

FOR THE PEOPLE, BY THE MINISTER: MINISTERIAL INTERVENTIONS IN SUBNATIONAL ELECTED BODIES AND A PRINCIPLED APPROACH TO THEIR FUTURE USE

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New Zealand's democratically-elected, subnational bodies provide many of the day-to-day services that everyone relies on, from water and sewerage to healthcare and education. However, the broad discretion enjoyed by ministers responsible for local government, District Health Boards and school boards of trustees means elected representatives could easily be removed with little justification. This article reviews the ministerial intervention regimes for each of these bodies and concludes that a principled approach to their use is needed to protect democratic values and prevent a concentration of power with the ministers. It suggests democracy, subsidiarity, the scale of the problem, the importance/centrality of the function, timing, complexity, transparency, consultation, apolitical decision-making and minimising interventions as principles upon which to critically analyse past interventions and ensure the powers are used more effectively in future.

I INTRODUCTION

Democracy is traditionally considered to be "government of the people, by the people, for the people".¹ This apparent unity of purpose and membership belies the tension between elected ministers and other entities whose democratic legitimacy comes from subsets of the wider populace. Such democratic subnational bodies provide indispensable day-to-day services. Eighty-six local authorities

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1 Abraham Lincoln "The Gettysburg Address" (Dedication of the Soldiers' National Cemetery, Gettysburg, 19 November 1863).

control water and sewerage in New Zealand.² Twenty District Health Boards (DHBs) manage our hospitals.³ Over 2,500 boards of trustees govern our primary and secondary schools.⁴ These bodies permit community input rather than representing a one size fits all approach. Ministerial intervention jeopardises this when displacing locally elected representatives.

This article argues that current intervention regimes afford ministers too much discretion, potentially harming local democracy, and seeks a principled approach for their future use. Parts II to IV examine intervention regimes for local government, DHBs and boards of trustees from both theoretical (the statutory context and formulation of each regime) and practical (examining the effectiveness and justifiability of previous interventions through case studies) standpoints. Part V then derives principles transcending and uniting these regimes to encourage better application of ministerial intervention powers.

II LOCAL GOVERNMENT

In this Part, I examine the alarming breadth of ministerial discretion to intervene extensively in local government. The increasing prevalence of interventions provokes criticism under learning, constitutional and democratic perspectives. Replacing elected authorities risks a concentration of power with the Minister, while depriving communities of representatives elected specifically to ensure decisions take account of local conditions.

A The Statutory Regime

The original Local Government Act 1989 replaced 800 single and multi-purpose entities with 78 regional councils and territorial authorities.⁵ Regional councils manage "natural and physical resources", water supply, discharges into or onto water, air or land, flood protection and natural hazards.⁶ Territorial authorities are city or district councils, responsible for controlling land use and development, protecting public health and safety and providing infrastructure including sewerage, roads and water supply.⁷

Since local authorities manage \$100 billion of public assets, spending four per cent of New Zealand's GDP (\$7.5 billion) annually, central government has, unsurprisingly, refused to relinquish

2 Department of Internal Affairs "About local government" <www.localcouncils.govt.nz>.

3 Ministry of Health "District health boards" (14 January 2014) <www.health.govt.nz>.

4 Ministry of Education "Number of Schools" <www.educationcounts.govt.nz>.

5 These together make up local authorities under the Local Government Act 2002, s 5; see Peter McKinlay "Future of Local Government Summit: A New Zealand Perspective" (paper presented to the Local Government Centre, Auckland, 2005) at 1 and 2.

6 Local Government Act, s 149(1); and Resource Management Act 1991, s 30.

7 Resource Management Act, s 31, Local Government Act, ss 5 and 146.

control entirely.⁸ The 2012 amendments to the Local Government Act 2002 (LGA) Part 10 gave the Minister of Local Government additional powers to assist local authorities and "intervene in [their] affairs ... in certain situations".⁹

While each intervention option has particular prerequisites, all necessitate either a problem or a significant problem. A problem requires a current or potential issue reducing the authority's ability to implement the purposes of local government or "a significant or persistent failure" to perform statutory duties.¹⁰ This may include "[im]prudent management of ... revenues, expenses, assets, liabilities, investments, or general financial dealings".¹¹ A significant problem further requires "actual or probable adverse consequences for residents".¹² Including potential issues widens the definition immensely, while significant adds little since situations constituting problems will virtually always have probable adverse consequences.

The purposes of local government are enabling local democracy and providing "good-quality local infrastructure, ... public services, and performance of regulatory functions" in the "most cost-effective [way] for households and businesses".¹³ Good-quality is further defined as "efficient, effective and appropriate to present and anticipated future circumstances".¹⁴ Thus, failing to get value for money permits intervention.

The Minister has six intervention options. These are:

- requiring information;¹⁵
- appointing a Crown Review Team (CRT);¹⁶
- appointing a Crown observer;¹⁷
- appointing a Crown manager;¹⁸

8 (12 June 2012) 680 NZPD 2839.

9 Local Government Act, s 253. The 2012 amendment also made other significant changes including the removal of the four well-beings, however these are beyond the scope of this article.

10 The civil emergencies aspect of ministerial powers will not be examined in this article: Local Government Act, s 256.

11 Section 256 (b)(i).

12 Section 256.

13 Section 10.

14 Section 10(2).

15 Section 257.

16 Section 258.

17 Section 258B.

18 Section 258D.

- appointing a commission;¹⁹ and
- calling or postponing a general election.²⁰

These appear hierarchical, from minor monitoring to major intervention.²¹ A Minister can require information as to the problem's nature and plans to address it.²² Alternatively, a CRT can independently assess problems and recommend action to the Minister or authority.²³ Crown observers assist in addressing problems, monitor progress and make further recommendations to the Minister, while a Crown manager may also direct the local authority in addressing problems.²⁴ Appointing a commission to take over the local authority's functions and powers, with councillors remaining in office in name only, is the most invasive option.²⁵ Calling a general election allows a fresh start.²⁶ While the council must pay appointees' fees, they are responsible only to the Minister.²⁷

19 Section 258F.

20 Section 258M.

21 New Zealand Treasury *Regulatory Impact Statement – Better Local Government* (March 2012) at [184].

22 Local Government Act, s 257(1).

23 Section 258(4).

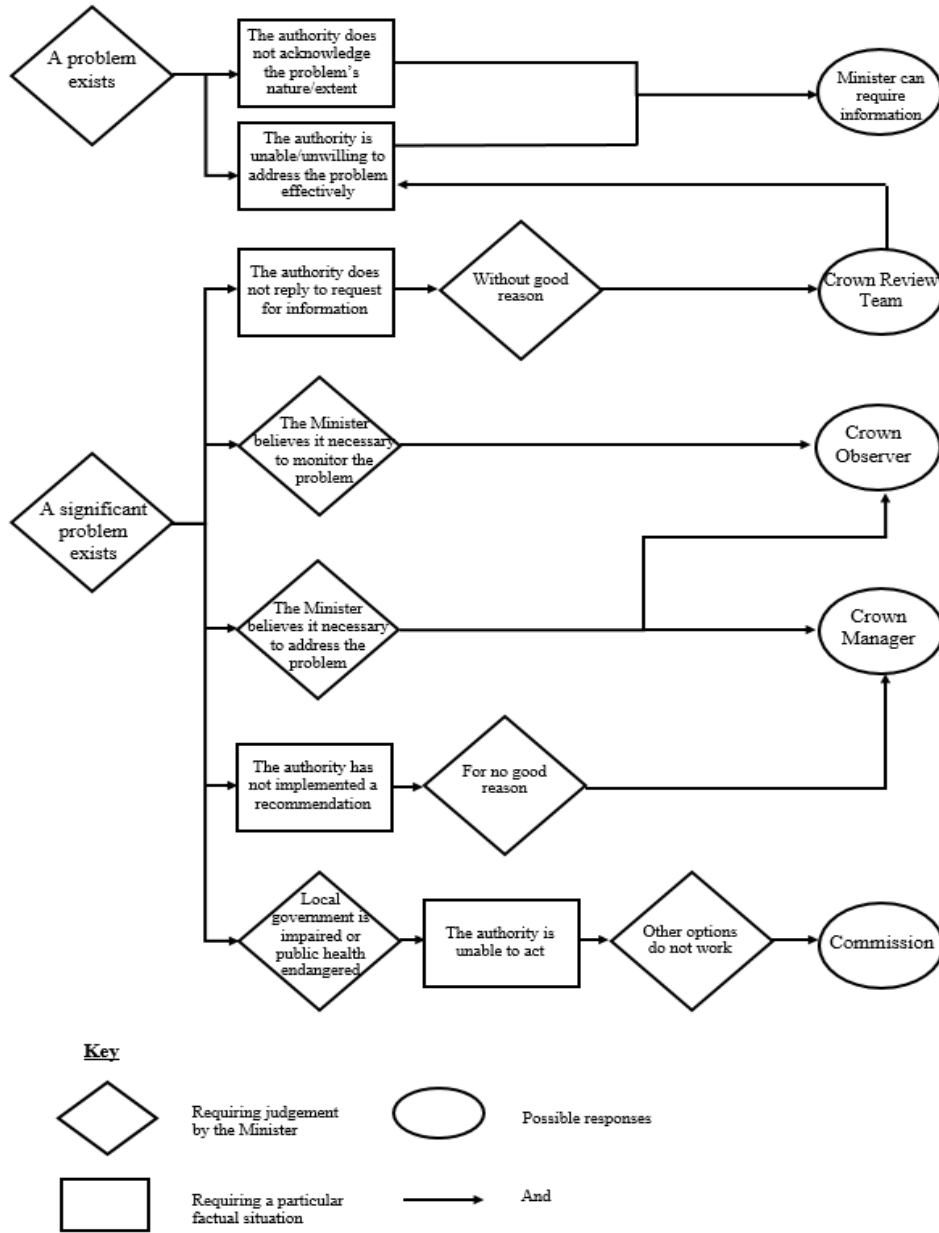
24 Sections 258B(4) and 258D(4).

25 Sections 258F and 258K.

26 Section 258M(1).

27 Sections 258W and 258Y.

Diagram 1: Ministerial intervention powers for local government



A Minister may also intervene upon request from the local authority or a pre-existing appointed body.²⁸

Despite this hierarchy of intervention options, there is no equivalent hierarchy of thresholds for their use. Instead, the Department of Internal Affairs (DIA) considers Part 10 a "menu", implying free choice based on personal preference; this appears accurate.²⁹ For example, a local authority hesitating to act upon recommendations may find a CRT is appointed if the authority is considered unwilling to address the problem, or a more invasive Crown manager if it fails to implement recommendations.³⁰

Particularly concerning is the number of discretionary decisions involved. A Crown observer or manager's availability is based purely upon a Minister's view of the situation, while the less powerful CRT requires that the local authority be unable or unwilling to act, which is quantitatively ascertainable.³¹ Furthermore, most criteria for appointing a commission, and thus displacing elected representatives entirely, require only ministerial judgment.³² The regime also allows punitive action against local authorities. An authority failing to do as recommended risks a Crown manager's appointment; not responding to requests for information within the Minister's chosen timeframe may prompt the appointment of a CRT.³³

A minister must issue a list of factors which might influence intervention decisions.³⁴ The guiding principles published in 2013 included transparency, that local authorities should resolve their own issues and that assistance should be proportionate to the problem's nature and potential consequences. Matters identified as "likely to detract" from a local authority's capacity to meet the purposes of local government are listed as "financial mismanagement", relationship breakdowns, "serious capability deficiencies of elected members" and dysfunctional governance.³⁵ While the published list is extensive, the Minister may consider non-listed factors.

28 Sections 257, 258, 258B, 258D, 258F and 258M.

29 Department of Internal Affairs "Implementing the 2012 Amendment Act" <www.dia.govt.nz>. This concurs with the Local Government Act, s 254(4).

30 Local Government Act, ss 257 and 258D.

31 Sections 258B and 258D.

32 Section 258.

33 Sections 257 and 258F.

34 Section 258O.

35 "Notice Regarding Ministerial Powers of Assistance and Intervention" (28 March 2013) 38 *New Zealand Gazette* 1111 at 1140.

The present provisions significantly tightened the leash on local government. Pre-2012, a Review Authority was required before further intervention, delaying matters significantly.³⁶ Even convening that authority required a significant or persistent failure to meet obligations or "significant and identifiable" mismanagement (potential problems, now capable of triggering much greater intervention, were insufficient).³⁷ Once a Review Authority reported, the Minister could appoint a commission or call an election, but only if the reviewers recommended it, or the local authority requested it or could not hold meetings due to lack of a quorum.³⁸ Alternatively, an appointee could perform obligations in place of local authorities "wilfully refusing or substantially refusing" to act and thus impairing local government or endangering public health.³⁹ Such high thresholds meant provisions were often circumvented.⁴⁰

The need for change was arguable at best. The Bill's supporters focused on financial concerns, citing rates increasing 6.8 per cent and debt increasing from \$2 billion to \$8 billion.⁴¹ The Department of Internal Affairs suggested that a lack of intervention powers was contributing to rates increases.⁴² Despite evidence that existing powers were seldom needed, councils did not require assistance and other statutes already permitted limited interventions.⁴³ The Bill's detractors disputed that there was any evidence of financial irresponsibility, citing an independent report showing spending levels were ensuring a "long-lived asset base".⁴⁴ Others considered the Bill "constitutionally untenable" in light of "the notion of a separate institution of local government",⁴⁵ or simply a "central government power grab".⁴⁶

Thus, the Government's extension of powers of intervention in local government was decidedly controversial. However, it is the level of discretion the amendments afford that is most concerning,

36 Local Government Act, s 254(2) as originally enacted. Section 254 was replaced by a different provision by s 31 of the Local Government Act 2002 Amendment Act 2012.

