at the expense of complexity and some loss of community voice.

Separation from the balance sheets of local authorities is one of the Government's bottom lines. The WSEs will be borrowing at levels that are significantly higher than local authorities presently do to finance the capital expenditures necessary to meet regulatory expectations. Giving the entities the balance sheet strength and the revneue capacity to be able to service that level of debt is the sole (or at least the main) driver of the aggregation of services into four entities.

The Department has released a letter from the Rating Agency S&P Global that reports the agency's conclusions on the degree of separation between the entities and the balance

sheets of their local authority 'owners'.[2] The letter is an interesting and useful read for two reasons. First,there is an implicit conclusion that separation from council balance sheet's has been achieved. The second conclusion, and bulk of the letter concludes that the removal of waters undertakings would not materially impact the ratings for Auckland Council and Wellington City Council.

The Committee, and Parliament generally, should be aware that one of the agency's assumptions is that "there is an an **'extremely high**' likelihood that the New Zealand sovereign will provide timely support to WSEs if they were in financial distress" (emphasis supplied). In other words, the Committee should be asking if S&P Global has effectively put the Crown 'on the hook' for the financial management of the WSEs.[3,4]

We invite the Committee to reflect on the other findings and stated assumptions that S&P Global have made. For example, they've assumed WSE board members will be independent of councils, that the iwi/mana whenua representatives are independent of council, that the appointment committee 'isn't dominated by any one council' etc. S&P's commentary also appears to have gone some way to defining what is considered a strategic as opposed to an operational matter.

In short, an outsider could readily conclude that the views of the rating agencies have been accorded a weight broadly on a par with those of the local authority owners. The design of the community elements of the model have been strongly influenced by the views of the rating agencies. The findings of the so-called Working Group on Governance, Representation and Accountability (the Governance Group) has shifted the balance to one that strikes more of a balance.

The Bill provides a stronger recognition of the Treaty partnership in the three waters context. This is perhaps one of the strongest features of the Bill.

Ko te Tuarua (Article 2) of Te Tiriti guarantees Māori the right to make decisions over the resources and taonga they wish to retain. This includes, but is not limited to, decisions

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2 Retrieved from https://www.dia.govt.nz/diawebsite.nsf/Files/Three-waters-reform-programme-2022/%24file/Ratings-Evaluation-Service-(RES)-Letter-Three-Waters-Reform-Programme-May-2022.pdf on 20 June 2022.

3 We are advised that the Crown has committed to a stand-by credit facility for the WSEs, targeted at "extraordinary events that impact a WSE and result in a lack of liquidity. That could be, for example, a temporary dislocation in capital markets".

4 We accept that clause 15(1) establishes the WSEs as a separate legal entity from the Crown (and from local authorities). We refer you to the Local Government Act 2002. Under that Act local authorities are deemed to be bodies corporate. Yet there are provisions that not only expressly exclude the Crown from liability and requires local authorities to mention this fact in disclosure and loan documents. WSEs will have the power to borrow denominated in foreign currency. A potential parallel situation may lie in the 1990 collapse of the Development Finance Corporation where it was less than clear who was liable and the Crown took on some of its debts following pressure from overseas creditors (we recall there were similar issues with the BNZ around the same time).

affecting lands and waters. Ko te Tuatoru (Article 3) commits the Crown to ensuring the rights and obligation of a New Zealand citizen are applied equally.

There can be little room for debate that WSEs are public sector entities – public ownership is another of the Crown's bottom lines. Likewise there can be little doubt the WSEs that make significant decisions which impacts on waters, lands and other taonga on a more or less daily basis. Decisions of this nature range from decisions as significant as a decision about a sewage treatment plant, to a decision to waive a charge in whole or in part.

While no WSE signed the Treaty of Waitangi, and nor did any of the shareholding local authorities, the decisions a WSE makes can easily impact on the Crown's obligations to Māori, most notably by impacting or undermining Te Mana o te Wai. And the manner in which the WSEs apply their legislation can give rise to a breach of the Crown's obligations.

Parliament has chosen to provide for the Treaty partnership and the promotion of Māori interests in several ways in this Bill. This includes the following:

- equal membership of the regional representative groups (RRG) for each water services entity and of the Board Appointment Committee (BAC) that each of RRG will create. This provides Maori with a say in the strategic direction for the WSE but not the operations of the WSE. We understand that Māori did not seek, and have not received joint governance through the entity boards
- provision that the members of the BAC and the WSE board have knowledge of the principles of te Tiriti, and of the perspectives of perspectives of mana whenua, mātauranga, tikanga and te ao Māori and (not least)
- the ability for iwi to prepare a Te Mana o te Wai statement – a formal recording of what te Mana o te Wai means at local level. The WSEs must consider how they respond to a statement where one has been developed.

The Bill does not provide Māori with any rights of special access to water over and above other New Zealanders, or provide Māori with any right to control the access that others might have to water services. It provides mechanisms for Māori to have a say over the strategic direction of WSEs that are entirely consistent with approaches to, for example, the management of bodies of freshwater that are relatively common in Treaty settlements (and have been for the last ten years). It is therefore our position that the Bill meets the Crown's obligations under Te Tirti.

The Bill makes the removal of the WSEs from public ownership all but impossible, at least for the moment.

As worded, the Bill will achieve another of the Government's 'four bottom lines' i.e. that water services assets remain in public ownership. While theoretically possible, the privatisation of WSE held assets would require:

- 75 percent support in the Regional Representative Group i.e. neither the local authority appointed representatives nor the iwi appointed representatives could advance a proposal acting alone and
- the unanimous consent of each of the shareholding local authorities. While there are different levels of shareholding based on population, a single negative vote from any

local authority defeats any proposal to privatise. In effect every territorial authority would hold the right of veto on this decision and

- a 75 percent supermajority of voters supporting the proposal in a referendum of the WSE area. It is not often that 75 percent of the public agree on any issue, let alone one as contentious as access to water.

Those who claim these proposals are a stalking horse for privatisation are very wide off the mark.

Of course, this is based on the Bill as it stands. These requirements can be amended or removed by a one vote majority in a future Parliament. The Governance Group's recommendation that the above protections be 'entrenched' provides an additional further protection by requiring broad cross-party consensus to change.

We are unaware of any legislation that is entrenched outside of few core provisions of a constitutional nature. Entrenchment is quite rightly, something that should be limited. We submit that water services are fundamental to the maintenance of wellbeing and in some ways to the maintenance of basic public order.

As far as we are aware none of the parties represented in this Parliament currently supports the removal of these assets from public ownership. Entrenchment does not shut the door on amendments if the public view changes. Support for retention of the assets in public ownership does not, or at least need not, mean supporting the remainder of the Bill. We call on Parliament to entrench the Bill's limitations and procedural requirements on the disposal of ownership.

Recommendation

3. That the Select Committee support entrenchment of the provisions that set out the requirements for any disposals of a WSE to proceed.

The entities will be subject to wide range of direction from outside. Could this impact on the ability to attract appropriately skilled people to the Boards?

This overview has focussed on the Government's four bottom lines and the extent to which each has been achieved. The last 'good governance; is the one where we are less certain as to the final results.

The Bill sets up a very centralised system where the WSEs will be subject to a great deal of external influence which will constrain the decisions that WSE directors are able to make. In short:

- Taumata Arowai will be regulating drinking water quality and in the long-run taking a tougher stance on enforcement – of course, this is both something that is a given, common to all jurisdictions and something the sector supports

- central government is lifting its expectations of freshwater management, in part to give effect to Te Mana o Te Wai - which has implications for what the entities might take from or discharge into bodies of water
- the second Bill will bring water services within the ambit of economic regulation (likely to be the Commerce Commission) for the first time
- the second Bill will also strengthen the consumer protection regulation of water services by providing some degree of purpose-built regulation, as opposed to water services being part of the general consumer law (such as the Sale of Goods Act)
- this Bill provides a Government with power to prepare a Government Policy Statement for Water Services (GPS: Water) that will bind water entities (and establishes that the Crown can sanction a WSE board that fails to give effect to that statement in a persistent or significant way).

And, of course, local authorities as owners, will have a broadly similar kit of tools to influence the WSEs as they do with their own council-controlled organisations (though the means for exercising them is primarily through the regional representative)

Governance is about making choices, and to that extent we are left wondering how much governing the boards of the WSEs will do in practice when so many important decisions will be made elsewhere.

To be clear, we are not criticising individual settings, per se. Indeed we are conscious that the sector asked for a greater level of community voice in the model. It is entirely proper that there be centralised health and economic regulation. But that does not take away from the cumulative effect, and it is that which concerns us.

