

LOCAL GOVERNMENT ACT 2002 AMENDMENT BILL (No 3)



Human Rights Commission Submission to the Local Government and Environment Committee

14 February 2014

The New Zealand Human Rights Commission (“Commission”) welcomes the opportunity to make a submission on the Local Government Act 2002 Amendment Bill (No 3) (“Bill”).

1. Introduction

1.1 The Bill signals a major shift in how local government operates and is structured. It aims to enable councils to “be able to play their part in creating an environment conducive to sustained economic growth” by providing “effective processes and governance arrangements, fair and efficient decision-making and charging practices, and sound asset management planning”.¹

1.2 This submission addresses four aspects of the proposed amendments, namely:

- principles relating to local authorities;
- participation;
- ability for Māori to contribute to decision making; and
- the special consultative process.

2. Principles relating to local authorities

2.1 Human rights obligations, democracy and good governance by public bodies are inextricably linked.² These obligations are set out in a number of international instruments including the International Covenant on Civil and Political Rights (“ICCPR”), the International Covenant on Economic, Social and Cultural Rights (ICESCR), the Convention on the Elimination of All Forms of Discrimination Against Women (“CEDAW”), the Convention on the Rights of the Child (“CRC”) and the Convention on the Rights of Persons with Disabilities (“CRPD”). New Zealand is bound by these covenants and conventions, having ratified them, and is required to report regularly to the United Nations on steps taken to realise its obligations.

¹ Local Government Act 2002 Amendment Bill (No 3), 2013 No 165-1, Explanatory note, General policy statement, p.1.

² International Council for Human Rights, *Local Government and Human Rights: Doing Good Service*, Geneva (2005) at 4.

2.2 Where the government delegates authority to another entity, the delegated authority should be subject to the same duties and obligations as apply to the government itself. As the Crown has committed itself to international obligations under international human norms³, these principles should also apply wherever relevant to the activities of local authorities.

2.3 Services provided by local government – such as the supply of water, places to play and recreate, and the provision of housing and transport – directly influence the quality of life of most people. It is through these services that a State realises many of its human rights obligations.

2.4 The *Better Public Services* (“BPS”) programme sets high-level targets for the delivery of value-for-money public services. These targets are underpinned by Action Plans in each key result area. The BPS and the human rights approach share a common focus, whether labelled “affected people’s rights centric”, “consumer centric” or “citizen centric”. All of these approaches are based on the principle that working with affected people on issues they face. This is both the most effective and efficient way to work. A world class exemplar of where a local authority, a health board in this case, has adopted this approach is the recent work of the Canterbury District Health Board (“CDHB”) in its development of a health system that places people and their homes at the centre.⁴

2.5 Clause 7 of the Bill amends section 14 of the principal Act which lists principles in accordance with which a local authority must act when performing its role. **The Commission recommends amending clause 7 to include a statement that local authority decision making and provision of services be consistent with, and have respect for, the human rights of the people affected by those decisions or the provision of those services.**

3. Participation

3.1 Article 25 of the ICCPR provides that:

Every citizen shall have the right and the opportunity, without any of the distinctions in article 2 and without unreasonable restrictions:

- (a) to take part in the conduct of public affairs, directly or through freely chosen representatives;
- (b) to vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression;
- (c) to have access, on general terms of equality, to public service in his country.

³ As set out in the Covenants and Conventions at paragraph 2.1.

⁴The King’s Fund, *The quest for integrated health and social care: A case study in Canterbury New Zealand*. Available at: <https://www.cdhb.health.nz/What-We-Do/Projects-Initiatives/kings-fund/Documents/Quest-for-integrated-health-final-low-res.pdf>

3.2 Although the term ‘conduct of public affairs’ is often thought to be limited to the election of a legislative authority⁵ it can, and does, relate to a wider range of activities. This is particularly important in the context of local bodies where voter turnout is traditionally low. For example, national voter turnout in 2013 was 41.3 percent.⁶

3.3 The Human Rights Committee considered the scope of article 25 in General Comment 25.⁷ The General Comment confirms that the concept of ‘the conduct of public affairs’ includes the exercise of governmental power by all arms of government and at all levels. The Committee stated in part:⁸

The conduct of public affairs, referred to in paragraph (a), is a broad concept which relates to the exercise of political power, in particular the exercise of legislative, executive and administrative powers. It covers all aspects of public administration, and the formulation and implementation of policy at international, national, regional and local levels. The allocation of powers and the means by which individual citizens exercise the right to participate in the conduct of public affairs protected by article 25 should be established by the constitution and other laws...