37 Section 254(2) (repealed).

38 Section 255 (repealed) and sch 15 cl 14 (repealed).

39 Section 256 (repealed).

40 See Part II.B of this article.

41 (12 June 2012) 680 NZPD 2843.

42 Department of Internal Affairs *Regulatory Impact Statement: Better Local Government* (30 May 2012) at 7.

43 At 7 and 22.

44 New Zealand Institute of Economic Research *Is local government fiscally responsible? NZIER report to Local Government New Zealand* (11 September 2012) at 2 and 12.

45 Auckland District Law Society "Submission to the Local Government and Environment Committee on the Local Government Act 2002 Amendment Bill" at [43].

46 Local Government Act 2002 Amendment Bill 2012 (27-2) (select committee report) at 20.

particularly since the case studies below reveal a willingness to use these powers in the interests of politics, rather than the community.

B Interventions in Practice

Past usage of intervention powers may inform speculation as to future uses. While only Christchurch City Council's Crown manager was appointed under the current legislative regime, earlier interventions remain informative. Since the present statute is more permissive of ministerial intervention, it seems likely that similar, if not more stringent, action would have been taken under its provisions. The previous interventions, while few in number, reveal a somewhat inconsistent approach to utilising LGA powers. Furthermore, four out of five have occurred in the last six years, the only previous intervention being in 1999, suggesting ministers are increasingly willing to displace elected councils.

1 Christchurch City Council

In 2012, the Christchurch City Council requested a Crown observer to assist with post-earthquake "governance issues",⁴⁷ following public anger at the chief executive's \$68,000 pay rise and "quite destructive" council leaks and squabbles.⁴⁸ The observer would offer advice, develop a council charter and report to the Minister.⁴⁹ Should issues remain unresolved within "weeks, not months", a commission would be appointed.⁵⁰ The observer's appointment preceded the LGA's 2012 amendments and had no statutory basis. An organisation calling itself 'Council Watch' requested that the Ombudsman and Crown Law investigate the appointment's legality since local government is "constituted separate from central government under an Act of Parliament for a reason".⁵¹ It considered the move a subversion of democracy and the principle that taxation requires representation.⁵²

47 Department of Internal Affairs "Summary of Crown Observer Proposal" <www.beehive.govt.nz>.

48 Ben Heather "Council observer to meet councillors" *The Press* (online ed, Christchurch, 30 January 2012); and Sam Sachdeva "Government observer appointed to council" *The Press* (online ed, Christchurch, 28 January 2012).

49 Nick Smith "Crown Observer to assist ChCh City Council" (press release, 27 January 2012).

50 Sachdeva, above n 48.

51 Council Watch "Crown Law Asked to Investigate Minister's Decision" (press release, 30 January 2012).

52 Council Watch, above n 51.

The observer, Kerry Marshall, identified a "breakdown in trust and the blurring of the line between governance and management", exacerbated by councillors publicly criticising staff members.⁵³ However, progress was made and his contract ended on 1 July 2012.⁵⁴

In July 2013, International Accreditation New Zealand revoked the Christchurch City Council's Building Consent Authority status following prolonged "compliance and performance issues" in terms of speed and quality, prompting the Council to request a Crown manager under the LGA.⁵⁵ The Labour Opposition's attempt to urgently debate the matter in the House was rejected since the outcome of the government's actions was not yet clear.⁵⁶ A Crown manager was appointed to oversee the council's building control functions and ensure it regained accreditation.⁵⁷ His initial review identified a "lack of a clear point of accountability", leadership problems, inadequate resourcing and cultural issues.⁵⁸

The Christchurch City Council reapplied for accreditation in May 2014. Preliminary findings approved the cultural change but cautioning that modifications were "very recent" with some processes only "partially implemented".⁵⁹ By November, most issues had been resolved.⁶⁰ The Crown manager's contract expired on 31 December 2014. His tenure was controversial, running up \$9 million in "unexpected costs" during that period.⁶¹ To the best of the author's knowledge his appointment has been the only intervention under the current legislative regime.

2 *Kaipara District Council*

Problems arose in Kaipara when the Kaipara District Council undertook a public-private partnership rather than paying outright for the Mangawhai wastewater scheme. The Council lacked

53 Rachel Young "Contract for council's Crown observer to end" *The Press* (online ed, Christchurch, 26 June 2012).

54 Sam Sachdeva "Crown observer should stay until election" *The Press* (online ed, Christchurch, 2 June 2012).

55 APNZ "Chch consents crisis: Crown manager to be appointed" *The New Zealand Herald* (online ed, Auckland, 4 July 2013); and "Notice of Intention to Appoint a Crown Manager Pursuant to Section 258D(1)(b)" (11 July 2013) 88 *New Zealand Gazette* 2354.

56 (9 July 2013) 692 NZPD 11774.

57 "Notice of Intention to Appoint a Crown Manager Pursuant to Section 258D(1)(b)", above n 55.

58 Doug Martin *Monthly Progress Report of the Crown manager to the Christchurch City Council* (6 September 2013) at [32]–[33].

59 IANZ *Building Consent Authority Accreditation Assessment Report* (17 November 2014) at 3.

60 At 3.

61 Lois Cairns "Consents rights bid cost council \$9m" *The Press* (online ed, Christchurch, 2 July 2014).

the skills to implement it effectively.⁶² The resulting \$85.2 million debt blowout rendered it New Zealand's most indebted council per capita and ratepayers revolted over proposed 31 per cent rates increases.⁶³

The Kaipara District Council invited the Minister to appoint a Review Team (circumventing the LGA's provisions on appointing a Review Authority). The Review Team's report found the Council unable to rectify problems and saw the Council members as catalysing the rates strike.⁶⁴ A "failure of governance" had broken the community's trust and commissioners were needed to enable a cultural shift.⁶⁵ An Auditor-General's report also found that Kaipara District Council had failed in "its fundamental legal and accountability obligations" and "effectively lost control of a major infrastructure project".⁶⁶ Management was so poor that the council's losses could not be calculated; the best estimate was \$63.3 million.⁶⁷

The Kaipara District Council consented to commissioners being appointed to enforce rates, address illegal rates, review financial strategies and work with the community.⁶⁸ The Kaipara District Council (Validation of Rates and Other Matters) Act 2013 passed with cross-party support, legalising rates the High Court had ruled illegitimate.⁶⁹ The commissioners have subsequently issued summons to 300 rates strikers and added arrears to 200 mortgages.⁷⁰

62 Office of the Auditor-General *Inquiry into the Mangawhai community wastewater scheme* (November 2013) at [2.7] and [4.42].

63 John Hartevelt and Nick Unkovich "Commissioners installed in Kaipara" *The Dominion Post* (online ed, Wellington, 13 August 2012).

64 Greg Gent, Leigh Auton and Peter Tennent *Report of the Kaipara District Council Review Team* (17 August 2012) at [25]–[26], [30]–[31] and [50]–[51]; and Office of the Auditor-General *Inquiry into the Mangawhai community wastewater scheme*, above n 62, at 10.

65 Gent, Auton and Tennent, above n 64, at [2]–[3].

66 Office of the Auditor-General, above n 62, at 9.

67 At 10.

68 "Appointment of Commissioners of the Kaipara District Council" (31 August 2012) 110 *New Zealand Gazette* 3155; and David Carter "Kaipara Council commissioners appointed" (press release, 29 August 2012).

69 Kaipara District Council "Kaipara Commissioners reject MRRA rates exemption" (press release, 4 October 2013); and *Mangawhai Ratepayers' and Residents' Association Inc v Kaipara District Council* [2013] NZHC 2220.

70 Rob Stock "Council targets 500 rates rebels" *The Dominion Post* (online ed, Wellington, 23 November 2014).

3 *Environment Canterbury (Canterbury Regional Council, ECan)*

In September 2009, ten Canterbury mayors complained to the Minister of Local Government of slow consent processes and fractious relationships with ECan.⁷¹ The Minister commissioned a wide-ranging review of ECan's operations, headed by the Rt Hon Wyatt Creech.⁷² Since the DIA was concerned that the high threshold for convening a Review Authority had not been met, this was not a LGA review. Resource Management Act 1991 (RMA) review powers were however exercised.⁷³

The report found major flaws in ECan's water consenting processes, concluding that Canterbury's water management was too complex to entrust to a regional council.⁷⁴ Central government intervention was needed to address this "single most significant issue facing the Canterbury Region".⁷⁵ ECan was only processing 29 per cent of consents on time, the least of 84 authorities, and were 18 years late in implementing a regional plan.⁷⁶ The reviewers also criticised its single-minded focus on environmental protection and "we know best attitude".⁷⁷ This said, they found that ECan was meeting all other LGA obligations; its major problem was its interpretation of the RMA, and it was making progress.⁷⁸

The report recommended a specialist Canterbury Regional Water Authority be created by legislation, since neither the LGA nor RMA's options were workable.⁷⁹ In the interim, a temporary commission should replace ECan's water consent division "as soon as practicable", with elections to be restored by 2013.⁸⁰ Functions other than water consenting were to remain with ECan. By contrast, the DIA recommended against a separate water authority as it reduced the Government's options

71 Environment Canterbury "Mayors' letter to Minister out of left field" (press release, 23 September 2009); and Paul Gorman "Environment Canterbury's work under the gun" *The Dominion Post* (online ed, Wellington 29 October 2009).

72 Nick Smith and Rodney Hide "Govt announces Environment Canterbury Review Team" (press release, 16 November 2009).

73 Department of Internal Affairs "Powers and Process for Ministerial Intervention in a local authority under the Local Government Act 2002" (14 September 2009) at [17]; and Ministry for the Environment "Investigation of Environment Canterbury" (17 September 2009).

74 Wyatt Creech and others *Investigation of the Performance of Environment Canterbury under the Resource Management Act and Local Government Act* (February 2010) at i and 7.

75 At i, 4, and 5.

76 At 6 and 25.

77 At 10 and 26.

78 At 50.

79 At 22 and 11.

80 At iv, v, 12 and 17.

regarding "planned work on local government structure".⁸¹ However, it considered that the LGA's high threshold for intervention was met, despite the Creech report's uncertainty in this regard.⁸²

Rather than worry about meeting intervention criteria, the Government passed the Environment Canterbury (Temporary Commissioners and Improved Water Management) Act 2010 (ECan Act) under urgency, citing Canterbury's need for a quick resolution to the uncertainty.⁸³ Elected members were replaced by appointed commissioners and elections were suspended until 2013 then further postponed until 2016.⁸⁴ The Minister gained full discretion over commissioners' appointments, payment and terms of reference, while regulations could temporarily suspend the RMA's operation in Canterbury.⁸⁵ Part 9 of the RMA, dealing with water conservation, was suspended indefinitely.⁸⁶ The Environment Court's jurisdiction was removed; only points of law could be appealed to the High Court.⁸⁷ The Minister could also permit the suspension of any application without compensation.⁸⁸

Opposition MPs roundly criticised the ECan Act as disenfranchising voters.⁸⁹ Professor Philip Joseph considered the "disproportionate and excessive" suspension of local democracy to have "menacing implications" and was particularly troubled by its extension beyond the three year Parliamentary term.⁹⁰ He also criticised the specific targeting of the Hurunui water conservation order application, the Act's retrospective provisions and the exclusion of the Environment Court as

81 Department of Internal Affairs "Implications of appointing commissioners to Environment Canterbury" (12 February 2010).

82 Creech and others, above n 74, at 18.

83 Department of Internal Affairs "Aide Memoire for Cabinet Paper 'Response to Review of Environment Canterbury'" (5 March 2010) at 3.

84 Environment Canterbury (Temporary Commissioners and Improved Water Management) Act 2010, ss 10 and 22 as amended by the Environment Canterbury (Temporary Commissioners and Improved Water Management) Amendment Act 2013. The review of ECan's governance has now been completed, with the result that there will be a mix of 4–7 elected councillors and 3–6 government appointed councillors for the local government term 2016–2019; see Nick Smith and Louise Upston "Environment Canterbury transition plan announced" (press release, 8 July 2015). See also Environment Canterbury (Transitional Governance Arrangements) Bill 2015 (60-2).

85 Sections 10, 13, 17 and 18.

86 Sections 20, 31 and 46.

87 Sections 46 and 52 to 53.

88 Sections 34 and 44.

89 (30 March 2010) 661 NZPD 9935.