As part of its assessment of the Bill we invite the Select Committee to seek an independent view from an expert in regulatory economics and/or institutional economics on the cumulative impacts of the above. In our view the places that such an expert would probably look for simplification or streamlining lie are:

- the degree of bind associated with the GPS: Water (or even whether this is needed at all) and
- whether a purpose-built consumer protection regulator is needed (with the existing consumer provisions in the Bill, Taumata Arowai has some ability to regulate and to investigate complaints, and of course, the general consumer protection law).

Recommendation

4. **That the Select Committee commission an independent analysis of the cumulative impacts of the Bill from an expert in regulatory economics or institutional economics as part of its scrutiny of the Bill.**

Question for Discussion

Are there any other matters of a general nature that Taituarā should raise in Part One of its submission? If so, what are they?

Part Two: Comments on Specific Provisions

'Ownership'

Taituarā supports the Governments 'public ownership' bottom line and the protections that the Bill puts in place to protect public ownership (subject to the comment that Parliament should entrench these).

We are less convinced of the shareholding model. The Governance Group suggested that a shareholding model would
" … mean there is a tangible relationship between communities and their WSE that is well understood by the public (as compared to a legislated collective ownership). This will provide a connection to the WSE and additional rights that are recognised and have value for communities and territorial authorities."[5]

We agree that there would be benefits in the public clearly understanding the relationship between the owner local authorities and the WSE.

But the model outlined above is not a shareholding in any conventional sense of the word. Shareholding does not entitle the owner to any share in the revenues or assets of the WSEs (and the WSEs are expressly prohibited from distributing any surplus even if they had).

RRG decision-making is by consensus, with a requirement that a 75 percent supermajority be reached as a back-up in the event that a consensus is not acheived.

Shareholding does not entitle the shareholder to any vote in any annual general meeting of the owners – indeed we couldn't find any provision in the Bill requiring that the owners meet or even empowering one. It appears the RRG replaces an annual general meeting of owners (though nothing precludes the owners from meeting as a group).

The one entitlement that does come to a shareholding local authority owner is the right of veto in any decision to privatise. Yet that is a decision that must be unanimous. Effectively Mackenzie and Kaikoura's single vote each have as much weight as Dunedin's three votes or Christchurch City's eight.

We are not convinced that the model as set down in clause 16 is any more understandable to the public than the notion that all local authorities in any area are joint owners. Indeed, to the extent that it is described as a shareholding model, it may mislead the public into considering that local authorities have more influence than they actually do. The WSEs are not CCOs, we consider legislation should avoid sending signals that might convince people otherwise.

5 Working Group on Representation, Governance and Accountability (2022), *Recommendations from the working Group on Representation, Governance and Accountability*, page 27.

However, we are pragmatists, and we recognise that the arrangements in clause 16 might be one pragmatic way forward as a default provision in WSE constitutions for appointing members to RRG. That is the only real value in what appears to have been a political compromise.

Clause 16 allocates shares based on population at the last Census. There are different measures of population – the usually resident population and the census night population (i.e. all those in the area on census night regardless of whether they are visiting or make the district their home).

The usually resident population is the one most commonly used for legislative purposes. It is also less open to sudden change, for example, the presence of cruise ships 'in port'. Usually resident population is the better measure for the 'normal' demands placed on services and so is used as the basis for forecasting school rolls and the like. But the management of network infrastructure must manage for the peak demand on an infrastructure network – although imperfect the census night measure may be a better approximation of that.

Recommendation

5. **That the Select Committee amend clause 16 to clarify whether the census night population or the usually resident population counts should be used for determining local authority shareholding.**

Question for discussion:

What are the benefits and disadvantages of the shareholding model is set out in clause 16 of the Bill? Has your council expressed any views on this model of ownership or the collective model i.e. all territorial authorities are joint, several and equal owners?

The Government Policy Statement: Water Services

The Bill empowers the responsible Minister to issue a Government Policy Statement for Water Services that sets out the Government priorities for water services.

It is no mere statement of vision - it is intended to (and will) provide Government with a significant level of control over the WSEs. Clause 132 requires the WSEs ***to give effect*** to any GPS (emphasis supplied). A significant or persistent failure to give effect to the GPS is included in the definition of a problem under clause 174 meaning that the suite of options for Ministerial intervention may be triggered (e.g. Crown observer, Crown manager etc).

While perhaps not an operational control, this is several steps up on, for example the degree of control central government takes over other network providers. For example, the Minister of Transport must issue a GPS for land transport, but that document is primarily used to guide the funding priorities of Waka Kotahi etc. The relevant legislation doesn't appear to empower the Minister to set out the expected contribution that Government expects land transport would make to various other Government priorities. And the GPS land transport has a looser degree of 'bind' on others in that documents such as a regional land transport strategy need only be consistent with the GPS.[6]

The findings of the Commission into Havelock North that there had been systemic regulatory failure has been addressed by creating an independent health and environment regulator, by unifying capability through the acquisition of scale, and by establishing a new regime for economic regulation. Those are all features that are common to regulation overseas. The level of centralised control created by the GPS: Water is unusual and is perhaps one that is not strictly central to Government's stated rationale for reforms. Noting out comments about the ability to attract suitably qualified directors – this is an area the Committee might want to further consider if it wishes to simplify the model.

Support to implement the GPS

In any case, the Bill is it stands allows a future Minister to impose set of priorities upon the WSEs that might, for example, override the policy positions of an RRG and the constituent territorial authorities. The Minister can set expectations as per clause 130(3) that will significantly direct investment decisions and the associated spending with very little by way of 'skin in the game'. That is to say, the Minister will exercise significant influence over WSE spending decisions yet need not make any financial contribution (or other support) to the achievement of their own objectives.

We submit that as it stands the Bill empowers an 'all care, no responsibility' approach to development of a GPS: Water. We submit that the Minister should be required to publicly state what support the Government intends to provide those agencies that are required to give effect to the GPS: Water to implement it. That would include funding but would not be limited to funding support alone. For example, the Government might support the

6 The Committee might refer to the Land Transport Management Act 2003.

development of the water workforce by loosening immigration restrictions; amend other government policy statements to address areas of conflict and so on

Recommendation

6. **That the Committee amend clause 130(2) by adding a clause that requires the Government to explicitly state how the Government intends to support other agencies to implement the GPS: Water or explain its reasons for not providing support.**

A regulatory case

The power to adopt a GPS: Water is a significant and almost unfettered power as it stands. We submit that the 'all care, no responsibility' nature of these powers could be ameliorated somewhat if there were some more formal analytical requirements for the statement to meet. While the Cabinet processes supporting adoption of a regulatory impact statement provide some comfort, they are non-statutory and can be overridden by a Minister as they wish.

We submit a stronger, statute backed test that requires Ministers to identify the costs and benefits of the policy positions that they expect the WSEs to give effect to. There are precedents for this elsewhere in legislation – for example, in the Resource Management Act.

Recommendation

7. **That the Committee amend clause 130(2) by adding a clause that requires the Minister to undertake an analysis of the costs and benefits of the objectives in the GPS: Water.**

Relationship with other Government Policy Statements

We conclude this section with a drafting issue (although equally it may be an interpretation matter). Clause 132 requires WSEs to give effect to any Government Policy Statement (emphasis supplied). Other clauses (e.g. clause 174) refer more specifically to "any Government Policy Statement under (clause) 129". The Committee will doubtless be aware that there are a multiplicity of Government Policy statements. In the absence of the specificity of the reference to this one, it is open for someone to claim that the WSEs should be giving effect to others.

This is almost certainly a drafting inconsistency in that the suite of the Government Policy Statements, while important, are far from the only strategic document that might be relevant. For example, our colleagues at Local Government New Zealand have raised issues

around the integration of this GPS with the current suite of National Policy Statements issued under the Resource Management Act.

Recommendation

8. **That the Committee amend clause 134 to read "When performing its functions a water services entity must give effect to any Government policy statement issued under section 129."**

Engagement on the GPS Water Services

We consider that the engagement provisions for adoption of a GPS: Water are generally no more than of moderate strength. Water services are fundamental to the achievement of community wellbeing (which perhaps is why central Government proposes to set a GPS: Water in the first instance).

We imagine that the Committee will receive a large number of submissions from various agencies seeking to be added to the list of named agencies in clause 131(b). Taituarā does not seek such recognition, however we submit that local authroties be added to the list of named agencies.

Local authorities have, and will continue to, have responsibilities in promoting a sustainable urban form and land use (though the balance of decision-making responsibilities and the instruments that record these decisions may change).[7] Local authorities retain roles as the makers of place that is so critical to our competitiveness. And (not least) a local authority provides the means for democratic local decision-making and action and, on behalf of communities, will have views on water services and each of the matters listed in clause 130(3)(a).