3.4 The Committee further noted that there are various ways in which a State may provide avenues of direct participation beyond those set out in articles 25(b) and (c). The ways in which participation can occur are infinitely varied and will depend on the circumstances of a particular case:

Citizens participate directly in the conduct of public affairs when they exercise power as members of legislative bodies or by holding executive office. This right of direct participation is supported by paragraph (b). Citizens also participate directly in the conduct of public affairs when they choose or change their constitution or decide public issues through a referendum or other electoral process conducted in accordance with paragraph (b). **Citizens may [also] participate directly by taking part in popular assemblies which have the power to make decisions about local issues or about the affairs of a particular community and in bodies established to represent citizens in consultation with government....**

Citizens also take part in the conduct of public affairs by exerting influence through public debate and dialogue with their representatives or through their capacity to organise themselves. This participation is supported by ensuring freedom of expression, assembly and association.

(Emphasis added)

⁵ M Nowak, *CCPR Commentary* (23e: Engel, 2005) 571-572.

⁶ See www.lgnz.co.nz

⁷ United Nations Human Rights Committee (1996) General Comment No. 25: *The right to participate in public affairs, voting rights and the right of equal access to public service* (Art. 25) CCPR/C/21/Rev.1/Add.7

⁸ *Ibid.*

3.5 The importance of participation in relation to local bodies has been noted by the International Council for Human Rights:

Local governments are more effective and legitimate if they involve citizens in decisions that concern them ... meaningful participation empowers them to take decisions and accept decisions taken by those who represent them.⁹

3.6 Unfortunately there appears to be a trend to move towards centralised governance, progressively removing the voice of those affected from the decision making process.¹⁰ For example, people affected by the Canterbury earthquakes, and the subsequent recovery process have been limited in their opportunities to participate in problem identification, solution design and decision-making in issues which affect their lives.¹¹ These limitations on meaningful participation have been shown to be a factor that has contributed towards deteriorating standards of mental health and wellbeing.

3.7 One of the key changes introduced by the Bill is the roll out of the Local Boards governance model as an option the Local Government Commission can consider for any local government reorganisation proposal constituting a unitary authority. The Explanatory note to the Bill states that “[A] reorganisation involving local boards can provide for effective democratic governance at a community level, while achieving the benefits associated with larger organisations.”¹²

3.8 Local boards are intended to ensure that governance at a community level reflects local wants and needs. The Bill allocates local boards the same decision-making responsibilities as in the Auckland Council model.

3.9 Although the Commission supports any move which promotes a more community centric approach to democratic decision making, it has previously voiced concern about the limited delegation of decision making powers to local boards. In relation to the *Local Government (Auckland Council) Bill* the Commission stated that:

Local democracy will only come from a local government sector able to implement decisions at a level in line with the needs and requirements of the community. To be truly effective input needs to reflect the concept of subsidiarity.

⁹ Ibid.

¹⁰ In 2010, the Minister of Local Government and Minister for the Environment promoted a law change, passed under urgency, allowing appointed commissioners to replace the elected members of Environment Canterbury, a regional council, with a view to improving its relationship with the region’s 10 territorial local authorities in the context of work on a fresh-water management strategy.

A further law change, also under urgency, provided for Environment Canterbury’s governance arrangements to be reviewed in 2014 and for commissioner governance to be extended until 2016. The 2012 amendments to the Local Government Act 2002 extended the minister’s powers to intervene in territorial local authority affairs.

The centralisation of governance arrangements in the Auckland region has also been controversial.

¹¹ See paragraphs 2.3 to 2.4 above.

¹² Supra note 1, p. 2

That is, the ability to make relevant decisions should rest with the lowest competent authority capable of undertaking the activity.¹³

3.10 The Commission would welcome the explicit expansion of local board decision making powers. Nevertheless, is pleased to see the inclusion of a presumption that all non-regulatory decisions will be allocated to local boards unless:

- the impact of the decision will extend beyond the local board area; or
- effective decision making requires alignment with other decisions that are the responsibility of the governing body; or
- the benefits of a consistent or coordinated approach through the district in regard to that activity outweigh the benefits of reflecting particular local needs.