90 Philip Joseph "Environment Canterbury legislation" [2010] NZLJ 193 at 196.

breaching the "fundamentals of a civilised society under the rule of law".⁹¹ Section 31, he said, was a Henry VIII clause, allowing regulations to override primary legislation.⁹²

4 *Rodney District Council*

In 1999 the Rodney District Council imploded. The mayor struggled to control meetings as councillors bandied profanities and openly criticised decisions.⁹³ Standing orders and codes of conduct were ignored.⁹⁴

The Rodney District Council unanimously requested a Review Authority in October 1999.⁹⁵ Following 60 hours of submissions, that authority labelled the Council "clearly dysfunctional" and incapable of the "urgent action ... needed to enable it to become a cohesive political entity".⁹⁶ While financial management was adequate, governance issues required immediate resolution to prevent "adverse social, economic and environmental impacts".⁹⁷

While the authority would have preferred the Council to be independently monitored, the then LGA did not permit this, so it recommended a temporary commission.⁹⁸ Local Government New Zealand and the Auditor-General supported this conclusion.⁹⁹ A commissioner held office from April 2000 until the March 2001 elections. The Local Government (Rodney District Council) Amendment Act 2000, clarifying the commissioner's role, received cross-party support.¹⁰⁰

5 *Critiquing the intervention regime's application*

Previous interventions have been inconsistent. The Christchurch City Council, having failed in a core function (building consents), received only a Crown manager, while ECan's water consenting failures resulted in its dismissal, generating accusations of political manoeuvring. It is also unclear

91 At 193; see Environment Canterbury (Temporary Commissioners and Improved Water Management) Act 2010 Sch 2 Part 2. See also Ann Brower "ECan Act staggering use of legislative power" *The Dominion Post* (online ed, Wellington, 24 May 2010).

92 Joseph, above n 90, at 195.

93 Margaret Evans "The Role of the Mayor in New Zealand" (Master of Social Science Dissertation, University of Waikato, 2003) at 60.

94 At 60–61.

95 Rodney District Council Review Authority *Ministerial Review of the Rodney District Council* (March 2000) at [2.1].

96 At [1.4] and [4.1].

97 At [7.1] and [1.5].

98 At [1.6] and [7.1].

99 Sandra Lee "Commission appointed to Rodney District Council" (press release, 10 April 2000).

100 (2 May 2000) 596 NZPD 2648.

why the Christchurch City Council initially received a Crown observer when bickering between councillors and ratepayers' outrage at officials' pay rises are an ordinary part of democracy.

Ultimately, the intervention regime aims to prevent misuse of subnational power by holding local authorities accountable and allowing the Minister to act if necessary. A local authority's efficacy can be considered using Bovens' framework for assessing accountability.¹⁰¹ Bovens defines accountability as:¹⁰²

... a relationship between an actor and a forum, in which the actor has an obligation to explain and to justify his or her conduct, the forum can pose questions and pass judgment, and the actor may face consequences.

Here, the relevant actor is the local council, the forum is the Minister. This enshrines a hierarchical accountability model repeated in the other regimes examined (a horizontal accountability model might give greater power to assist to other organisations within the local government sphere including Local Government New Zealand).¹⁰³ The only thing lacking is the ability for the council to explain or justify its decisions in the absence of a consultation requirement, but a minister would be well-advised to undertake such consultation anyway.¹⁰⁴

In considering accountability, Bovens suggests analysing three perspectives. The democratic perspective asks whether there is a link to the electorate to legitimise the use of power.¹⁰⁵ The constitutional perspective is critical of any attempt to centralise power as this may lead to corruption.¹⁰⁶ Finally, the learning perspective assesses the capacity of public bodies to learn from their mistakes through feedback and reflection.¹⁰⁷

Both the local council and the Minister, and thus his or her appointees, have democratic legitimacy through local and central government elections respectively. However, the principle of subsidiarity suggests that decisions should be taken as locally as possible, and indeed, local government's

101 Mark Bovens "Analysing and Assessing Accountability: A Conceptual Framework" (2007) 13 European Law Journal 447 at 450.

102 At 450.

103 At 460.

104 See Part VI.H of this article. See also *Durayappah v Fernando* [1967] 2 AC 337 (PC), where the Privy Council determined that natural justice principles should apply when dismissing or replacing a council.

105 Bovens, above 101, at 462–463.

106 At 463.

107 At 463.

proximity to the people arguably grants it greater democratic legitimacy.¹⁰⁸ It also accommodates New Zealand's heterogeneity better than central government.¹⁰⁹

However, going one step further and examining the strength of the democratic link reveals some problems. Local government may not represent diverse interests within constituencies.¹¹⁰ Low election turnouts (approximately 40 per cent) arguably diminish its democratic legitimacy, despite choosing not to vote arguably being a democratic prerogative.¹¹¹ Younger residents overwhelmingly fail to vote (34 per cent of 18–29 year olds voted in the 2001 local government elections compared to over 80 per cent of over 50s).¹¹² That regional councils in particular often appear to be mere providers of technical services rather than an "instrument of democratic will" is perhaps off-putting for voters.¹¹³ However, local democracy is not just about voter turnout, but also residents' rights to stand for election, and the high turnover of local candidates keeps councils sensitive to community concerns.¹¹⁴

Studies also show "little clear evidence that policies and expenditure are influenced by voting at local elections" as non-elected officials are primarily responsible for policy-making and daily administration.¹¹⁵ Councils also tend to act consistently with the government's wishes and override community views, producing little regional variation.¹¹⁶ Thus, local democracy has little impact. Indeed, some have suggested that this continuity of unelected officials is preferable, since those not concerned with re-election can make difficult decisions without fear.¹¹⁷ However, allowing ministers

108 Steven Thomas and P Ali Memon "New Zealand Local Government at the Crossroads? Reflections on the Recent Local Government Reforms" (2007) 25 *Urban Policy and Research* 171 at 172.

109 Mike Reid "Chapter 23: Local Government: The Search for Constitutional Certainty" in C Morris and others (eds) *Restructuring the Constitution* (Springer-Verlag Berlin Heidelberg, London, 2011) at 410.

110 Richard Welch "Legitimacy of rural local government in the new governance environment" (2002) 18 *Journal of Rural Studies* 443 at 451.

111 Local Government New Zealand "Local elections 2013" <www.lgnz.co.nz>.

112 Local Government New Zealand "Voter turnout in New Zealand local authority elections – what's the story?" <www.lgnz.co.nz>.

113 David Walker *Living with ambiguity: The relationship between central and local government* (Joseph Rowntree Foundation, York, 2000) at 8; Welch, above n 110, at 448.

114 Local Government New Zealand, above n 112.

115 Martin Boddy "Central-local Governance Relations: Theory and Practice" (1983) 2 *Political Geography Quarterly* 119 at 124.

116 At 124; And Welch, above n 110, at 452.

117 New Zealand Public Service Association *Empowered to serve: A new relationship for central and local government* (September 2011) at 20.

such wide powers to intervene may actually worsen local government's democracy problems by making it appear to be merely a central government agent.

Considering the constitutional perspective, the intervention regime for local government may be of concern as the Minister could easily remove a council's power and grant it to ministerial appointees over a minor matter. Even appointing a Crown observer or CRT might influence behaviour. Indeed, simply the threat of being taken over by a commission at the Minister's behest might encourage councils to fall into line or at least, cause decision-making to stagnate as authorities constantly look over their shoulders. However, the fact that there have been only five official interventions in 15 years belies this. Then again, four of those interventions occurred in the last five years, suggesting such activity may be increasing.

Regarding the learning perspective, the current local government regime provides for Crown observers to assist councils rather than simply taking over their powers. However, this presupposes that a Crown observer will be used before a Crown manager or commission, whereas, at present, these seem to be used as discrete options. There is also no consultation mechanism to enhance communication between the Minister and council.

C Summary

The current intervention regime for local authorities gives ministers very broad discretion, which is increasingly being used. This raises concerns regarding the potential concentration of power with the Minister, stagnation of local government processes and the appropriateness of replacing locally-elected representatives with ministerial appointees.

III DISTRICT HEALTH BOARDS

The intervention regime for DHBs includes fewer options (three compared to the six for local government), but grants the Minister far wider discretion to intervene, as there need not be a specific problem, merely room for improvement. However, factors such as DHBs being partially minister-appointed arguably legitimise such interventions, despite there being greater scope for misuse.

A The Statutory Regime

The New Zealand Public Health and Disability Act 2000 replaced earlier, more centralised and more commercial models of healthcare provision with 21 (now 20) DHBs.¹¹⁸ Together they spend

¹¹⁸ Sian French, Andrew Old and Judith Healy "Health Care Systems in Transition: New Zealand" (European Observatory on Health Care System, EUR/01/5012667 (NEZ), 2001) at 29–30.

over \$10 billion annually, approximately three-quarters of healthcare funding.¹¹⁹ Wielding budgets of over \$1 billion per annum, some rank among the country's biggest entities.¹²⁰

DHBs comprise up to 11 members.¹²¹ Seven members are elected during local body elections and the Minister of Health has discretion to appoint (and subsequently dismiss) up to four more, as well as the chair and deputy chair.¹²² These appointments must encourage proportional Maori membership; each DHB requires at least two Maori members.¹²³ The Board's elected members assist in "provid[ing] a community voice" regarding health services, one of the Act's stated purposes.¹²⁴

DHBs' objectives and functions include "to improve, promote, and protect the health of people and communities"; to "seek the optimum arrangement" to effectively and efficiently deliver health services; to reduce disparities in health outcomes between population groups and encourage community participation.¹²⁵ In practical terms, they are responsible for New Zealand's primary healthcare and hospitals, making strategic decisions and monitoring finances and service provision.¹²⁶

DHBs are Crown agents, so must comply with government policy as directed by the Minister of Health.¹²⁷ The Ministers of State Services and Finance may also jointly implement specific requirements as part of a "whole of government approach" where necessary to "secure economies or efficiencies" or manage financial risks.¹²⁸

DHBs remain somewhat controversial. Elected representatives' suitability to the complex work board members undertake is frequently questioned.¹²⁹ Elected members need not, and often do not,

119 Office of the Auditor-General *Spending on supplies and services by district health boards: Learning from examples* (September 2010) at 5.

120 Reg Birchfield and Jens Mueller "Ailing DHB Directors – Tony Ryall's health sector tonic" *New Zealand Management* (New Zealand, February 2010) at 30; and Ministry of Health *District Health Board Elections 2013: Information for candidates* (Ministry of Health, Wellington, 2013) at 2.

121 Ministry of Health "District health boards" (14 January 2014) <www.health.govt.nz>.

122 New Zealand Public Health and Disability Act 2000, s 29(1) and sch 3 cl 10(1); and Crown Entities Act 2004, s 36(1).

123 New Zealand Public Health and Disability Act, s 29(4). However, the Crown Entities Act 2004 disqualifies undischarged bankrupts, those prohibited from involvement in companies under various Acts, those subject to property or personal orders, MPs and those who have been imprisoned for two or more years: s 30.

124 New Zealand Public Health and Disability Act, s 3(1)(c).

125 Sections 22 and 23.

126 Ministry of Health, above n 120, at 6–7.

127 Crown Entities Act, ss 7(1)(a) and 103.

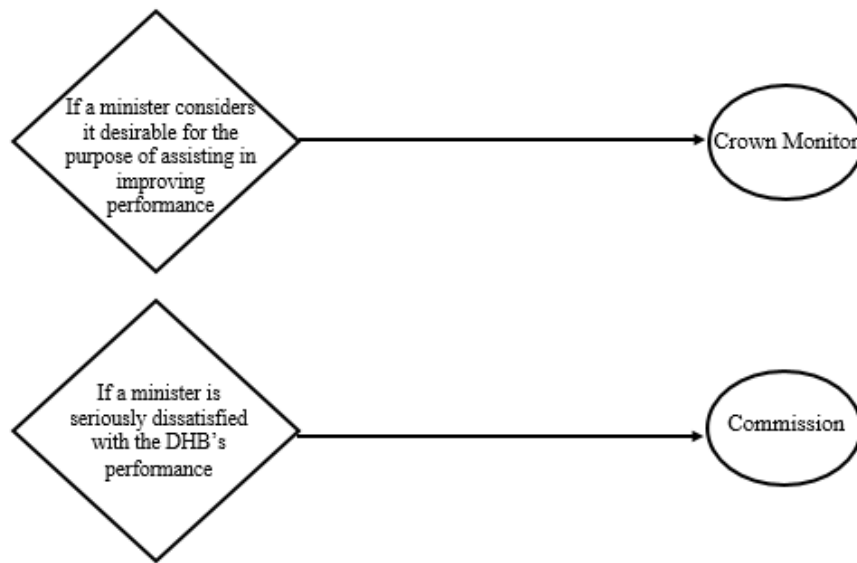
128 Crown Entities Act, s 107.