Providing local authorities with an explicit voice in the engagement process is something practical that could be done to enhance the overall degree of community voice in the system. Not all local authorities are satisfied that the present RRG/advisory panel model provides for adequate representation of territorial authority views. Giving individual local authorities a voice in the engagement will enable the GPS: Water to be better informed with real-life examples of the real world issues that communities must negotiate at the interface of say, water, housing, and environmental outcomes. That can only make for a stronger GPS: Water.

We compare the obligations to consult and how they have been expressed, with the equivalent provisions in local government legislation. For example, the decision of most

[7] The Resource Management Act reforms may see some of these decisions move to what we'll refer to as regional planning committees (for the purposes of this submission). They too will have views on the matters listed in clause 130(3)(a). While it would be inappropriate for the Committee to incorporate a reference to entities that do not currently exist (and may never), we submit that this an issue the Committee may want to draw to Parliament's attention.

significance under the Local Government Act is the adoption of a long-term plan. That requires consultation, and has a process laid down which includes:

- the preparation of a consultation document
- a minimum period for the engagement (one month)
- an obligation to accept written feedback and provide at least one opportunity for people to interact with decision-makers.

The Committee will be aware that there is intense public interest in water services, in the reforms that have driven this bill and in the matters that the Government may choose to include in the GPS: Water. We submit that this level of interest is likely to carry through beyond this reform and legislative process to the decisions and actions that the Minister takes or sanctions in the course of preparing the GPS: Water.

That being the case, the decisions and actions that the Minister takes will be under a great deal of public scrutiny, and will be open to judicial review. The Committee may want to take advice on the utility of specifying some expectations as to the steps that the Minister should take when consulting.

Furthermore, we note that there are more specific (and higher level) obligations on the WSEs. The WSEs are under an obligation to "engage" on certain key decisions as opposed to "consult." The terms are not interchangeable. Consultation is but one form of engagement and a relatively low-level form at that. Typically, it is taken to mean the preparation of a proposal and an opportunity to provide feedback on the proposal in a relatively formal process. Engagement encompasses a full range of methods from consultation, through co-design options through to devolving decisions. Of course, we have little doubt that the Government intended that the Minister consult on the GPS, but we note the Bill places WSEs under a higher obligation.

Regardless, clause 202 does provide a steer for the WSEs in that it is expected to provide and seek feedback on a proposal. Additionally, clause 202 provides the WSE with a list of things to consider in determining an approach to engagement on any particular issue. These are all things that we would support as they appear to substantially align a similar provision in section 82 of the Local Government.

In short, there is considerable merit in the Bill placing the Minister under similar obligations when engaging on the GPS, as are placed on the WSEs when giving effect to it.

Recommendations

That the Select Committee:

9. **amend clause 131(b) by replacing the word 'consult' with the words 'engage in a way that gives effect to the requirements of clause 202'**
10. **amend clause 131(b) by adding local authorities to the list of named parties for engagement**

Te Mana o te Wai

The strengthening of the regulatory system for the three waters and these reforms are both intended to protect and enhance Te Mana o te Wai (either directly or by creating institutions with the financial capacity). In addition to the partnership aspects to the governance arrangements, the Act empowers mana whenua to prepare a Te Mana o te Wai statement and requires the WSEs to state what actions they intend to take to give effect to that statement.

We support these requirements in principle, noting that the obligation on the WSE is to receive the statement, engage with Manu Whenua, and provide a plan for how it will give effect to the statement. It is therefore possible that there could be conflicts between a Te Mana o te Wai statement and (for example) the direction in a GPS: Water.

The Bill provides no obvious hierarchy or process for resolving conflicts here, or indeed between any of the other responsibilities, powers, duties, obligations in the Bill. At a minimum there should be some expectation on the WSEs to ensure that conflicts are resolved in an open, transparent and accountable manner. That could be included either as one of the operating principles of clause 13 or as part of the 'how WSEs give effect to the objectives clause' (see recommendation six).

We noted that clause 74 requires boards to maintain systems and processes for ensuring that they develop and maintain skills and knowledge in Te Tiriti and to give effect to Te Mana o te Wai. In reality, those skills are being called on across other reform programmes for example:

- in the development of regional spatial strategies in the proposed Strategic Planning Act
- in the proposed Natural and Built Environments Act and
- to an extent in last year's reforms to the rating of Whenua Maori.

This is an area where central government (through the National Transition Unit) can provide a greater level of support to the WSEs and their boards, by working with Maori to devleop a resoruces and professional development. This will be needed from day one and might, for example, form part of the Industry Transformation Strategy that the Transition Unit is developing.

But equally we recognise that there are increasing demands on iwi/mana whenua to contribute both as a partner in co-governance processes (and not just in three waters) and through engagement processes that are growing in their frequency and their complexity There should be some degre e of two-way or reciprocity, for example by the WSE taking steps to assist iwi/mana whenua to build their caoacity to contribute to the WSE engagement and governance processes.

Section 81 of the Local Government Act requires local authority to *"consider ways in which it may foster the development of Māori capacity to contribute to the decision-making processes of the local authority"* and to report on the steps it actually took in accountability documents. Local authorities take steps such as formal or informal professional development, resources in Te Reo, secondments of staff from iwi authorities into local authorities (or staff exchanges

between the two) and financial support to enable Māori to purchase specialist advice. The WSEs will be extremely large entities with a local presence. There is the potential for WSEs to be taking the same steps.

Recommendations

11. **That the Select Committee provide guidance that WSEs are expected to manage conflicts in an open, transparent and accountable manner either as one of the operating principles of clause 13 or in 'giving effect to the objectives clause' as per recommendation 6 above.**

12. **That the Select Committee place WSEs under an obligation to consider ways in which they can help foster the development of Māori capacity to contribute to the governance and decision-making processes of the WSE.**

The Regional Representative Group and Panels

In its report the Governance Group stated that
"As described in the model originally proposed by the Government (July 2021), the role of the RRG was seen as unclear and lacking in a genuine ability to provide input from iwi and councils from the regions they represent. As the RRG is the co-governance body made up of representatives from councils and iwi/hapū, the Working Group considers this body as having a primary role in driving strategic direction that encompassed all of the various priorities and local voice within the WSE region, including Te Mana o te Wai, catchment priorities, headline matters from local council strategic plans, and future development strategies. Its role was also to appoint/remove Board members and monitor the performance of the Board and the WSE."[8]

We agree. The role of the RRG has been both clarified and strengthened from the original model as a result of the Governance Group, and the Government's response to it. For example:

- the board appointment committee no longer sits at arm's length from the RRG, and
- the approval process for documents such as the funding and pricing plan and the infrastructure strategy have been strengthened, and
- regional advisory panels been established.

We have one concern about the representativeness of the RRG. The Governance Group's report recommended that
"The Bill require that Council representatives should have a mix of representatives from urban, provincial, and rural councils."[9] (recommendation 20).

We agree, and note that the Government agreed that Bill would ensure that the WSE constitutions would contain provisions allowing the shareholding local authorities to define this. We can find nothing in either clause 32 (appointment of territorial authorities) or clause 91 (contents of the WSE constitutions that appears to explicitly require that the RRGs have a mix of representatives.

In our view, local authority confidence in the model would be enhanced by an RRG that has real and perceived representativeness of the local authorities this may go some way to overcoming concern that most local authorities will 'miss out being represented by their people'. This should be stated as a 'bottom line' in the clause that provides for the appointment of territorial authority representatives to RRGs.

But we also agree with the Governance Group's finding that the constitutions should allow for flexibility in how these requirements are met in practice. This could that a simple addition to clause 91(a)(ii) requiring the procedures for appointment of territorial authority representatives give effect to any requirement that the RRGs broadly reflect the range of different types of territorial authorities.

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8 Working Group on Representation, Governance and Accountability (2022), *Recommendations from the working Group on Representation, Governance and Accountability*, page 11.

9 Working Group on Representation, Governance and Accountability (2022), *Recommendations from the working Group on Representation, Governance and Accountability*, page 33.

Turning to another matter, we suggest there should be a mechanism for the shareholding local authorities to meet as a collective to discuss matters that relate to the WSE and are of joint interest. An annual 'shareholders' meeting might provide a venue to for example, to undertake the appointment of the local authority members to RRG and for RRG to get feedback on its performance. It could be used to supplement or replace the regional advisory panels (RAPs) as a means of providing community voice. Assuming the Select Committee agrees with that model, then we consider this would be best given effect as an option that could be taken up and given effect to in the WSE constitutions.