3.11 For any governance structure to be truly empowering there must be clearly defined avenues for consultation and the ability to deliver services to the people that need them most. We therefore welcome the inclusion of a requirement for local boards to prepare a local board plan that must reflect the priorities and preferences of the communities within its area.

4. Ability for Māori to contribute to decision making

4.1 As mentioned above¹⁴, where the Government delegates authority to another entity, the delegated authority should be subject to the same restrictions as apply to the Government itself. As the Crown has committed itself to upholding the principles of the Treaty, the Commission considers that these principles should apply wherever relevant to the activities of local authorities.

4.2 Section 4 of the Local Government Act 2002 (“LGA”) requires local authorities to “recognise and respect the Crown’s responsibility to take appropriate account of the principles of the Treaty of Waitangi ...”and specifically to ensure that opportunities are provided¹⁵, established and maintained¹⁶ that allow Māori to contribute to decision making processes. Arguably these obligations extend to local boards as part of a territorial authority.¹⁷ However, it is unclear under the current legislative framework how this will work in practice and where the responsibility lies.

4.3 In the interests of certainty **the Commission recommends that the Bill be amended to include express recognition that local boards must comply with the requirements of s4 of the LGA.**

¹³ New Zealand Human Rights Commission, *Submission on the Local Government (Auckland Council) Bill* (Wellington, 2009).

¹⁴ See paragraph 2.2.

¹⁵ Section 14(1)(d) LGA.

¹⁶ Section 81(1)(a) LGA.

¹⁷ Local authority is defined as a regional council or territorial authority, s4 LGA 2002.

5. Special Consultative Process

- 5.1 A local authority is only required to consult about decisions if it is directed to under the LGA or other legislation. The obligation to take into account community views does not in itself impose such an obligation.¹⁸ However, a local authority may still elect to consult on a matter, even though it is not obliged to do so, in order to ascertain the views of its community. In either case, when undertaking a mandatory or voluntary consultation process, a local authority is obliged to undertake that consultation in accordance with the prescribed principles of consultation.¹⁹ For this reason some have suggested that local government decision making is increasingly a creature of statute rather than mandated by the community.²⁰
- 5.2 The special consultative procedure is a prescribed process of formal consultation that must be followed when making certain decisions.²¹ A local authority may also elect to follow the special consultative procedure when making a decision, even if it is not obliged to do so.²² First, the local authority must prepare a "statement of proposal", the content of which is prescribed depending on the nature of the proposal. Generally this incorporates the proposed new provisions, plan or rules, along with supporting explanation and evaluation. All proposed changes, along with a summary, must be made publicly available ahead of the decision.²³ The public are then entitled to make written and oral submissions on the proposal. As the special consultative procedure amounts to consultation, the principles of consultation must also be complied with.²⁴
- 5.3 The special consultative procedure - a statutory prescribed process - achieves some balance between community participation in decisions that affect them and efficiency. However, the Bill removes the requirement for the special consultative procedure for a number of processes including: establishment of a council-controlled organisation; amendment of the significance (and engagement) policy; review of the development contributions policy; reviews of rates remission and postponement; and prescribing fees in a bylaw.
- 5.4 These amendments potentially erode the ability for any community voice in these important decisions. Noting that consultation can at times be arduous and expensive from a council's perspective, in the Commission's view the

¹⁸ S. 78(3) LGA.

¹⁹ S. 82 LGA.

²⁰ It should be noted that the delegation of certain decision making to local boards is a positive move back towards community participation in decisions that affect them.

²¹ These decisions include the adoption or amendment of the long-term council community plan or annual plan (ss 84 and 85); the making, amendment or revocation of bylaws (s 86); changes to the mode of delivery of a significant activity (s 88); decisions to significantly alter the intended level of service provision for a significant activity (s 97(a)); decisions to construct, replace, abandon, or transfer ownership of a strategic asset (s 97(b) and (c)) and decisions which will significantly affect the capacity of, or cost to, the local authority in relation activities identified in the long-term council community plan (s 97(d)); in the case of the last four, only if not otherwise explicitly provided for in the long-term council community plan.

²² S. 87 LGA.

²³ S.83(1)(c) LGA.

²⁴ S. 82(1) and (5) LGA.

right to participation in public affairs²⁵ and the social benefits of participatory democracy outweigh these considerations. **The Commission recommends that the proposed amendments to the special consultative procedure be removed from the Bill.**

²⁵ Article 25 of the International Covenant on Civil and Political Rights.