129 Birchfield and Mueller, above n 120, at 30.

have previous governance or financial experience.¹³⁰ Furthermore, DHBs allocating funding may affect lives, placing added stress on inexperienced members perhaps already struggling with complex medical terminology.¹³¹ Members seeking re-election may be distracted from the DHB's main business by headline-grabbing issues such as fluoride, and often underestimate the time required for DHB matters weekly. Some commentators have also advocated smaller boards to increase decision-making efficiency, while others criticise board members' lack of understanding of DHBs' statutory obligations.¹³²

Given the significance of healthcare provision and DHB budgets, central government has again sought to retain much control, although the intervention regime is far less complex than for local government.

Diagram 2: Ministerial intervention powers for DHBs



The Minister may appoint a Crown monitor, where considered desirable for improving the DHB's performance. There need be no particular problem requiring resolution, as for the Part 10 local

¹³⁰ For example, only three of Whanganui DHB's 11 members have any financial or clinical administrative experience: Whanganui District Health Board "WDHB Board Members" <www.wdhb.org.nz>.

¹³¹ Birchfield and Mueller, above n 120, at 30.

¹³² At 30.

government powers, which only require a potential problem.¹³³ Whilst Crown monitors observe board decisions and processes and advise the Minister on any issues, like local government Crown observers, they must also aid the DHB in understanding government policies and wishes so that board decisions can "appropriately reflect" them, illustrating the greater control central government has over DHBs.¹³⁴ Monitors may attend any DHB meeting and access any Board documentation.¹³⁵

Alternatively, the Minister can sack the board and appoint a commission; he or she need only be seriously dissatisfied with the board's performance and give written notice.¹³⁶ The commission acquires all the DHB's powers, duties and functions and the Minister may dismiss commissioners at will.¹³⁷ Again, there need not be a particular problem, or any prescribed level of severity and the legislation does not reference consultation for any proposed action.

The Minister can also sack the chairperson or deputy if notice is given and the individual and DHB consulted.¹³⁸ Although separate from the statute's other intervention options, this power could influence decision-making, although the chair has no particular additional powers and no casting vote.¹³⁹

Under the Crown Entities Act 2004, the Minister may request any information pertaining to the DHB's operations.¹⁴⁰ Ministers may also issue directions regarding eligibility for funded services or provision of specified services where considered "necessary and expedient".¹⁴¹ These are in addition to the more general powers to direct Crown agents to effect government policy.¹⁴²

B Interventions in Practice

At present, only one DHB has been replaced by a commission, three have received Crown monitors and two have had their chairperson sacked. However, these intervention powers have been used even more inconsistently than for local government. The following examples indicate the use of intervention powers is driven by politics rather than concern for communities' interests.

133 See Part 2.A of this article.

134 New Zealand Public Health and Disability Act, s 30(3).

135 Section 30.

136 Section 31(1).

137 Sections 31(2) and (4).

138 Schedule 3, cl 13.

139 Schedule 3, cl 29(2).

140 Crown Entities Act, s 133.

141 New Zealand Public Health and Disability Act, ss 32(2) and 33(1).

142 Crown Entities Act, ss 103, 114 and 115.

1 Commissions

The only DHB to be replaced by a commission is Hawke's Bay DHB. In February 2008, the Minister of Health considered a \$7.7 million deficit, deteriorating relationships between the Board, himself and staff and the Board's attacking him in the media "to advance the personal agenda of Board members" sufficient grounds for dismissal.¹⁴³ He accused members of driving away clinicians and bullying staff.¹⁴⁴ The Board had a week to respond but failed to sway him. In Parliament, the Minister's biggest concern was not the magnitude of the budget blowout, but the Board's lack of a credible plan to address the problem.¹⁴⁵ He felt a commission was necessary, despite the Board proposing a Crown monitor instead.¹⁴⁶

Initial problems had arisen over contracts worth up to \$50 million which were entered into despite a government-appointed DHB member's significant conflicts of interest.¹⁴⁷ The Director-General of Health compiled a report on the DHB's governance issues, but its release was delayed by the Board successfully gaining an injunction. The Minister opted not to wait two weeks for the report's release, and appointed a commission.¹⁴⁸ The report itself recommended only a Crown monitor, to provide some external input regarding the handling of conflicts of interest.¹⁴⁹ It also identified conflicts between the Board and management, with "a perception ... that the Board had overreached its governance role into operational areas".¹⁵⁰

The dismissal was roundly criticised as "an alarming abuse of political power" against "democratically elected representatives".¹⁵¹ Former Board chair, Kevin Atkinson, considered the Minister's decision a reaction to the Board's refusal "to endorse ... political cronyism and chicanery"

143 "Health Minister fires Hawke's Bay DHB" *The Dominion Post* (online ed, Wellington, 27 February 2008); and Letter from David Cunliffe (Minister of Health) to the chairman of the Hawke's Bay DHB regarding dissatisfaction with the Board's performance (20 February 2008). The actual figure for the deficit was reported differently by different sources. In Parliament, Cunliffe suggested it was either \$8 million, \$11 million or \$12.7 million: (4 March 2008) 645 NZPD 14530. This was despite using the \$7.7 million figure in his letter to the DHB on 20 February 2008. The most widely quoted figure has been used here.

144 (4 March 2008) 645 NZPD 14530.

145 (4 March 2008) 645 NZPD 14530.

146 Letter from Kevin Atkinson (Chairman of Hawkes Bay DHB) to David Cunliffe (Minister for Health) regarding the minister's dissatisfaction with the Board's performance (26 February 2008).

147 Ian Wilson, David Clarke and Michael Wigley *Conflicts of interest and other matters at the Hawke's Bay District Health Board* (Report for the Director-General of Health, 14 March 2008) at [1.2].

148 (4 March 2008) 645 NZPD 14530.

149 Wilson, Clarke and Wigley, above n 146, at [1.20] and [1.21].

150 At [1.28].

151 "Health Minister fires Hawke's Bay DHB" *The Dominion Post* (online ed, Wellington, 27 February 2008).

and insistence on pursuing the judicial review case.¹⁵² The deficit was blamed on underfunding.¹⁵³ Atkinson asserted that some comments had been incorrectly attributed to him and he had not criticised the Minister.¹⁵⁴ Meanwhile, the Minister used parliamentary privilege to call the DHB "a nasty little nest of self-perpetuating, provincial elites who have been propping each other up".¹⁵⁵

The affair prompted an urgent parliamentary debate. Heather Roy argued that Hawke's Bay had one of the country's best DHBs and that the deficit was only 2.5 per cent of its annual funding.¹⁵⁶ Ten other DHBs had more significant deficits than Hawke's Bay. She believed the Minister had been blinded by his belief that the Board had been publicly criticising him, something MPs should be accustomed to, and protested his sacking the Board after only 72 days in office. He responded that the vast majority of the Board had been there since at least 2001.¹⁵⁷ Five local mayors also showed support for the Board and its chair in a joint letter to the Minister.¹⁵⁸ However, journalists privy to communications between key DHB figures reported "a torrid story of an organisation in chaos with fault residing on all sides".¹⁵⁹

Ultimately, the sacked DHB sought a judicial review of the Minister's decision to dismiss them, citing a wide range of grounds, including unreasonableness, irrelevant considerations including the employment relationship between the Board and Chief Executive, improperly conducted surveys of clinicians' opinions and failure to consider "objective measures of Board performance".¹⁶⁰ The Minister was accused of breaching natural justice, predetermining the matter and of bias by allowing the government-appointed board member with significant conflicts of interest far greater opportunities

152 "Health Minister fires Hawke's Bay DHB", above n 143.

153 Letter from Kevin Atkinson to David Cunliffe, above n 146.

154 (4 March 2008) 645 NZPD 14530; Letter from Kevin Atkinson to David Cunliffe, above n 147.

155 *Hawke's Bay Regional Council v Minister of Health (Synopsis of Submissions on Behalf of Plaintiffs)* HC Napier CIV 2008-441-145, 4 November 2008.

156 (4 March 2008) 645 NZPD 14530; and Ministry of Health, above n 120, at 2.

157 (4 March 2008) 645 NZPD 14530.

158 (4 March 2008) 645 NZPD 14530; and "Mayors: We stand by sacked board" (online ed, Hawke's Bay Today, 18 March 2008).

159 John Armstrong "Cabinet's Action Man cops sacking backlash" *The New Zealand Herald* (online ed, Auckland, 1 March 2008).

160 *Hawke's Bay Regional Council v the Minister of Health (Synopsis of Submissions on Behalf of Plaintiffs)*, above n 154, at [66], [84], [87] and [88].

to address criticism than the Board was afforded.¹⁶¹ The court documents also attacked the Minister for interfering with democracy.¹⁶²

The judicial review case was never heard. The new National government in December 2008 reinstated the sacked DHB members, but negotiated with local councils to retain Commissioner Sir John Anderson on the Board.¹⁶³

2 *Crown monitors*

Capital & Coast DHB received a Crown monitor in December 2007, after debt reached \$47.5 million and problems emerged with maternity and child oncological care, tensions between staff and management and preventable deaths of patients on waiting lists.¹⁶⁴ The Health Minister also replaced the chairperson.¹⁶⁵ National, in opposition, criticised this approach as unlikely to be effective but has continued the Crown monitoring into its third term of office.¹⁶⁶

Whanganui DHB received two Crown monitors in April 2008 to address business and governance difficulties.¹⁶⁷ Several "scathing reports" had criticised the board's performance, particularly regarding the appointment of an obstetrician who subsequently improperly performed a series of sterilisations after insufficient board monitoring.¹⁶⁸ Concerns were also raised over a \$7 million deficit, staff shortages and the loss of 166 patient referrals to specialists.¹⁶⁹

161 *Hawke's Bay Regional Council v the Minister of Health (Second Affidavit of Kevin Henry Atkinson)* HC Napier CIV 2008-441-145, 22 August 2008 at [133]–[136]; and *Hawke's Bay Regional Council v Minister of Health (Synopsis of Submissions on Behalf of Plaintiffs)*, above n 155, at [106].

162 Synopsis of Submissions on Behalf of Plaintiffs in the matter of *Hawke's Bay Regional Council v Minister of Health (Synopsis of Submissions on Behalf of Plaintiffs)*, above n 155.

163 "Sacked Hawke's Bay DHB members reinstated" *The Dominion Post* (online ed, Wellington, 11 December 2008).

164 Aaron van Delden "Govt still watching Capital & Coast DHB" (online, NewsWire.co.nz, 21 July 2010); "Temporary CCDHB leader revealed" *The Dominion Post* (online ed, Wellington, 5 September 2013); Office of the Auditor-General *Health sector: Results of the 2010/11 audits* (March 2012) at [2.10]; and "Government sends in monitor and fresh chief to aid troubled health board" *The New Zealand Herald* (online ed, Auckland, 14 December 2007).

165 "Government sends in monitor and fresh chief to aid troubled health board", above n 164.

166 "Government sends in monitor and fresh chief to aid troubled health board", above n 164.

167 David Cunliffe "New appointments to Whanganui DHB" (press release, 23 April 2008).

168 "Minister appoints monitors to assist Whanganui DHB" (23 April 2008) Stuff <www.stuff.co.nz>; and "New monitors appointed at Wanganui" (24 April 2008) Television New Zealand <www.tvnz.co.nz>.

169 Health Committee *c* (8 April 2009) at 2; and "Call for re-think of district health board system" *The Dominion Post* (online ed, Wellington, 2 March 2008).

A Crown monitor was appointed to Southern DHB in May 2010, when it was formed by merging the Southland and Otago DHBs.¹⁷⁰ The two former DHBs had experienced deficits for 10 to 15 years, with annual shortfalls of around \$10 million and looming capital works costs.¹⁷¹ In July 2013, Dr Jan White became the next Crown monitor, with the intention that she would remain in office until the Board ceased to be in deficit.¹⁷²

Other DHBs have previously agreed to board advisors being appointed to perform a similar function to Crown monitors, thus circumventing the legislation.¹⁷³

3 *Sacking DHB chairs*

Otago DHB chairman, Richard Thomson, was sacked in February 2009 by the Health Minister after the DHB's chief information officer defrauded it of \$16.9 million.¹⁷⁴ This was despite the fraud starting before Thomson's term and three former ministers and Otago healthcare professionals supporting his continued tenure.¹⁷⁵ Labour labelled the move "nonsensical" since Thomson had "helped catch the crook",¹⁷⁶ while Thomson felt National was deliberately attacking a known Labour supporter.¹⁷⁷ By comparison, Mary Hackett survived calls for her dismissal as Bay of Plenty DHB's chairperson in 2002 after collecting \$1,125 fees for meetings she did not attend and subsequently lying about it.¹⁷⁸

4 *Critiquing the regime's application*

As is the case for local government interventions, the Minister has very significant discretion to intervene in DHBs. There are no definite thresholds for intervention and no need for a stated problem

170 "Minister names head of new Southern DHB" (30 March 2010) Radio New Zealand <www.radionz.co.nz>.

171 Health Committee *2010/11 Financial review of the Southern District Health Board* (30 May 2012) at 2.

172 Tony Ryall "Southern DHB crown monitor appointment" (press release, 29 July 2013); and Eileen Goodwin "New Crown monitor for health board" *Otago Daily Times* (online ed, Dunedin, 30 July 2013).