Recommendations

That the Select Committee:

13. **add a requirement that the territorial representatives to RRGs be broadly representative of the different mix of metropolitan, provincial and rural territorial authorities to clause 32**
14. **add a requirement that appointment procedures for the territorial authority representatives for RRGs give effect to the requirements that RRG membership be broadly representative of the different mix of territorial authorities**
15. **empower WSEs to allow for the calling of a annual shareholders' meeting by amending clause 91.**

Non-voting Membership Questions

The Governance Group's recommendation 42 was that the Bill include provision for a non-voting Crown representative to an RRG. The Government response suggested the legislation would not prevent an RRG from inviting a non-voting representative, and further that a Minister might appoint a Crown observer where a 'problem' exists.[10] We agree that there is nothing that would obviously preclude this, but nor is there anything obvious that would empower it.

We submit that the degree of 'bind' in the GPS: Water makes the addition of someone who can explain the Minister's intent would be a useful addition to the RRG. Especially given that failing to give effect to the GPS: Water in a significant way might give rise to a 'problem' which would trigger the intervention framework.

In a similar vein an RRG may find it useful to appoint one or more non-voting regional council observers to the RRG or perhaps to the regional advisory panels. Regional councils have a critical role as environmental regulators that cannot help but impact in a significant way on the achievement of WSE objectives.

[10] In this context, we consider the observer power to be red herring. The purpose of an observer as currently provided for is to fix an issue. As we understand it, the Governance Group's recommendation was to provide a means for avoiding them!

Again our intent is to empower both types of appointment rather than require it. This could be done by adding an empowering statement into clause 91 i.e. we consider this to be a constitutional matter.

In a similar vein, some Crown entities have provision for alternates in the event that a board member is unable to attend a meeting. The RRG is an entity providing perspectives on issues that will shape local communities for years to come – being unable to contribute these because someone is ill, overseas etc does not seem in keeping with the nature of the role. Again, the legislation doesn't preclude the appointment of alternates, but nor does the legislation empower it. Any appointment of alternates would be subject to the same processes and statutory criteria as the appointment of full members,

Recommendation

That the Select Committee:

16. **empower regional representative groups to, at their discretion, invite the Crown to appoint a non-voting observer to attend all group meetings**
17. **empower regional representative groups to, at their discretion, appoint a non-voting observer or observers from a regional council in entity's service area**
18. **empower regional representative groups to, at their discretion, appoint alternates to perform the roles of members of the group when they are absent.**

Question for discussion

Would you support empowering WSEs to allow for the appointment of non-voting observers from central government and/or regional councils to an RRG? Why or why not?

The Regional Advisory Panels

During the first reading debate several members commented about the representativeness of a model where up to 22 local authorities would be selecting no more than seven representatives on the RRG. We agree with these concerns and therefore commend the Governance Group for its wise recommendation that the RRGS be empowered to establish RAPs.

The RAPs will be central in gaining public confidence and trust in the overall model, as the RAPs will be a conduit between the RRG, the shareholding local authorities and their communities. It is this mechanism that will provide the means for communicating local views and concerns – some of which may relate to those matters that we referred to Part One as

the customer facing issues, but which can have a high level of local significance (for example, Bromley's odour issue).

While the legislation is quite empowering as to what matters the RRG could seek advice from any RAPs they have established we consider that there are certain matters that are so fundamental that the RRG would have to seek advice. Those matters will largely relate to the various components of the accountability framework In others the RRG must seek RAP advice as it;

- develops the Statement of Strategic and Performance Expectations
- comments on the funding and pricing plan and on the infrastructure strategy "(we are less convinced about the need to seek advice on the asset management plan as local authorities will be commenting on that directly)
- develops the appointment and remuneration policy.

Clause 46 is clear that the RAPs are advisory panels and not decision-making bodies. That is to say this model isn't setting up a multi-layered decision-making arrangement or even joint/shared decision-making. To take one example, it seems fairly clear (and sensible, in the context of the Government bottom lines) that there is no obvious powers to RRG to delegate a decision to an RAP.[11] That's important because such an arrangement keeps transactions costs at their minimum.

RAPs are intended to provide for a greater degree of representation and to play an advisory role. Of necessity that includes acting as an advocate for the needs and preferences of local communities. Balancing the competing interests of mutiple RAPs with the views of manu whenua and making decisions is the task of the RRG.

As a purely advisory body we were surprised to read in clause 47 that the RAP members must exercise their roles wholly or mostly for the benefit of all communities in the WSE's service area. That is to greatly diminish what we had understood to be the central role of an RAP – that it be there to advocate and advise for local communities. In a local govenrment context, local and community boards are not only empowered to, but are expected to advocate for their local area. By all means, the RAP should regard to the needs of the entire service area, but as it stands it seems that the Bill is creating a group for a representative purpose, and with its ability to represent hobbled.

Taituarā expects that the RRGs and the local authorities they represent will want to set up RAPs – possibly more rather than fewer initially. There is a wide degree of flexibility afforded the WSEs and the RRG in the existence of RAPs and the number of RAPs, their boundaries , to some extent their duties and support structures (such as committees). That is as it should be – trying to provide for every circumstance adds a level of prescription to the legislation that would have been less than helpful in the long run.

However, we do not think that this discretion should be completely unfettered. That the development of the first constitutions is being left to regulation is one check. The Minister

[11] Decision-making at RAP level may lead to the blurring of strategic and operational, and the neaer decision-making gets to local authority the greater the potential to imperil balance sheer separation.

needing to approve any subsequent changes is another. But those developing RAP arrangements, be it the Minister or RRGs subsequent should be given criteria to exercise when making these decisions. Broadly speaking these might be

a. the purpose of the WSEs
b. the purpose of the RRGs and the degree to which the proposed arrangements support these
c. the effective representation of the needs of local communities to the RRG
d. the efficiency, including the cost efficiency, of the proposed arrangements..

If these seem familiar, they should, they are (loosely) based on the test of good local government that historically applied to proposals to reorganise local government and the tests that are currently applied.

RAPs are important to the success of these reforms. As we've said the likely initial case will be that there are more rather than fewer RAPs established and that they'll cover the entire WSE area. Local demography, local economies, local needs and priorities are forever changing – its one of the reasons we have local government.

There should some mechanism where the RRG and the shareholding local authorities periodically review the RAP boundaries, duties and other matters relating to RAPs. A first review might be undertaken no later than the review of governance and accountability envisaged under clause 195. We submit that there should be a review at least once per term thereafter – with discretion not to undertake a review if the RRG deems there to be no need.

Recommendations

That the Select Committee:

19. **place the RRGs under an obligation to seek advice from regional panels when developing a Statement of Strategic and Performance Expectations, when commenting on an infrastructure strategy, when commenting on a funding and pricing plan, and when approving a board appointment and remuneration policy**
20. **amend the collective duty of a regional advisory panel to advocate for the interests of its local area, having had regard to both the interests of the local area and wider WSE service area**
21. **provide those designing or determining regional advisory panel arrangements be with a set of statutory criteria to have regard to**
22. **add provision requiring the RRGs to regularly review their regional advisory panels (including provision for an initial review before the wider review of governance and accountability in clause 195).**

Vacancies on the RRG (and Board)

The local authority members of RRG may only drawn from amongst the ranks of sitting elected members, currently serving chief executives and senior managers from within the WSE's service area. The role is to provide the perspectives of the local authority owners on the range of matters in clause 28.

Given the narrow manner in which the clause 27 is drawn we consider it unlikely that the policymakers intended that a person who has ceased to be an elected member of a local authority, or an employee would complete the remainder of their term. That is further given support by the fact that board members cease office if they become disqualified under clause 97.

The Committee may want to take advice on the Government's policy intent. If the intent was that a person would hold office as an RRG member only while they meet the requirements of clause 27, then a procedure will be needed for circumstances where an elected member is defeated in a triennial election. There are procedures in the Local Government Act that require a Chief Executive to declare an elected office on receipt of a resignation or other evidence that the member is no longer eligible to hold office.[12] There is no discretion – once aware the Chief Executive must declare a vacancy. That must also be accompanied by an obligation of RRG and board members to advise the Chief Executive as soon as reasonably practicable after becoming aware they are no longer eligible for membership.

Recommendations

That the Select Committee

23. add a clause clarifying that RRG members hold office only while they satisfy the requirements of clause 27(3)

24. clarify that RRG and board members must notify the WSE Chief Executive as soon as practicable after ceasing to be eligible to hold office as an RRG or board member as the case may be.

Skills on the Appointment Committee (and Board)

Achievement of the Government's 'good governance' bottom line will be critically dependent on getting the right skills into the right roles.

Clause 38 sets out a requirement that the appointees to the BAC collectively possess skills and knowledge in performance management and governance, network infrastructure industries, te Tiriti principles and perspectives of mana whenua, mātauranga, tikanga and te ao Māori. Clause 57(2) has an identical provision covering appointments WSE boards.