173 Cunliffe, above n 167.

174 "Sacked DHB chairman hits out at health minister" *The New Zealand Herald* (online ed, Auckland, 17 February 2009).

175 Liane Topham-Kindly "DHB chair sacking a 'fait accompli'" (3 Feb 2009) *New Zealand Doctor* <www.nzdoctor.co.nz>.

176 "Otago DHB chairman sacked by Minister" (17 February 2009) *Television New Zealand* <www.tvnz.co.nz>; and "Thomson sacking wrong" (17 February 2009) Clare Curran: MP for South Dunedin <www.clarecurran.org.nz>.

177 Clo Francis "Minister sacks Otago DHB boss" *The Dominion Post* (online ed, Wellington, 2 March 2009).

178 New Zealand National Party "Minister Won't Sack Dishonest Board Chair" (press release, 23 July 2002).

to be addressed. Thus, a DHB may be performing comparatively well, but if improvement is possible, a Crown monitor might be appointed.

Such significant discretion may again cause DHB processes to stagnate as Board members second-guess decisions to keep the Minister happy. However, this is arguably less significant than for local government since the Minister need not use intervention processes to coerce DHBs into doing as he or she wishes; the regime is designed to ensure that his or her policies are followed anyway. Furthermore, ministerial intervention powers have rarely been exercised. Since the first DHB elections in 2001, only one commission and three Crown monitors have been appointed, although those Crown monitors have been in place for a very long time.

However, heightened discretion may allow ministers to exercise their intervention powers inappropriately for political gain. The contrast between the Hawke's Bay and Capital & Coast DHBs' experiences is stark. The former had amassed only a fraction of Capital & Coast's debt, and had maintained public confidence while Capital & Coast was much maligned.¹⁷⁹ The Minister argued that the differing responses were because the issues for Capital & Coast were "at the clinical and management level" while those for Hawke's Bay were at the "governance level".¹⁸⁰ However, it seems unlikely management issues alone would cause such a significant debt. Political motivations better explain the disparity. Should a Minister exercise their powers for an improper purpose, the decision can be challenged under judicial review. However, Ministers may avoid scrutiny as Board members may be concerned for their present or future appointments.

It is perhaps arguable that the significant discretion afforded the Minister is entirely appropriate since DHBs are not and should not be as democratic as local councils, given the complexity of their work and their closer relationship with the Crown, emphasised by their partial ministerial appointment. Elected members merely ensure greater public participation than other consultation processes and their overriding obligations are to the Minister and to implement government policy.¹⁸¹

Applying Bovens' three perspectives, the democratic element is again problematic. While ministerial appointments can be traced back to a democratic mandate, the DHB also has democratic legitimacy through its elected members, compromised by ministerial intervention. The principle of subsidiarity also mandates that decisions be made as locally as possible, but DHBs have appointed members and are restricted to primarily implementing ministerial policy and so arguably have a lesser democratic mandate than the Minister. Thus, the democratic aspect is perhaps not as troubling as for local government.

179 Tony Ryall "DHB Sacking: 'Appalling Political Manipulation'" (press release, 27 February 2008).

180 (21 February 2008) 645 NZPD 14474.

181 Robin Gauld "Delivering democracy? An analysis of New Zealand's District Health Board elections, 2001 and 2004" (2005) 29 *Aust Health Rev* 345 at 345–346.

Furthermore, voter turnout for DHB elections is very low, around 40 per cent.¹⁸² Thirty per cent of people polled had no interest in DHB elections.¹⁸³ In addition, there are serious questions about the quality of elected candidates. Despite the complex management minefield that is sitting on a DHB, less than seven per cent of voters reportedly look for management or financial experience in candidates (61 per cent look for experience in healthcare).¹⁸⁴ Thus perhaps it is preferable to allow the Minister significant discretion to intervene.

Regarding the constitutional perspective and the desire to minimise concentrations of power, the ministerial intervention scheme for DHBs scores poorly. The Ministers still exert very significant control and can easily sack elected members and replace them with commissioners they appoint.

In terms of the learning perspective, there is capacity for assisting DHBs in improving performance through Ministry monitoring or the appointment of a Crown monitor. The absence of an obligation on the Minister to consult with DHBs before acting denies them an opportunity for dialogue and improvement. However, since there is no specific statutory provision regarding consultation, as there is for local government, a court might imply natural justice requirements.

C Summary

The Health Minister has very significant discretion to appoint either a Crown monitor or commission, which in Hawke's Bay DHB's case was utilised with questionable motivations. DHBs are partially elected and must implement ministerial policy so have far less democratic legitimacy than local councils, making such interventions perhaps less of an affront to democracy. Power remains heavily concentrated in central government.

IV BOARDS OF TRUSTEES

Entirely elected, boards of trustees operate very differently from local authorities and DHBs, controlling one school among thousands. Their widely-used intervention regime offers an interesting comparator. It is highly discretionary, but Ministry of Education practice has been to use it sparingly and effectively.

A The Statutory Regime

All New Zealand state and state-integrated schools require boards of trustees.¹⁸⁵ Boards of trustees are responsible for governance, the principal for day-to-day management.¹⁸⁶ Trustees have a

182 At 348.

183 At 348–349.

184 At 349.

185 Education Act 1989, s 93.

186 *Hobday v Timaru Girls High School Board of Trustees* [1994] 2 ERNZ 171 (EmpC).

three year term of office.¹⁸⁷ Boards determine "the school's strategic and policy direction", oversee financial, staff and curriculum management and monitor progress against set targets.¹⁸⁸ They have "complete discretion" in management, but must act to ensure every student can "attain his or her highest possible standard in educational achievement".¹⁸⁹

School boards of trustees comprise three to seven parent representatives, the school's principal as chief executive and a staff representative.¹⁹⁰ Parent representatives are elected by parents and adult students but need not themselves be parents or students.¹⁹¹ Trustees may also be co-opted by the Board and schools with full-time students in Year 9 or above require a student representative.¹⁹²

Boards of trustees constitute a special class of Crown entity, subject only to certain specified provisions of the Crown Entities Act 2004, primarily regarding financial matters.¹⁹³ Of note, while Ministers may direct DHBs to effect government policy, boards of trustees are exempt, although may be instructed to give effect to a "whole of government approach".¹⁹⁴

Boards of trustees have yet another different intervention regime, refined in October 2001.¹⁹⁵

187 Education Act, s 105.

188 Ministry of Education "Boards of trustees" <www.minedu.govt.nz>.

189 Education Act, s 75.

190 Section 94.

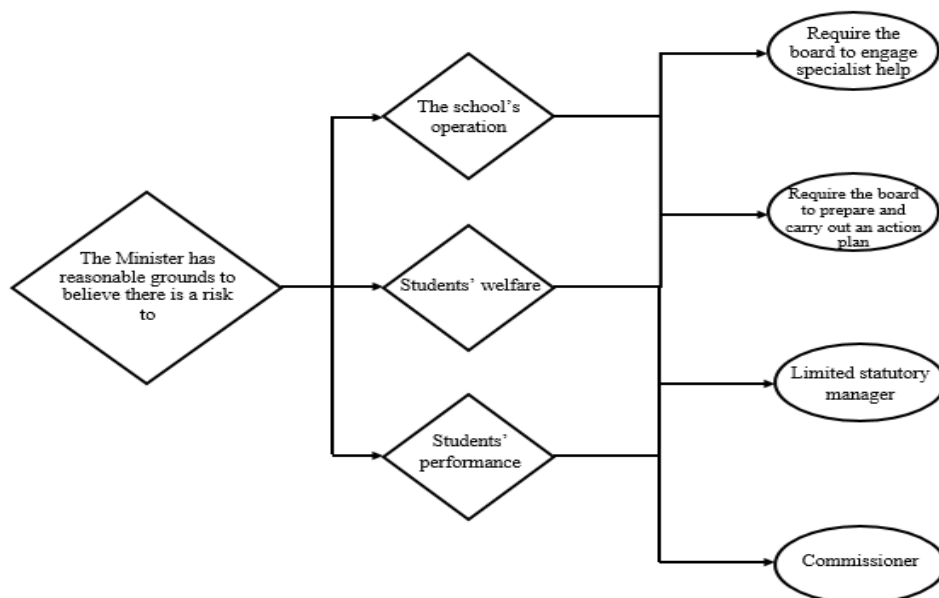
191 Sections 96 and 103.

192 Section 94.

193 Crown Entities Act, s 7 and sch 3.

194 Schedule 3.

195 Ministry of Education *Interventions: Guide for Schools* (Ministry of Education, Wellington, July 2013) at [1].

Diagram 3: Ministerial intervention powers for boards of trustees

Note that the Secretary of Education can also permit interventions, although he or she can only dissolve a board where it has not met in three months, no member remains who can conduct meetings, fewer than three trustees have been elected or there are problems with the election process.¹⁹⁶ The Secretary can also require the board to provide information which the Minister can only do under the Crown Entities Act 2004.¹⁹⁷ The Secretary's powers are unlimited.

Interventions in boards of trustees do resemble items on a menu and may, except for the commission, be utilised concurrently.¹⁹⁸ If the Minister reasonably believes a risk to the school's operation, students' welfare or performance exists, he or she may select any option he or she wishes. This provides significant discretion since this threshold is easily met and there is no specified standard of evidence of a problem's existence. A risk to students' performance in particular seems a low

196 Education Act, s 78N.

197 Section 78I; and Crown Entities Act, s 133.

198 Ministry of Education, above n 194, at [7].

standard. However, the legislative regime also states that the Minister should not intervene "more than necessary".¹⁹⁹

There is no requirement regarding consultation before the Minister intervenes. The wide range of options is more akin to those for local government than DHBs. However, mandating specialist assistance or the creation of an action plan are unique to this regime, ensuring that the board of trustees gets help but its decision-making authority is not affected. For the former, the Minister must identify the individuals or entity the board should engage for assistance.²⁰⁰ A limited statutory manager is similar to a local government Crown manager, in that they take only the powers or duties the Minister vests in them, leaving other functions with the board of trustees. As for DHBs, appointing a commission dissolves the board entirely. Any statutory appointees must work independently of the Ministry, asking only for "general consultative advice".²⁰¹ The Minister must review all interventions annually.²⁰²

Given New Zealand has 2,532 schools, Ministry of Education policy is well-defined, setting out extensively how and when interventions will occur once it is made aware of the issue by Education Review Office reports, the media, public or parental concern.²⁰³ Its documentation emphasises that the "level of evidence-based identified risk will determine the level of intervention applied" and that it will intervene "no more than is necessary" while "promptly and effectively" addressing risks and preventing future problems.²⁰⁴ Risks to schools' operation may include financial, personnel and asset management, inadequate communication with parents and "poor community relations".²⁰⁵ Student welfare issues might include health and safety problems or "high suspension, exclusion and expulsion rates".²⁰⁶ Student performance matters could include staffing problems, low achievement generally and amongst particular groups as well as problems with the curriculum and assessment.²⁰⁷

199 Education Act, s 78I(4).

200 Section 78J.

201 Ministry of Education, above n 194, at [35].

202 Education Act, s 78R.

203 Ministry of Education "Number of Schools" <www.educationcounts.govt.nz>; and Ministry of Education, above n 194, at [11].

204 Ministry of Education, above n 194, at [6].

205 At [13].

206 At [14].

207 At [15].

B Interventions in Practice

The Ministry reports that 2.8 per cent of schools (69) are subject to statutory interventions at any one point in time.²⁰⁸ Research into individual statutory interventions is hindered by the paucity of information, since many are not especially newsworthy. There are also few cases where judicial review is even threatened; it is often avoided by out of court settlements. However, from the information available, it appears that particularly the more serious intervention powers are used discerningly, with Ministry guidance adding a significant gloss to the statutory regime.

1 Commissions

Twenty-two schools currently have commissioners.²⁰⁹

Commissioners were appointed to Te Kura Kaupapa Maori o Whangaroa in Matauri Bay, Northland, in June 2014 and the board dismissed after only a year in office due to problems running board elections, including a failure to publicly advertise, tension over the principal's dismissal a year earlier and subsequent parental backlash, staff being locked out and a plunging roll (down from 103 to 36).²¹⁰ The board of trustees claimed it had been blindsided and likened the intervention "to the imposition of Marshall [sic] Law", subsequently initiating judicial review.²¹¹ However, an out-of-court settlement meant this was abandoned, with the commissioner being replaced, former trustees standing in a new election and a working group established to review intervention processes.²¹²

Moerewa School, also in Northland, received a commission in April 2012 after the school refused to close its senior classes (Years 11 to 13).²¹³ It retained these students without Ministry approval and continued to post substandard NCEA results, with accusations of students copying Wikipedia and work containing multiple handwritings.²¹⁴ However, the former board chair said students had only

208 Ministry of Education *Review of Statutory Interventions in State Schools and State Integrated Schools: Final Report and Recommendations to the Minister of Education* (November 2014) at 6. One school has two separate interventions.

209 At 6.

210 Peter de Graaf "School trustees pledge to fight" *The Northern Advocate* (online ed, Whangarei, 17 June 2014).

211 Dean Nathan "Kura Kaupapa Maori o Whangaroa board review" (14 December 2014) Maori Television <www.maoritelevision.com>.