[12] Clause 5, Schedule 7, Local Government Act 2002 and section 117 of the Local Electoral Act 2002.

We generally support the specified requirements. During the policy process leading to this Bill we did query whether the need for skills and knowledge of network infrastructure industries needed more specificity. On a plain English read a BAC/board would meet this test by having members with skills or knowledge in areas such roads and footpaths, telecommunications, energy, and at a stretch, passenger transport (as well as the three waters themselves).

While we would agree there are aspects of infrastructure management that are common to all of these (network economics, the fundamentals of asset management and the like). But there is also a very strong public health element to the provision of water services that is fundamental to the understanding of a three waters business. The linkages between three waters and Te Mana o Te Wai is also a very important aspect that may not be apparent in other industries. We suggest that likelihood of a successful reform process is maximised if the boards have some pre-existing knowledge of the services they are charged with delivering.

Policy-makers have (quite correctly) noted that the reforms must deliver customer-centric service from the very start. We see this in the consumer panel, in the customer engagement panel and in the attention being given to consumer protection (the latter for the second Bill). We agree with this, and were therefore quite surprised that the Bill does not require that neither the BAC nor the board have any skills or knowledge of customer service or consumer engagement.

Our observation is that good engagement and the organizational culture and values that support it 'come from the top', especially in the public sector. We submit that either or both of customer service or consumer engagement must be added to the mandatory skill sets of the BAC, and particularly the Board.

Recommendations

That the Select Committee agree to:

25. amend clauses 38(2) and 57(2) by replacing the words 'network infrastructure' industries with the words 'water services industries'.

26. amend clauses 38(2) and 57(2) by adding the words 'customer service and customer engagement' to the list of skill sets.

Boards

The assumption that the Boards would be competency-based rather than representative based is one of the core tests that S&P appear to have applied in reaching its conclusions. Those few council controlled organisations that deliver water services, appoint on the basis of skills rather than representation.[13] And while practice with others varies from council to council, the days when being on a board delivering a significant service was seen as 'councillors only' has passed.

Earlier in this submission we discussed the skills sets for board members. A Board member will need to balance these skills with some of the softer skills around the ability to listen, personal empathy and so on. They will need to balance commercial discipline with a genuine valuing of local voice. This is why its important that the community voice is maintained in the strategic level decisions and interactions between the RRG entity and the WSE Board.

Board appointment policies

In addition to the above comment on skills we would like to raise one further matter around appointment policies. As currently worded, we see no obligation on the BAC to ensure that there is any ongoing training or other professional development for the Board. Good governance practice, outside of the fundamentals, is a constantly evolving thing. Board members should be receiving regular refreshers/update training.

In addition, we would expect that any BAC worth its salt would want to ensure that it appointed and built depth in the necessary skills so that, for example, all directors had a sound working knowledge of the principles of te Tiriti and how they apply to a WSE. We'd also expect a Board would regularly update its skills in financial management, law, asset management etc.

RRGs and their associated BAC would also want to ensure that their appointment and remuneration policies were regularly reviewed. We consider a prudent RRG/BAC would review the appointment and remuneration policy at least once per term – probably shortly before the end of a term (so that it takes effect from the start of the next term).

The appointment and remuneration policies are critically important to determining who is appointed to a WSE board and on what terms. Transparency in this area would boost public confidence in the board members and the boards (i.e. avoiding perceptions of 'jobs for the boys', 'buggin's turn' and the like). Local authorities publish these documents as a matter of course – though it was historically a legal requirement.

[13] Watercare has eight directors – none are sitting elected members. Wellington Water directors are appointed likeswise.

Recommendations

That the Select Committee add further provisions to clause 40 that:

27. **require that appointment and remuneration policies set out policies on the provision of training and professional development of entity board members**
28. **require that appointment and remuneration policies be reviewed at least once in the term of each RRG**
29. **require the publication of board appointment and remuneration policies on an internet site maintained by the WSE.**

Membership

One of the assumptions that S&P Global made was that WSE directors would be independent of the councils in their service area. This is the reason that clause 97(2) prohibits a sitting elected member of a territorial authority, member of an RRG or of a RAP from sitting on a WSE board.[14]

We have paid close scrutiny to this clause as it was deemed fundamental to separation, and conclude that it may not. As drafted, the clause does not preclude local authority Chief Executives and senior managers from being a member of their local WSE board. Yet a Chief Executive is bound to follow the lawful instructions of their council, and a senior manager likewise must follow the lawful instructions of their Chief Executive. Although it would be a brave Chief Executive that accepted a role on a WSE board, our view is that the legislation should rule it out.

As we read it, the legislation precludes only territorial authority members from sitting on a WSE board. Local board members are not members of a local authority (though this circumstance is currently limited to Auckland alone), and similar applies to a community board members'. We propose that the exclusion provision be extended to cover members of these bodies.

Most interestingly of all, regional council members (elected as per section 19D of the Local Electoral Act) appear expressly included. There are regional councils that own some water services (Wellington Regional Council mostly) and of course regional councils have strong regulatory interests through, for example, the National Policy Statement on Freshwater. While in most instances there is no balance sheet separation argument there is a conflict of role argument to be made for excluding them from Boards (and noting they are precluded from RRG membership).

[14] The Committee should note that the Bill precludes those who meet these tests from being a member of the board of <u>any</u> WSE not just their 'local' WSE. We understand why the Bill might maintain this degree of separation – but would separation be imperilled if say an Auckland Councillor who had (say) been a director of Auckland Transport was a member of entity B's board?

Recommendations

The Select Committee:

30. amend the Bill to preclude regional council members, local and community board members from membership of a WSE board

31. amend the Bill to preclude a local authority Chief Executive or an employee of a local authority from membership of a WSE board.

Meetings

We were interested to see the Bill specified a minimum number of public meetings that the WSE board must hold.

The legislation should not be doing anything other than encouraging the WSEs to hold those meetings that are *'that are necessary for the good governance of the entity'* (borrowing from clause 19, schedule seven of the Local Government Act 2002). That is not prescriptive as to when, where, how many or prescribing an agenda and leaves it to entity constitutions. Any competent board would know it needs to meet to adopt a statement of intent (and the suite of plans described).

The Boards are public sector entities, with significant influence over land use and urban form outcomes, providing an essential service and with what is not far off a power to tax (especially in the initial years when collection via the rating system is a strong possibility). The default setting should be that a WSE meeting should be open to the public unless there is sufficient lawful reason to exclude the public. This the case with three waters issues as they arise in a local authority.

Clause 61 establishes that the WSEs are subject to the Local Government Official Information and Meetings Act 1987. These provide for a series of reasons for excluding the public from meetings – essentially those that are grounds for withholding requests for information. We see no reason why the WSE Board would be exempt from those provisions.

Recommendations

That the Select Committee:

32. replace the minimum number of public meetings that WSEs must hold with a requirement that the WSE hold such meetings as are necessary for the good governance of the entity and

33. require that all meetings of the WSE be held in public except where provided for by section 47 of the Local Government Official Information and Meetings Act 1987.

Planning Documents

We turn to a cluster of requirements that together make up the WSE equivalent of the long-term plans that local authorities have to prepare and a significant component of the information that underpins these documents. We will use the collective term 'planning documents' to refer to the combination of the asset management plan (clauses 147-149), the funding and pricing plan (clauses 150 to 152) and the infrastructure strategy (clauses 153 to 155).

Funding and Pricing Plan

The Funding and Pricing Plan (FPP) sets the entities overall revenue requirements and set out the WSE's proposed set of funding sources. We support these provisions as they stand but raise the following points as matters of amplification.

Water services are essential to the maintenance of life. Access to water and sanitation is, rightly, regarded as a human right. We were therefore surprised that, even in this first bill, the FPP contains no obligation on the WSEs to consider the affordability of their services to the end user. It is not enough to leave this to an economic regulator.

Our first point replicates one that we've made about the equivalent requirements in the Local Government Act. WSEs will almost certainly engage on their FFP in conjunction with their infrastructure strategy, and between engagements are likely to be read by users together. It seems unhelpful and confusing to a ratepayer to have an FPP with a minimum shelf life of 10 years, when the infrastructure strategy with a minimum life of 10. It can also incentivize deferring key decisions with significant financial impacts into year 11.

The FPP must include a financial strategy. This is modelled on the requirement placed on local authorities, but may not adequately account for the differences between WSE's operating environment and that of a local authority.

The purpose of a financial strategy in local government was to provide local authorities and their communities with a tool for identifying the financial impacts of proposals and prioritizing. The strategy does this by requiring local authorities to set a overall financial direction (i.e. what's the financial position the local authority expects in at the end of the strategy) and requires the local authority to set 'soft' limits on rates and debt.