212 Nathan, above n 210.

213 Education Review Office *Moerewa School Education Review* (25 February 2013).

214 3News "Anger over Moerewa School sacking" (25 April 2012) <www.3news.co.nz>; and (3 May 2012) 679 NZPD 1943.

returned for a farewell powhiri and the school had wide community support.²¹⁵ The Board was granted a new constitution in March 2014, heralding a return to elected representation.²¹⁶

Isla Bank School, in Southland, was appointed a commission in November 2014, after all but two trustees resigned and parents complained that they were being ignored. However, the commissioner believed the intervention would last only "between six and nine months" as there was nothing "seriously broken".²¹⁷

Masterton's Makoura College received a commission in 2008, after the board resigned amid attempts to close the school, which were widely resisted by the community.²¹⁸ 7,510 people signed a petition to save one of only two secular state schools in the city and the only school serving low socio-economic areas.²¹⁹ The school's roll had declined from 425 in 2002 to 220 in 2008, alongside significant staff vacancies.²²⁰ A limited statutory manager in 2005 had already attempted to resolve employment and human resources problems, and a financial adviser was subsequently brought in.²²¹ NCEA pass rates were around 20 per cent lower than nationally.²²² Supporters of the school's continued existence advocated the commissioner's appointment to address the community's lack of confidence in the board.²²³ Since the commissioner's appointment, the roll has increased significantly, as have NCEA pass rates.²²⁴

215 ONE News "Students forced to find new school after classes shut down" (26 April 2012) <www.tvnz.co.nz>; and Willi Jackson "Moerewa decision sets kids up to fail" (27 April 2012) Stuff <www.stuff.co.nz>.

216 "Alternative Constitution for the Board of Trustees of Moerewa School (2013) (13 March 2014) 29 *New Zealand Gazette* 23.

217 Evan Harding "Nothing that can't be fixed' at school" (25 November 2014) Stuff <www.stuff.co.nz>.

218 "Notice of Dissolution of the Board of Trustees of Makoura College (243) and Appointment of a Commissioner" (28 August 2008) 133 *New Zealand Gazette* 3485.

219 Piers Fuller "Makoura College defies the odds" *The Dominion Post* (online ed, Wellington, 22 September 2010).

220 Nathan Crombie "Hometown educator to lead Makoura fight-back" *Wairarapa Times-Age* (online ed, Masterton, 27 November 2008).

221 Tanya Katterns "The school on the wrong side of the tracks" *The Dominion Post* (online ed, Wellington, 9 November 2010).

222 Claire Hills "Close or be Closed: To What Extent Can School Closures and Mergers be Contested and Negotiated?" (PhD Thesis, Massey University, 2013) at 113.

223 At 112 and 114.

224 Fuller, above n 218.

2 *Limited statutory managers*

Forty schools currently have limited statutory managers.²²⁵

Ngaruawahia High School received two limited statutory managers in April 2013 and credits them with preventing its closure.²²⁶ The managers had to address high truancy rates, plunging rolls and a \$170,000 debt. They successfully recouped the deficit, increased attendance rates 20 per cent and tripled Year 9 enrolments.²²⁷

The decile ten Chelsea Primary School in Chatswood received a limited statutory manager after an Education Review Office (ERO) report highlighted an inadequate complaints system and "poor relationships" between board members as preventing progress.²²⁸

Christchurch's Linwood College sought a statutory manager in September 2014 to take over all employment matters to address staffing issues.²²⁹ Control had only returned to the board in June 2012 after issues moving the school following the 22 February 2011 Canterbury earthquake meant it was sacked in March 2011.²³⁰

3 *Critiquing the regime's application*

Regarding Bovens' democratic perspective, there is once again tension between the board of trustees' more local democracy and the Minister's democratic pedigree through national elections. Indeed, a school community is even more localised than a council's constituency, heightening the issue of subsidiarity. Because schools are small communities, their characteristics and interests may well be radically different from that of the general population, so cannot be represented by a nationally elected minister; a local council's electorate is more likely to be statistically similar to the national population. Furthermore, there may be questions over what rights parents have to some level of control over their child's education and whether this is interfered with should a minister replace a board the parents have elected.

Since boards of trustees are elected and operate independently, if a commission is appointed elected members should not necessarily be removed from office. For local councils, where a commission is appointed, representatives remain in office but are powerless to act, enabling them to

225 Ministry of Education, above n 207, at 6.

226 Libby Wilson "Schools get over troubles" (1 January 2015) Stuff <www.stuff.co.nz>.

227 Wilson, above n 226.

228 Katasha McCullough "Statutory manager takes over top primary school" *The New Zealand Herald* (online ed, Auckland, 20 May 2012); and Maryke Penman "Ministry acts on school" (24 May 2012) Stuff <www.stuff.co.nz>.

229 Radio New Zealand "School requests statutory management (9 September 2014) <www.radionz.co.nz>.

230 "Linwood College to get statutory manager" *The Dominion Post* (online ed, Wellington, 9 September 2014).

return to their roles proper should the commission resolve matters efficiently. However, perhaps that this is not the case for boards of trustees reflects their position as Crown entities, as opposed to separate bodies like councils. Furthermore, trustees may have a better understanding of a school's special characteristics such as for Kura Kaupapa Maori. The Ministry has recently suggested the development of separate protocols for these schools.²³¹

Individualised democratic boards of trustees have been controversial since their introduction with the "Tomorrow's Schools" reforms and the Education Act 1989.²³² Previously, schools were managed by "unresponsive, non-participatory, inflexible and inefficient" local education councils overseen by the Department of Education.²³³ Indeed, democratisation of school boards is an international trend.²³⁴ However, the level of devolution, an extreme seen nowhere else in the world, was accused of implementing a more commercial outlook, with schools dependent on keeping "customers" happy and sending their children to the school.²³⁵ Others advocate for a system of everyone voting for a district education board, like a DHB, eliminating redundancies inherent in overlapping board functions.²³⁶ There is also concern to represent the interests of local taxpayers who have no school-age children, since they cannot vote for boards of trustees (although they can stand for election).²³⁷ It is questionable whether ministerial intervention powers help address these issues.

Boards of trustees may not adequately represent their own school community.²³⁸ No research exists as to which parents sit on boards of trustees, but it would appear anecdotally to be primarily those from higher socio-economic groups. This may be due to greater understanding of the system, time or sway among other parents. This may lead to inherent bias away from students from less affluent backgrounds.

231 Ministry of Education, above n 207, at 21.

232 Sally Varnham "'Tomorrow's Schools' today – legal issues in New Zealand education" (2001) 13 *Education and the Law* 77 at 78.

233 At 78.

234 Steven Austen, Pam Swepson and Teresa Marchant "Governance and school boards in non-state schools in Australia" (2001) 26 *Management in Education* 73 at 78.

235 PPTA Executive "Tomorrow's Schools: Yesterday's Mistake?" (paper presented to the PPTA Annual Conference, Wellington, October 2012) at 2.

236 Cathy Wylie "What Can New Zealand Learn from Edmonton?" (New Zealand Council for Educational Research, 2007) at 13; Jody O'Callaghan "Tomorrow's Schools 'lost a decade'" *The Dominion Post* (online ed, Wellington, 4 December 2012); Cathy Wylie "Chapter 11: getting more from school self-management" in John Langley (ed) *Tomorrow's Schools 20 years on...* (Cognition Institute, 2009) at 137; and PPTA Executive, above n 234, at 10.

237 Larry Booi "School boards, school councils and democracy" (2000) 80 *ATA Magazine* 49.

238 At 49.

Many parents also do not vote in board of trustees' elections and fewer still stand. This is problematic since 12,785 parent representatives are needed nationwide.²³⁹ There is a high turnover rate and those standing may lack the knowledge or capacity required to be effective trustees.²⁴⁰ Indeed, 15 per cent of boards of trustees are estimated to be performing poorly.²⁴¹ Such problems have also led to a decline in parental trust in both schools and staff.²⁴²

Regarding the constitutional perspective and the risk of the centralisation of power, this is minimised by commissioners and statutory appointees being independent of the Ministry and Minister. There is thus no scope to exercise direct control over the school, even once an intervention has occurred. However, the commissioner is appointed by the Minister which leaves room for more subtle control.

As noted above, the Minister has significant discretion. Minor events could negatively impact on the performance of a limited number of students and thus pave the way for anything from an action plan to the Board's dismissal. The Ministry also has a very wide range of matters it would consider intervening to address.²⁴³ However, its documentation and practice suggest that it is discerning when utilising each intervention option and tries to go no further than is needed to rectify the particular issue as is required by statute.²⁴⁴ The Ministry also offers professional advice and development, small amounts of additional funding to allow this and "low-level support and advice" before seeking intervention.²⁴⁵

Thus, the Ministry chooses to exercise little coercive power over both boards and appointees, leaving independent boards of trustees to better advocate and lobby for students' interests in a way that the "less democratic" DHBs cannot.²⁴⁶ However, boards may be conscious of the fact that once

239 PPTA Executive, above n 234, at 9; Stuart Middleton "Is the Board of Trustees Model Working?" *Education Review* (online ed, Wellington, August 2013); and Lucy Townend "School trustee boards shrinking" (7 February 2015) Stuff <www.stuff.co.nz>.

240 New Zealand School Trustees Association *School Governance: Board of Trustees Stocktake* (July 2008) at 23.

241 Middleton, above n 238.

242 Cathy Wylie "Tomorrow's Schools after 20 years: can a system of self-managing schools live up to its initial aims?" (2009) 19 *New Zealand Review of Education* 19 at 13.

243 Ministry of Education, above n 194, at [13]–[15].

244 Education Act, s 78I(4); Ministry of Education, *Interventions: Guide for Schools*, above n 194, at [6]; and *Attorney-General v Daniels* [2003] 2 NZLR 742 (CA) at [77]. Compare this to the Canadian position, where under similar legislation, courts have found ministers justified in their interventions even when less invasive options were available: Darryl Hunter and Rod Dolmage "Fiduciary Duty and School Board Takeovers in Canada since 1981: Fumbling Toward a Framework?" (2013) 22 *Education & Law Journal* 153 at 158.

245 Ministry of Education, above n 194, at [16]; and Ministry of Education, above n 207, at 7.

246 Booi, above n 236.

interventions have started, they generally last a long time. A sample of 50 schools which have had commissions revealed 21 lasted for over two years.²⁴⁷

Considering the learning perspective, there is significant scope for the Ministry to work with troubled schools to improve outcomes. The Ministry also has reporting, review and evaluation systems to improve the efficacy of interventions.²⁴⁸ However, more could be done, with the Ministry's review of statutory interventions reporting that 96 per cent of respondents wanted a more "transparent framework for determining and reporting risk in schools" to allow schools to better determine their intervention risks, followed up by early warning meetings.²⁴⁹ Furthermore, 79 per cent also wanted an annual review of intervention procedures, while many thought that specific interventions should be reviewed every three to six months.²⁵⁰

The specialist advice and action plan options for boards of trustees are arguably superior to CRTs or Crown observers for local government, or Crown monitors for DHBs. Both leave control firmly with the Board and allow them better to learn to address problems (although there is potential for abuse given the Ministry determines which experts should be hired). A specialist advisor is not responsible to the Minister as Crown observers or monitors are.²⁵¹ While the action plan must be approved by the Education Secretary, it is produced by the board. These options do not represent close ministerial scrutiny and thus the risk of board processes stagnating for fear of ministerial action is reduced. There is less scope for the Ministry to subtly impose its will in the way a Crown observer may do through access to meetings and key figures. However, this perhaps removes some of the incentive to improve.

The option of a limited statutory manager before a commission is an important one for safeguarding the board's autonomy where possible, as with the Crown manager option for local government. It gives the board of trustees the opportunity to learn from mistakes, before all power is removed. The Ministry appears to be making good use of the limited statutory managers option, there being twice as many of these in place than commissions.²⁵²

There is no requirement that the Minister consult anybody before intervening. However, documents published by the Ministry indicate that it "will begin by scoping the identified and related

247 Ministry of Education "Schools with Commissioners as at 3 June 2013" (Obtained under Official Information Act 1982 Request to the Ministry of Education).

248 Ministry of Education, above n 207, at 16.

249 At 17.

250 At 17–18.

251 Ministry of Education "Key information on Section 78K Statutory Interventions" (3 September 2008) <www.minedu.govt.nz>.

252 Ministry of Education, above n 207, at 6.

issues", through work with the board of trustees, senior management, ERO and teachers' union field officers.²⁵³ They conclude that "experience has shown that a board that has been included" in the processes of identifying risks and intervention options "will be more likely to work co-operatively with the intervention", although "consultation may be brief or limited" where "swift action is needed".²⁵⁴ This appears a useful gloss on the statutory framework and one which a judicial review applicant may claim to have relied upon. Such attempts to work with boards of trustees rather than against them also appear in the context of notification, with the Ministry noting that "common courtesy for optimum success of the intervention requires additional methods of notification" to mere inclusion in the *Gazette*.²⁵⁵ Furthermore, the Ministry recommends that commissioners establish a "representative community advisory group to provide a parent community perspective".²⁵⁶ This is at the commissioner's discretion.²⁵⁷

C Summary

Interventions in boards of trustees, including requiring specialist assistance or appointing a limited statutory manager or commission, are permissible where the Minister reasonably believes there to be a risk to the school's operation or student welfare or performance. This is a wide discretion, but one that is exercised selectively. There are no appointed board members, unlike for DHBs.

The intervention schemes examined can be summarised as follows in Table 1.

253 Ministry of Education, above n 194, at [19].

254 At [23].

255 At [29].

256 At [39].

257 Ministry of Education "Key information on Section 78N(1) Statutory Interventions" (9 December 2013) <www.minedu.govt.nz>.

Table 1: Summary of intervention regimes discussed

	Local Government	DHBs	BOTs
Requiring information	Minister can require information	Minister can require information (Crown Entities Act)	Secretary can require information; Minister can under Crown Entities Act
Requiring a self-written, minister-approved action plan			Require the board to carry out an action plan
Review by a minister appointed team	Crown Review Team		
Specialist help to observe and advise	Crown Observer	Crown Monitor	Specialist assistance
Appointee to take over limited functions	Crown Manager		Limited statutory manager
Dissolution of the body and ministerial appointees take over all functions	Commission	Commission	Commission

V SUGGESTED INTERVENTION PRINCIPLES

This part suggests principles for determining when ministerial interventions are appropriate, which transcend these separate, but similar, regimes. They might thus be utilised whenever intervention in an elected subnational body is contemplated, applying to a greater or lesser extent depending on the body's democratic legitimacy and autonomy. Their purpose is to ensure democratic perspectives are recognised while enabling sub-national bodies to access support and learn for the future.

Ideally, legislation could harmonise these statutes, accounting for each body's democratic credentials and making all intervention options available by using easily-applied criteria. Legislation could for example increase DHBs' limited intervention options. Alternatively, statutory intervention regimes might explicitly contain, within a section or schedule, a list of principles as mandatory relevant considerations for decision-makers rather than relying on judicial interpretation or voluntary use.

However, such legislation is not a government priority. These principles might instead form a gloss on the current vague, highly discretionary statutory regimes. Much might be achieved through informal measures, such as ministerial or departmental policy. Even where intervention options are not provided for in legislation, central government often achieves the same results through informal arrangements; for example, the Christchurch City Council gaining a Crown observer before the LGA permitted one.

Such democracy-centric unifying principles may also rectify disparities in the current legislative regimes; for example, democratically elected local councils need not be consulted before intervention. There is also opportunity for greater cross-pollination, particularly from boards of trustees' experiences, given this regime is the most commonly used and thus most developed.

Principles such as these may help both in avoiding judicial review and identifying where cases may succeed. Applicants might argue that such principles are relevant, or mandatory, considerations.²⁵⁸ Since only the LGA specifically disclaims consultation obligations, courts would be free to imply natural justice requirements into the other regimes.²⁵⁹ Irrationality would inevitably be argued. Despite losing traction, the *Wednesbury* test's high threshold, requiring something "so outrageous ... that no sensible person ... could have arrived at it", remains influential as courts emphasise their traditional role as arbiters of process, not substance.²⁶⁰ If a right to local democracy in New Zealand could be demonstrated, the threshold for unreasonableness might be lowered, but this is far from clear.²⁶¹ The nascent inconsistency or *Guinness* grounds may be applicable. The *Guinness* ground requires only a problem "of a nature and degree" requiring judicial intervention, although its status as a separate ground of review is controversial.²⁶² Inconsistency demands that like cases be treated alike and is, like all substantive grounds, treated warily by judges.²⁶³

A Democracy

The more democratic a body, the higher the threshold should be for intervention as that body better represents the people its decisions affect than the nationally-elected minister does. Thus,

258 *CREEDNZ Inc v Governor-General* [1981] 1 NZLR 172 (CA) at 183, 202 and 211.

259 Local Government Act, s 258N.

260 *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223, [1947] 2 All ER 680 at 683; and Philip A Joseph *Constitutional & Administrative Law in New Zealand* (3rd ed, Thomson Brookers, Wellington, 2007) at 935–936.

261 *Wolf v Minister of Immigration* [2004] NZAR 414 (HC). See Part VII of this article.

262 *R v Panel on Take-overs and Mergers, ex parte Guinness plc* [1990] 1 QB 146 (CA) at 160. See also *Seataste Products Ltd v Director-General of Agriculture and Fisheries* [1995] 2 NZLR 449 (HC) at 461; and *Roach v Kidd* HC Wellington CP 715/91, 12 October 1992 as discussed in *Laws of New Zealand Administrative Law* (online ed) at [108].

263 *Thames Valley Electric Power Board v NZFP Pulp and Paper Ltd* [1994] 2 NZLR 641 (CA) at 654.

ministers should be careful when intervening in local government. Boards of trustees are fully elected and may understand a school's unique character better than the ministry, but the donations they receive do not afford them the same autonomy as councils gain through rates. By contrast, DHBs have minister-appointed members, weakening the imperative to avoid intervention. However, this is not currently reflected in the statutes (see below).

Table 2: Comparison of requirements for Crown observers and commissions

	Local Government	BOTs	DHBs
Crown Observer or equivalent	A significant problem (e.g. significant/persistent failure in statutory duties with probable/ actual adverse consequences for residents) and the minister believes it necessary to monitor/ address the problem	Reasonable grounds to believe there is a risk to the school's operation, students' welfare or performance	The minister considers it desirable for assisting in improving performance
Commission	A significant problem exists + local government is impaired/public health endangered + the authority cannot act + other options do not work	Reasonable grounds to believe there is a risk to the school's operation, students' welfare or performance	The minister is seriously dissatisfied with the DHB's performance

Both the LGA and New Zealand Public Health and Disability Act 2000 provisions on DHBs list increasing democratic representation among their purposes, suggesting it may be a mandatory relevant consideration.²⁶⁴ It may also be implied into the boards of trustees' regime since increasing community participation was key to the relevant reforms. Their democratic identities are a vital component of these bodies and it seems natural that ministers should have to consider the effects of removing them.

²⁶⁴ Local Government Act, s 10; and New Zealand Public Health and Disability Act, s 3.

A more difficult argument might be that individuals have a right to local government democracy, engaging the lower threshold for finding unreasonableness used in *Wolf v Minister of Immigration*. The International Covenant on Civil and Political Rights grants the right to political participation.²⁶⁵ However, the Bill of Rights Act 1990 contains only a right to vote in national elections, not local ones. Section 20 of the Local Electoral Act is headed the right to vote, but the provision itself grants only an, less emotive, "entitlement".²⁶⁶

There is thus a strong case for democracy being a mandatory relevant consideration for ministers. However, in the absence of an explicit right to local democracy, it is unlikely to result in a lower threshold for unreasonableness.

B Subsidiarity

The principle of subsidiarity promotes decisions being made as locally as possible, to account for local conditions. Central government must support local autonomy but also refrain from interfering in local government affairs.²⁶⁷ The principle originated with Aristotle, and was further promulgated by the Catholic Church, which considered it an ethical obligation to avoid concentration of power, and economists arguing it promoted efficiency.²⁶⁸ It also enhances local participation, empowering those who will actually be affected by a decision.²⁶⁹ Subsidiarity is extensively used in European Union law to prevent the collective from interfering in member states' affairs.²⁷⁰

265 Human Rights Commission "Submission to the Local Government and Environment Committee on the Local Government Act 2002 Amendment Bill 2012", at [1.2].

266 Bill of Rights Act 1990, s 12; and Local Electoral Act 2001, s 20.

267 Patrice Ranjault "On the Principle of Subsidiarity" (1992) 2 *Journal of European Social Policy* 49 at 49; and Benjamin F Gussen "Subsidiarity as a constitutional principle in New Zealand (2014) 12 *NZJPI* 123 at 124 and 129. See also Patrick McKinley Brennan "Subsidiarity in the Tradition of Catholic Social Doctrine" in Michelle Evans and Augusto Zimmerman (eds) *Global Perspectives on Subsidiarity* (Springer, New York, 2014) 29.

268 Gussen, above n 266, at 125. See also Brennan, above n 266; and Aurelian Portuese "The Principle of Subsidiarity as a Principle of Economic Efficiency" (2011) 17 *Columbia Journal of European Law* 231 at 232.

269 Michelle Evans and Augusto Zimmerman "Chapter 1: The Global Relevance of Subsidiarity: An Overview" in Michelle Evans and Augusto Zimmerman (eds) *Global Perspectives on Subsidiarity* (Springer, New York, 2014) 1 at 2.

270 Klaus-Dirk Henke "Subsidiarity in the European Union" (2006) 41 *Intereconomics* 240 at 240; and Mike Reid "Exploring the Rhetoric of Partnership: The Dynamics of Local Government Reform in New Zealand" in Jean Drage (ed) *Empowering Communities? Representation and Participation in New Zealand's Local Government* (Victoria University Press, Wellington, 2002) 304 at 307.

New Zealand, by contrast, has not generally adopted the subsidiarity principle and indeed, given the limitations on local bodies' powers, it may appear to have little sway.²⁷¹ However, it was considered as a principle of local government by the Royal Commission on Auckland Governance, whose background papers cited statistical evidence from Italy on the greater efficacy of more localised government.²⁷² The 180 submissions the Commission received on the matter would suggest that, politically at the very least, ministers would be wise to remember that these sub-national bodies are closer to the problems they must address than central government is and should not be displaced lightly.

C Scale of the Problem

Whether the problem's scale warrants intervention should be carefully considered. Since the statutory thresholds for intervention are so easily met, they do not necessarily identify cases where ministers *should* intervene.

At present, problems are treated inconsistently, particularly those involving local government and DHBs. ECan was appointed a commission despite trouble solely with its water consenting function, while the Christchurch City Council's building consent problems warranted only a Crown manager. Arguably, water consenting was more central to ECan's functions than building consenting was to the Christchurch City Council's, but both are vital and potentially disastrous if done poorly. Furthermore, appointing a Crown observer to the Christchurch City Council was questionable, since disagreements between councillors and controversy over salaries are normal in a democracy. The contrast between the treatment of Hawke's Bay DHB and Capital & Coast is also startling. Debt was a major reason for appointing a commission and a Crown manager respectively, yet Capital & Coast's debt equated to 7.4 per cent of its annual budget; Hawke's Bay's 1.8 per cent received a harsher response.²⁷³

Of course, the scale of the entities concerned will affect what constitutes a problem. A \$1 million debt would mean little to a district council, would be a problem for a DHB but disastrous for a board of trustees. For local government, only the Kaipara District Council's \$63 million debt (\$3,474 per

271 Royal Commission on Auckland Governance *Report Volume 4: Research Papers* (March 2009) at 401; and Kevin Guerin *Subsidiarity: Implications for New Zealand* (New Zealand Treasury, Working Paper 02/03, March 2002) at 11–12. Section 48L of the Local Government Act 2002 and s 17 of the Local Government (Auckland Council) Act 2009 to some extent adopt a subsidiarity approach by requiring governing bodies to allocate decision-making responsibility between themselves and local boards on the basis that this decision-making should be done by local boards unless the impact will extend beyond the local board's area or a wider approach is needed. However, this applies only to decision-making regarding non-regulatory activities.

272 Robert Putnam "The Prosperous Community: Social Capital and Public Life" (1993) 13 *The American Prospect* 35–42 cited in Royal Commission on Auckland Governance, above n 270, at 402; and Royal Commission on Auckland Governance *Report Volume 1: Report* (March 2009) at [3.86]–[3.97].

273 Ministry of Health, above n 120, at 2.

capita) has justified a commission's appointment.²⁷⁴ No major council has suffered intervention for financial impropriety, perhaps because larger budgets enable easier redistribution of funds. Alternatively, perhaps they can afford better advice.

Amongst DHBs, Hawke's Bay's \$7.7 million debt (\$50 per capita) resulted in a commission, while debts of \$47.5 million (\$178 per capita), \$7 million (\$112 per capita) and \$10 million (\$33 per capita) meant Crown monitors for Capital & Coast, Whanganui and Southern DHBs respectively. Such disparities prevent discernment of any pattern from past performance and decision-makers risk challenges based on unreasonableness or inconsistency. More data regarding acceptable debt levels for schools is needed to continue this exercise. Acceptable debt levels naturally decrease with the size of the entity.

Regarding local governance issues, the Creech report's authors expressed concern that ECan's problems did not warrant intervention, despite its failure to perform RMA duties.²⁷⁵ Rodney District Council members made meetings impossible before commissioners were appointed. This suggests a very high threshold for intervention, despite any significant problem impairing local government meeting current thresholds.²⁷⁶ The Minister of Health required little evidence of governance concerns before dismissing Hawke's Bay DHB, citing only poor relations with himself and criticism by two clinicians. This is in contrast to the serious governance issues that led to commissions being appointed in the board of trustees examples. The Isla Bank School Board of Trustees was dismissed after all but two members had resigned, Makoura College's board wanted the school shut down against the community's wishes and Moerewa School's board continued running NCEA level classes despite being told to desist. Thus, DHBs would appear to be the aberration here.