There is no such requirement on a WSE – that is to say that the top down strategic element would be missing from a WSE's financial strategy. It may well be that policy-makers considered that the economic regulator might well place controls on revenue that provide such a limit and render this requirement moot.

We submit that is to misunderstand the purpose of the limits. These help communicate realities to the public, and help priortise competing requests for levels of service changes. We add that if properly set a limit on revenue and on debt support the regulatory regime in encouraging WSEs to seek efficiencies.

The pricing plan is meant to tell the readers a story of the key financial issues, decisions and what they can expect to pay, how and when. Clause 151(2)(a) largely replicates the disclosures local authorities must include under the Local Government Act. We suggest that this could be simplified by deleting items (a)(i) to a(iii) and leaving the disclosure at the 'factors that are expected to have a significant financial impact on the entity as' as currently set out in the remainder of 151(2)(a).

Clause 1512) requires the WSE to set out its policies on giving of security for borrowing in it financial strategy. But WSEs are prohibited from using water assets as security for borrowing, leaving them with only one option – to secure debts against the future revenue streams. That seems more like a disclosure that might be incorporated as part of the disclosure required under clause 152(1)(a).

Similarly, the WSE is required to disclose objectives and quantified targets for any holdings of financial investments and equity securities. We cannot readily conceive of any circumstance where a WSE would take an equity shareholding in any entity (for example, by creating a subsidiary). The WSE would create, add to, subtract from and dispose of financial reserves as part of the normal management of its business. It would be reasonable to expect that the WSE would have targets and disclose that in s financial strategy

And last, the FPP should be made available to whatever agency is responsible for the economic regulation of water services. We understand that thisis likely to be the Commerce Commission.

Recommendations

That the Select Committee:

34. **amend clause 150(2)(a) to set a legislative timeframe of 30 years for the FPP**
35. **amend clause 151 to add a requirement that the WSE boards consider affordability for individuals and groups of individuals in developing their funding and pricing plans and document the results of that consideration**
36. **add a requirement on the WSEs to set limits on their revenues and borrowing as part of their financial strategy**
37. **delete clause 151(2)(b) as redundant**
38. **amend clause 151(2)(c) by deleting redundant references to equity securities**
39. **require each WSE to supply the Commerce Commission with a copy of the funding and pricing plan.**

Infrastructure Strategy

The infrastructure strategy is the counterpoint to the FPP. This is a much clearer requirement than the financial strategy, and indeed is more clearly expressed than the equivalent in the Local Government Act.

The one point we would make here is that the equivalent provisions of the Local Government Act require the disclosure of assumptions around the life cycle of significant assets, growth and demand for the relevant assets, and assumptions about levels of service. This is useful contextual information that can be used to illustrate or clarify the key issues that are disclosed elsewhere in the industry. For example, that these changes to the drinking water standards represent an enhanced level of safety over the current levels. The assumptions are also central to the reader forming a judgement about the robustness of the plan.

Local authority long-term plans are subject to a prospective audit that provides an attest to the quality of the assumptions and other information used to develop the plan. We do not see a need for WSEs to undergo a full-blown audit in the same manner as long-term plans are.

However, the WSEs should be required to publish the methodologies used to assess asset condition and the levels of demand for services, and periodically cause an independent assessment of these methodologies. Local authorities would typically check and calibrate their growth assumptions 18-24 months from the adoption of a long-term plan, and their asset condition information no more than 18 months from adoption of a long-term plan. That may or may not involve a full review of the methodology.

Recommendations

40. That the Committee add a further clause after clause 154(2) that requires disclosure of the WSE's assumptions regarding
(i) the condition and useful lives of significant assets
(ii) the levels of growth and demand for water services and
(iii) changes to levels of service.

41. That each WSE be required to publish the methodologies it uses to establish asset condition and estimate the level of growth and demand for water services.

Asset Management Plans

The third of the troika of plans required is a requirement to produce an asset management plan (AMP) and engage with the public in the preparation. This is an obligation that is actually over and above the equivalent that is currently required of local authorities.[15]

We agree that it is essential that the WSEs continue to undertake asset management planning.

[15] While local authorities required to undertake asset management planning (that is, a process) they are not required to produce an asset management plan by law. The requirement on local authorities is driven more by the requirmeents of the long-term plan audit, in practice a local authority that did not AMPs for water services would teceive a negative audit report.

Our reservation lies not with the requirement to plan, but with the requirements to engage in preparing those plans. We invite the Committee to review the AMPs presently prepared by local authorities. They are very detailed documents that can easily run to hundreds of pages – especially in those local authorities that have multiple water, sewage treatment and disposal schemes.

Now multiply that by more than twenty and you have some estimate of the likely size and complexity of the AMPs. We submit that these are not suitable as the focus for an engagement with the public, and that they were never intended to be.

Consumers are unlikely to want a say on the detailed programmes of maintenance and renewals that make up the business as usual for an AMP. They are far more likely to have a view on the levels of service they receive, whether there's any intention to increase or decrease these, and what the implications of those are for maintenance, replacement and renewal programmes.

Rather the requirements to engage on the asset management plans themselves, the Bill could be reframed to require the WSEs to periodically engage on their levels of service. These so-called levels of service reviews are common practice in local authorities, and while they can be (and often are) undertaken in conjunction with long-term plan engagement, they are equally often undertaken separately.

As with other engagement required under the Bill, the WSEs could be required to develop a proposal and seek views on that proposal. While legislation need not specify further content as a practical matter the proposal would need to set out

a. the current levels of service and the performance measures used to assess whether these have been achieved
b. the proposed changes to levels of service – including an indication of when the change will occur and the reasons for the change
c. the major capital projects necessary to support the change and an estimate of the likely order of cost
d. the expected expenditures on renewals, replacements and maintenance necessary to support the levels of service when these have been achieved.

Recommendations

That the Select Committee amend the Bill by:

42. requiring WSEs to prepare an asset management plan of at least 30 years duration for its infrastructure assets and publish these
43. deleting requirements to engage on the asset management plan
44. placing the WSEs under an obligation to review levels of service for each of their water services at least once every three years and identify the major capital projects and the overall implications for maintenance, renewal and replacement programmes .

Investment Prioritisation Methodologies

We join with the Governance Group in concurring (albeit reluctantly) that the provision of detailed comment to the WSEs on investment prioritisation would be operational direction and violate balance sheet separation. But the Boards will adopt protocols, procedures and practices for weighing the merits of competing proposals.

These might be formal practices such as variations on benefit/cost analysis techniques or multi-criterion analysis. They may be variants of a business case methodology (the Government's Better Business Case and the so-called 'BBC-lite methodology'). Whatever they are, transparency demands that these be available to the public.

Recommendation

45. That the WSE Boards document their investment prioritization methodologies and publish their methodologies on an internet sire maintained by the WSE.

Employment of a Chief Executive

The Bill establishes four new entities out of the undertakings of 67 local authorities. It is appropriate that the Bill spell out a requirement to appoint a Chief Executive for the entity and that the Bill include a good employer provision. The latter is closely modelled on the equivalent requirement on local authorities.

We were surprised that clause 119 is not clearer around the role of the Chief Executive, as is the case for Chief Executives of local authorities, government departments and the like. In particular, we are unclear as to why policymakers have not explicitly applied the separation of governance and management to design of the WSEs.

One of the government's 'bottom lines' was that the entities would be well governed. We consider the separation of the respective roles of governance and management to be a fundamental pre-condition for good governance. Not clearly separating governance and management provides the WSE board with licence to 'dabble' in the day-to-day operations of the WSE. This would seem inconsistent with any notion of the Board operating to commercial disciplines.

The usual means for creating for the separation is to make the Chief Executive the employer of all staff, with the board acting as the employer of the Chief Executive.[16] This is usually accompanied with some description of the role of a Chief Executive. Broadly speaking the role of a WSE Chief Executive would be to:

a. implement Board decisions
b. advise the Board
c. ensuring the effective and efficient management of the activities of the WSE
d. providing leadership for the WSE staff, including inculcating values of customer service[17]
e. employing staff on behalf of the WSE and negotiating their terms and conditions of employment.

And while it is unusual for legislation to specify a set of skills, competencies or knowledge for the Chief Executive of a public service entity, we return to our earlier comments reflecting the importance of customer service and customer engagement. While we do not see a need to set out a full set of skills and competencies we would expect that clause would require WSE boards to hire someone who can give effect to the role.

Recommendations

That the Select Committee:

[16] In both local government the separation is further consolidated by an absolute prohibition of any person being both an elected member and an employee of the same local authority.

[17] The inculcation of values of customer service would appear to be something of a bottom line given other requirements in this Bill emphasise consumer engagement e.g. the consumer forum established in clause 204 and the consumer engagement stocktake in clause 205.

46. add a clause to the Bill that sets out the statutory function of Chief Executives of the WSE and
47. that the Select Committee add a clause clearly stating that the Chief Executive is the employer of WSE staff.

Bylaws

<u>Note to the reader</u>: Taituarā thanks Shireen Munday, Kaipara District Council and Justin Walters, Whangarei for contributing this section of the draft submission.

These comments focus solely on section 214 of the Bill as presented, noting that it is anticipated the second Bill will likely address all matters regarding any final provisions for bylaws to be transitioned to the entities or otherwise resolved as indicated in the Explanatory Note. It should be noted that it is challenging to provide detailed constructive feedback in this context.

It is good to see that the Bill contemplates the issue of statutory reviews of bylaws and that undertaking such a review shortly ahead of the final confirmed approach anticipated in Bill 2 is counterproductive.

A 'review' of a bylaw (made under the Local Government Act 2002 (LGA)) does not mean a final resolution of a local authority to continue, amend, replace or revoke a bylaw. S160(1) of the LGA states that a review is making the relevant determinations under s155 of the LGA. S160(2) then goes on to state that *after* the review, a must consult on a proposal, which would then be followed by a final decision of the council.

This separation can and does cause confusion in the sector regarding what dates apply to what situation in relation to the requirements of S158 and 159. It is possible for example that the 'review' date of a bylaw could precede the first day of the transition period, but the consultation and final determinations of the local authority may still occur within the transition period. Consideration of how this would affect the intent of section 214 of the Bill is recommended. **Clear guidelines and explanatory notes for the sector are also recommended as to how to apply the final provisions.**

It is irrelevant to include a review under s158(2) of the LGA as any bylaws that have not been reviewed in accordance with the subsection would have been automatically revoked by now. The omission of 'trade waste' in the definition of a water services bylaw is of concern. While the LGA does not provide a definition of 'trade waste', a bylaw that is made in accordance with S148 will very likely deal with wastewater discharges as part of commercial activities and as such should be included in the definition provided.

Clause 159A(3) is potentially problematic. A local authority cannot revoke a bylaw without consultation (s156 LGA) and consultation must be preceded by the review requirements of S155 where applicable, which would apply to any deferred bylaw. It must be presumed that Bill 2 will provide for revocation of water services bylaws during the transition period without having to meet s155/156/160 requirements, noting that some consideration should be given to potentially unintended consequences of this clause depending on the overall intent and approach.

Clause 4 seems superfluous. Clause 5 covers all necessary matters for a bylaw that was

deferred, but which is still in force on the first day of the establishment date.

The definition of 'bylaw' is welcomed to ensure that all relevant water services related provisions can be appropriately captured. Often 'consolidated bylaws' are split into 'parts' (or chapters) and it is suggested that 'parts' are included in the definition for completeness.
A further appropriately worded clause is recommended for completeness. To provide clarity on the deferral of a 'water services bylaw', when that bylaw forms part of a larger individual bylaw, a consolidated bylaw or where there may be dual purposes for a provision (such as the protection of water services and roading or parks infrastructure). This should outline the requirement to progress a statutory review of a bylaw that includes any deferred water services bylaws (eg parts or individual provisions), but that the review excludes the deferred bylaw.

A final concern is that in making a decision to defer, councils are still bound by the decision-making requirements of the LGA and their respective Significance and Engagement Policies which may suggest even consultation on the decision to defer is required. We strongly recommend consideration of these factors in the final drafting.

Suggestions for wording changes as well as reflecting the above comments are provided in track changes.

h159A Review of water services bylaws may be deferred during transition period

(1) The local authority may defer a review required by section 158(1) or 159 if all the following requirements are met:
  (a) the review relates to a water services bylaw:
  (b) for that bylaw, the 5-year period in section 158(1) or (2)(b) or, as the case requires, the 10-year period in section 159 ends in the transition period:
  (c) the local authority makes the decision in the transition period:
  (d) the local authority gives prompt public notice of the deferral:
  (e) that public notice identifies clearly the bylaw.

(2) A deferral under subsection (1) has the results specified in subsections (3) to (5).

(3) The review is required only if the bylaw is not revoked in the transition period.

~~(4) The review, if required, is required no later than the second anniversary of the establishment date.~~

(5) For the purposes of section 160A, the last date on which the bylaw should have been reviewed under section 158 or 159 must be taken to be the second anniversary of the establishment date.

(6) Subsections (2) to (5) apply despite sections 158, 159, and 160A.

(7) In this section,—

bylaw, without limiting the generality of that term as defined in section 5(1), includes—

  (a) a set of bylaws; and
  (b) an individual bylaw in a set of bylaws; and
  (c) a provision within an individual bylaw

establishment date has the meaning in clause 1(1) of Schedule 1 of the Water Services Entities Act 2022

transition period means the period—

(a) starting on the day after the date of Royal assent of the Water Services Entities Act **2022**; and
(b) ending at the close of the day before the establishment date

water services bylaw means a bylaw that relates to all or any of the following:

(a) water supply (as defined in **section 6** of the Water Services Entities Act **2022**):

(b) wastewater:
(c) stormwater.

Recommendation

48. That clause 214 be amended as set out above.

Part Three: Linkages with Other Legislation

We have identified the following matters that relate to the linkages between the Bill and other local government legislation. We return to the comments we made in Part One that the Water Services Entities Bill addresses the far simpler half of the issues reform needs to resolve.

We further add that those issues, and those raised in this part are not 'minor' or 'transitional'. Some such as charging go right to the stated rationale for the reforms. The Select Committee therefore needs to be 'on top' of these issues – now. We are certain local government will not be the only submitters to raise some of these matters,

Charging, Billing, and Enforcement (Rating Act 2002)

The Government's stated rationale for the reforms has been to ensure that the cost of meeting the regulatory standards for three waters remains affordable for all communities. Implicit in that was that there would be some move to a network pricing approach on the part of the WSEs (i.e. little or no divergence in charges paid by consumers within a particular WSE area). Ironically then, the Bill says very little about the powers that the WSEs will have to fund their activities (so much so we were tempted to raise this as an issue in Part One of the legislation).

We accept that there will be some transitional period while charging adjusts from what are effectively 67 local solutions to the funding of three water services to a far more limited number (eventually to three in each WSE service area).We also accept that network pricing brings with it the certainty that some areas will subsidise others. The Select Committee will doubtless have seen concerns expressed by some areas that they will be 'asked to pay for others' (or will encounter this in the submissions process).

There has been some speculation that local authorities will be asked to collect WSE charges through the rating system, at least for a defined period after the WSEs begin operation. Taituarā asserts that the WSEs were created to have scale and financial capability and will have an asset base and financial capacity that many entities in NZ could only dream of. Further, the balancing of transitional matters and the design of funding systems is a matter that the WSE Boards should be taking accountability for, from 'day one'.

As we write this, there are a few days over two years left to the intended establishment date for the WSEs. In that time the WSE board will have been expected to develop a first funding and pricing plan. Why then would they not be expected to have a system for billing and collection in place at the same time, and to have done the necessary communication and other work to communicate with their consumers.

Taituarā submits that the Select Committee needs to send the WSEs a clear message in this Bill that they will be expected to stand on their own feet on establishment. And if there is merit in local authorities acting as the collection agents for the entities then legislation needs to clarify that the assessment and invoicing of WSE charges must be on a separate document and clearly distinguished as coming from the WSE.

Recommendation

49. That the Select Committee include a provision in this Bill ensuring that WSE charges are assessed and invoiced separately from local authorities.

WSE Charges and the Rates Rebates Scheme

One of the lessons from the 2009/10 Auckland reorganisation is that only those charges legally regarded as rates are included in the coverage of the Rates Rebate Scheme. In other words, a metered water charge levied under the Rating Act and payable to a council would be covered by the scheme, the same charge levied by a WSE would not be (regardless of whether the local authority is the collection agent).

The practical effect of this is to reduce entitlements of low-income ratepayers under the scheme. We understand that Auckland Council now 'tops up' the entitlement that eligible ratepayers receive from its own revenues.

This might be an issue that creates opposition to the reforms in and of itself, especially given the scale of increases in water charges, even under the reform proposals. It may be that this is a matter that is addressed alongside the funding and pricing powers, though we've seen no sign of any consideration in the policy process to date.

Recommendation

50. That the Committee agree that any charges levied by WSEs should be included within the ambit of the Rates Rebate Scheme and amend the Bill accordingly.

Assessments of Water and Sanitary Services (Local Government Act 2002)

Local authorities are required to undertake an assessment of the state of all water and sanitary services in their district.[18] The transfer of water services to the WSEs would see a transfer of the information and most of the decision-making authority to the WSEs. While there are a large number of private services these are the responsibility of Taumata Arowai. At a minimum these services need to be removed from scope of the assessment, and the responsibility transferred to the WSE.

[18] This includes: the supply of drinking water, sewage treatment and disposal, drainage works, cemeteries and crematoria, swimming pools, dressing sheds, disinfecting and cleansing stations, public toilets and works for the collection and disposal of refuse, nightsoil, and other offensive matter.

More fundamentally, when we look at the other services that the Health Act treats as sanitary services we become even more convinced the Assessment is archaic. To our knowledge, no local authority operates a facility for the collection of nightsoil, and similarly no local authority operates a disinfection station.[19] Local authorities operate public baths but these are swimming pools provided for recreation rather than sanitation, and any changing sheds provided are either provided to support a recreational facility or for public convenience in areas such as beaches.

Local authorities do operate cemeteries and crematoria and have oversight of waste management activities (if not providing the actual facilities and the collection). Assessment of needs should form part of the asset management planning for these activities (noting asset management planning is a statutory responsibility).

In short, less and less of the assessment falls within the purview of local authorities. We recommend removing the assessment from the Act, and with that removed there would be nothing to form the basis of an LTP disclosure on any the variations.

Recommendations

That the Select Committee:

51. **amend the Bill by adding a requirement for the WSEs to conduct an assessment of drinking water, sewage treatment and disposal and drainage works in their area**
52. **add a consequential amendment to the Local Government Act repealing sections 125 and 126 of the Local Government Act.**

Three Waters and the Accountability Regime (Local Government Act 2002)

Three water services are firmly embedded in the legislative provisions governing long-term plans (LTPs). At the time of writing the 'due date' for the next long-term plans is a little less than two years away. But the bulk of the work preparing a long-term plan actually happens between twelve and eighteen months from the 'due date', this is a case of 'the sooner, the better' for changing the law.

Local authorities are required to separately disclose information relating to drinking water, sewage treatment and disposal, and stormwater drainage in their LTPs. We have independently undertaken a 'find and replace' on the use of these terms in the accountability provisions of Part Six and Schedule 10 of the Local Government Act

[19] In the modern era, we're not aware of any private schemes for the collection of nightsoil or the cleansing and disinfection of human beings (outside of hospitals).

Financial Strategies and Infrastructure Strategies

We have already noted the similarities between these provisions and the requirements local authorities are under. Section 101A of the Local Government prescribes the contents of a financial strategy, The mandatory disclosures are very territorial authority oriented (and possibly growth authority oriented) as well as an encouragement to 'tick boxes'. The move of three waters to the WSEs, removes three of the five mandatory groups from the disclosures about the capex and opex involved in providing network infrastructure. Rather than amending the reference we favoured stripping this out, alongside the requirement to disclose capex and opex associated with providing from population and land-use change.

That leaves a financial strategy that has to describe the financial implications and drivers for meeting the existing levels of service/accommodating new requests (as determined by the local authority). The strategy would also retain the self-set limits on rates and dent , and the financial targets for investments. This seems much more in keeping with the notion of the financial strategy as a unique story. It will call for the exercise of greater judgement by local authorities which would be tested in any audit process.

Likewise the move of the three waters greatly reduces the scope of this a local authority infrastructure strategy to the point where it is really a strategic asset management plan for at most two activities as a matter of law (and one for all but six of the local authorities). Most of us queried the value of such a document and wondered if this was not already captured by, for example, any requirements to give effect/act consistently with a regional spatial strategy. Most of us therefore favour removing it *in totality*.

Recommendations

53. That the Select Committee amend section 101A, Local Government Act 2002 to require local authority financial strategies to disclose:
- **(a) the financial implications and drivers for meeting the existing levels of service/accommodating new requests**
- **(b) the local authority's self set limits on rates and debt**
- **(c) the local authorities targets for its financial securities and equity investments and its rationale for holding these assets.**

54. That the Select Committee amend section 101B, Local Government Act 2002 to align the required disclosures of local authority financial strategies with those the Bill would place on WSEs (and as amended by our recommendations above)

Non-financial Performance Measures

Section 261B requires the Secretary of Local Government to make performance measures for each of the five 'mandatory' groups of activities. The move of the three waters services to the WSE includes a move of the obligations on local authorities under the Health Act.

Delivery cannot be said to be by or on behalf of local authorities. The requirements to make regulations covering three water services should be repealed.

These measures were intended to provide a common language for local authorities and communities to talk about levels of service in a concrete way. We see little evidence that this occurred after three full LTP rounds and six or seven annual plan/report cycles. Other than the Department itself, we've seen no indication that any agency is actually using these to compare levels of service. We recommend that the regulations be revoked in toto and that the legislative provisions be repealed.

Recommendation

55. That the Select Committee recommend the repeal of the requirement that the Secretary for Local Government set mandatory performance measures under section 261B, Local Government Act.

A note about the Annual Report and Annual Plan

Many, but not all, LTP requirements are replicated in the requirements for the annual plan and have a reporting 'mirror' in the annual report i.e. the annual plan states your intentions, the annual report states the actual report. Although not of the same degree of urgency as amendments to LTP matters[20] the sector would welcome clarity on these matters as early as possible.

Recommendation

56. That the Select Committee note that many LTP requirements have flow on impacts to the annual plan and annual report requirements and will need to be address now, or in the second Water Services Entities Bill.

Public Works Act 1981

While WSEs are a purpose built entity they both provide network infrastructure and remain in public ownership. While we've not attempted a comprehensive analysis for the Public Works Act 1981 powers to acquire land, it is clear that these entities will either need access to these powers (or alternatively other powers to acquire land as they appear in the legislation governing other network infrastructure providers).

[20] Preparation of the first annual plan after the transfer of water services will not start until October 2024). Preparation of the first annual report after the transfer of water services will not start until April/May 2025.

Of course, the most publicly visible power available under the Public Works Act is the compulsory acquisition of land for public works. This comes with a general requirement that any property that is not subsequently required for these works is 'offered back' to the original owner or their successor. The WSEs are going to inherit a large number of capital projects in progress, and projects where land has been acquired for works that have not been started but were programmed to commence at a future time. We expect the default assumption was that land acquired in this way was to transfer to the WSE, but would such a transfer trigger the offer back provisions of the Act.

Although not a Public Works Act issue, a related matter is whether the WSEs will be deemed a network operator for the purposes of the Resource Management Act 1991 (and any successor legislation such as the upcoming Natural and Built Environments Bill)?

These may be issues that are being treated as sitting with the powers and duties of the WSEs, in which case they will presumably be resolved in the upcoming bill. We observe that although these issues aren't necessarily customer-facing issues in the manner of those set out in Part One, they are every bit as complex. The Select Committee may want to seek assurance from officials that powers under the Public Works Act 1981 are on the policy work programme for the second Bill.

Kainga Ora – Homes and Communities Act 2019

This legislation gives Kainga Ora the powers of an urban development authority. That includes powers to define a development area, build infrastructure and recover the capital and operating costs through the local authrority's rating system by way of a targeted rate. The Select Committee may want to reflect on whether the costs of any three waters infrastructure should be met by charges through the WSEs.

Infrastructure Funding and Financing Act 2020

This legislation established a new funding and financing model to enable private capital to support the provision of new infrastructure for housing and urban development. In essence, private developers create an entity known as a special purpose vehicle that develops a proposal to build the necessary infrastructure to serve an area (say a water treatment plant), borrows the funds and then levies a charge to repay the loan (collected by local authorities).[21]

The model is developed on the assumption that the infrastructure build by the SPV will be connecting to that provided by local authorities. As part of the process local authorities are called on to provide an infrastructure attest, that is to say that they are happy that the proposed infrastructure meets the requirements to connect with their infrastructure. That will need broadening to allow the WSEs to provide the same attest as the future owners if three waters infrastructure.

[21] As fas as we know the only such scheme in operation at the present time is the so-called Milldale development north of Auckland, operated by Crown Infrastructure Partners.

There are also similar accountability issues to those raised with the Kainga Ora-Homes and Communities Act.

Recommendation

57. That the Select Committee seek assurance from officials that the interface between the WSEs and the following legislation will be addressed in development of the second Water Services Entities Bill: the Public Works Act 1981; the Resource Management Act 1991 and successor legislation; the Land Drainage Act; the Kainga Ora – Homes and Communities Act 2019 and the Infrastructure Funding and Financing Act 2020.

Questions for Discussion

Are there linkages between this Bill, the WSEs and other legislation that you consider have been missed? If so what are they, and are these issues that must be addressed now r can they wait for the second Bill?

Are there any other matters that you'd like Taituarā to include in its submission on this Bill? If so, what

Are there any matters in this draft that you consider Taituarā should exclude from its final submission? If so, then what matters should be removed and why?