Management and governance issues should be distinguished: management being day-to-day operations below board level while governance involves board-level strategic planning.²⁷⁷ Management issues will likely arise through actions of the board's appointed subordinates. Since these individuals do not have the same democratic legitimacy as the board, intervention should arguably require less prompting. However, since the board is only indirectly accountable, such issues should rarely justify its dismissal. The Christchurch City Council's losing consenting accreditation and having a Crown manager appointed appears to be one end of the management spectrum. For governance, the board is directly responsible but caution is needed since it is performing functions as empowered by voters.

274 Per capita calculations made using the most relevant census data.

275 Creech and others, above n 74, at 18.

276 Evans, above n 93, at 60.

277 New Zealand School Trustees Association "What is Governance?" <www.nzsta.org.nz>.

Interventions involving ministerial appointees actively influencing decision-making (Crown observer upwards) should be limited to situations where a body's failings are negatively affecting individuals outside of the electorate which voted for it, although 'negatively affecting' could be interpreted broadly. Local government problems should be nationally important to justify intervention as leaving national issues to central government and local issues to local representatives partially alleviates democratic concerns. ECan's troubles would meet this test, since Canterbury contains 70 per cent of New Zealand's fresh water, as would the Kaipara District Council's, since a \$63 million debt the council cannot service threatens the national purse. Rodney District Council's uncivilised behaviour might be a national issue, bringing local government generally into disrepute. Such a test, although an inexact standard, ensures more consistent, rational and proportionate responses to issues and prevents inappropriate interventions. However, it might leave bigger councils, which act on a larger scale, more prone to intervention, allowing the Minister to obtain their powers by proxy, creating a new democratic concern.

For boards of trustees, the Minister should contemplate active intervention where the wider community is negatively impacted. This might be due to financial problems or major communication breakdowns with the community. Anything harming student welfare could also be said to be impacting their community's wellbeing and would allow intervention.

However, for DHBs, ministerial appointees make up a significant part of these boards and decisions they influence should not be confused with those coming from the people.

D Importance and Centrality of the Function

The importance of the function at issue may legitimise central government intervention. DHBs allocate healthcare resources; boards of trustees manage primary and secondary education. Both are vital; they were traditionally central government functions, whereas issuing building consents and water permits were not. Thus, central government might better justify intervening in DHBs and boards of trustees. Subsidiary functions these bodies perform, such as employment and budget management, might be less likely to legitimise government action.

Alternatively, subnational representatives are elected primarily for their views on healthcare, education, local government and so on, not necessarily for financial skills. Therefore, central government should avoid issues central to the community's choices when it voted, and instead provide support on matters outside representatives' expertise. Thus, arguments under the democracy principle are finely balanced and may depend on the particular circumstances.

E Timing

Timing issues operate in various ways. If problems have existed for a prolonged period, that may justify greater intervention. If matters are escalating quickly, the Minister must decide whether to act rapidly and thus undermine democratic legitimacy by not consulting.

A Minister should also consider how long the body has been in office. A major issue with the Minister of Health's approach to the Hawke's Bay DHB was that it had been in office only seven months. The Minister argued that many representatives had been there since 2001; however, ministers should be wary of removing boards without affording them sufficient time to address inherited problems.

F Complexity

A situation's complexity may operate against democracy. Democratic representation seeks to involve a community voice in important, broad-reaching decisions. However, this often means electing ordinary people based on their ability to represent constituents. While this is fine for setting high level aspirations, elected representatives may be ill-equipped to address any complex technical issues. This perhaps justifies DHBs having ministerial appointees; however, local government and boards of trustees may face similar problems. The teaching profession has expressed concern that trustees are struggling with the technical requirements of the role.²⁷⁸

Thus, a minister contemplating intervention should examine whether the particular problem is within the abilities of elected, non-specialist representatives to resolve, or whether it requires specialist attention. If the latter, specialist assistance mechanisms like Crown observers might be preferable initially.

G Evidence and Transparency

All local government interventions, bar Christchurch's Crown observer, have been preceded by a report into the problems, even when not statutorily required. This requirement was removed in 2012. Indeed, urgency may sometimes obviate the possibility of a report (although the Creech report on ECan took only four weeks). Where possible, a thorough report is surely prudent. Given the severe criticism the Creech report faced because of the authors' connections to the dairy industry, which was a major recipient of ECan's water permits, an independent report, for example from the Auditor-General, is advisable.²⁷⁹

The other regimes examined do not require reports before interventions either, but again, a report could improve transparency.²⁸⁰ The Ministry of Education's documentation regarding board of trustees' interventions suggest that they will always complete a report assessing risks before deciding to intervene, and will consult ERO reports. For DHBs, a report by the Director-General of Health had been completed into Hawke's Bay DHB's alleged management issues, but the Minister of Health did not utilise it in deciding to dismiss the board as it was subject to an injunction. However, the Minister

278 PPTA Executive, above n 234, at 9.

279 (28 February 2013) 687 NZPD 8366.

280 Hunter and Dolmage, above n 243, at 180.

could easily have waited at least to see whether the injunction could be successfully appealed. Intervention in the Whanganui DHB took place after a scathing report.

Thus, the practice of requiring a full report on the situation before intervention is widespread but not universal and may go a long way towards convincing a court (and the voting public) that an intervention is necessary. However, decision-makers need to be aware that once completed, a report's findings might become mandatory relevant considerations.

H Consultation

Under these three regimes, the Minister need not consult anyone, including affected bodies, before intervening, although he or she must give notice. Yet consultation may partially alleviate democratic concerns and the Ministry of Education has found that involving boards of trustees early ensures they work cooperatively with appointees during the intervention. Furthermore, all previous local government interventions, aside from ECan's, gained councils' consent following significant consultation. At the very least, consultation lends credibility to ministerial actions. Consultation directly with the public, with other entities such as Local Government New Zealand (previously a requirement) or the local MP would also be advisable. Consultation also reduces the risk of errors of fact.

Any appointees replacing elected officials should also undertake consultation; this is usually a requirement of their terms of reference. In Kaipara and Canterbury, this is reportedly going well and is an important legitimising factor.²⁸¹ A community advisory group is recommended by the Ministry of Education where a commission takes over a school board.

I Bipartisan support and apolitical decision-making

While political decision-making is inherent in being a minister, ministers exercising intervention powers risk challenge on grounds of pre-determination of an issue, bias or improper purpose if they remove elected bodies, for example, due to a clash of ideologies. These latter two grounds were to be argued in the judicial review of the Minister of Health's decision to remove the Hawke's Bay DHB and the available evidence (and inconsistency with other actions against DHBs) suggests the Minister may have wished to act against those criticising him. Some commentators have argued the same regarding ECan that the National government sought to evict a council prioritising environmental protection over development.²⁸² The appointment of political allies to key roles on review teams and commissions may also be symptomatic. Thus, while Boddy notes increasingly legalistic relations between central and local government in the United Kingdom, in New Zealand politics is making its

281 Sylvia Nissen "Who's in and who's out? Inclusion and exclusion in Canterbury's freshwater governance" (2014) 70 *New Zealand Geographer* 33 at 44.

282 Green Party of Aotearoa New Zealand "Eugenie Sage speaks on the Third reading of Environment Canterbury Bill" (4 March 2013) <www.greens.org.nz>.

presence felt.²⁸³ This should be discouraged, since the majority of these boards have been democratically elected; their members should not be removed lightly.

A good way of demonstrating that decisions are not improperly politically motivated is for them to receive cross-party support. The Rodney, Canterbury and Kaipara interventions required special legislation; statutes for Kaipara and Rodney passed virtually unanimously (Kaipara's by 112 to 9). For Rodney, the Labour Government Minister of Local Government also consulted the electorate's National party representative in preparing the Bill.²⁸⁴ ECan's was far more controversial. While two out of three statutes is insufficient to confirm a trend, bipartisan support would circumvent many democratic and constitutional concerns about interfering in local government and protect against minor interventions. The public might object to all an area's local representatives being ousted on a Minister's whim, or even by 51 per cent of national representatives. However, close to 100 per cent of national representatives overriding 100 per cent of local representatives appears more palatable.

Boards of trustees are entirely democratically elected and so the same issues might arise around national representatives telling 100 per cent of local representatives how to act. However, it would be impractical to determine formally whether there is cross-party support for the appointment of a commission as that happens reasonably frequently. That said, the opposition will undoubtedly voice their concerns if they oppose a move (Moerewa School and Te Kura Kaupapa Maori o Whangaroa appeared frequently at Question Time) or offer ardent support for a commission's appointment (as the local National MP did when Makoura College was threatened with closure).

Tellingly, the decision to sack the Hawke's Bay DHB generated a parliamentary debate and was roundly criticised by all opposition parties. DHBs are subject to far more government control than the other sub-national bodies examined so there may be less need for cross-party support.

J Minimising interventions

The LGA states specifically that commissioners should not be appointed where another option would be effective. A court might find this a sensible relevant, or even mandatory, consideration for other interventions (although its specific inclusion for the commission provisions may mean its implicit exclusion in others). It is already a strict requirement of the intervention regime for boards of trustees and this might be an example of beneficial cross-pollination. To act otherwise would unnecessarily reduce local democracy and financially burden ratepayers. Only for ECan and Hawke's Bay DHB might this previously have been problematic. Only ECan's water consent processes were flawed and these powers alone could have been vested elsewhere. ECan's functions were once distributed amongst 33 different bodies; they could be partially separated again.²⁸⁵ Judging from other

283 Martin Boddy, above n 115, at 135.

284 (4 December 2013) 695 NZPD 15278.

285 Environment Canterbury "Your Council" <www.ecan.govt.nz>.

similar cases, a more appropriate approach for Hawke's Bay would have been to appoint a Crown monitor.

As part of minimising intervention, ministers need also be aware of the other mechanisms available for holding these bodies accountable. Ministerial intervention should not take place where an investigation by an independent body such as the Ombudsman or Auditor-General would suffice and better uphold principles of democracy and avoid centralisation of power.

K Summary

This part has suggested a range of principles for decision-makers to consider regarding ministerial interventions, aimed at protecting both democracy and communities from poorly operating sub-national bodies. Such principles should be applied relative to the body's democratic mandate and incorporate matters specific to the situation at hand, like the scale of the issue and the function in question including its importance and complexity, and matters of general application, for example, transparency and consultation.

VI CONCLUSIONS

Subnational democratic bodies fulfil important roles in public welfare, healthcare and education. Partially or entirely elected, they localise decision-making. However, ministerial intervention powers threaten this; their high levels of discretion encouraging replacement of local bodies with ministerial appointees.

Part II examined increased discretion in the local government intervention regime since the Local Government Act's 2012 amendments, and the increasing prevalence of interventions. These have deprived communities of a more direct form of democracy and risk concentrating powers with the Minister.

Confusion over local government's constitutional position has perhaps encouraged encroachment on its powers. Local government is sometimes described as a "partner" in "a constitutional relationship" and represents an important check on central government.²⁸⁶ However, unlike many states, New Zealand grants it no constitutional protection, despite the LGA arguably being one of New Zealand's most important statutes.²⁸⁷ Furthermore, Part II's case studies suggest local

286 George Jones and John Stewart "Local government: the past, the present and the future" (2012) 27 Public Policy and Administration 346 at 354; Michael Wearne *New Zealand National Integrity System Assessment Additional Paper: Fitness for Purpose – New Zealand Local Government: Securing integrity and good governance within a bipartite constitution* (Transparency International, Berlin, 2013) at 2; and Ian Leigh *Law, Politics and Local Democracy* (Oxford University Press, New York, 2000) at 7–9. See also Kenneth Palmer *Local Authorities Law in New Zealand* (Brookers, Wellington, 2012) at 1077–1079.

287 European Charter of Local Self-Government ETS 122 (opened for signature 15 October 1985, entered into force 1 September 1988), art 2; and Matthew R S Palmer "Using Constitutional Realism to Identify the

government exists very much at central government's whim. The Constitutional Advisory Panel recommended "further conversation" on the central-local government relationship, to determine whether local government requires clear constitutional recognition.²⁸⁸ Hopefully, this prompts further research in the area.

Part III considered DHBs. While local authorities and DHBs are often mentioned in the same breath (and in some regions, comprise the same people), they are very different creatures.²⁸⁹ The fact that DHBs' have appointed members undermines their democratic legitimacy, as do the Minister's significant powers of oversight. This perhaps explains their minimal thresholds for intervention. Whether this will change and healthcare functions become increasingly localised is open to speculation.²⁹⁰

Part IV examined the arrangements for secondary educational institutions. School boards of trustees take subsidiarity to the extreme, with decisions made at an institutional level. The Minister's discretion to intervene is even greater than for DHBs and local authorities, but Ministry policies ensure the system is used sparingly and effectively. Cross-pollination with other regimes is thus to be encouraged.

Having considered these three regimes' successes and difficulties, this article presented a set of principles to encourage better use of ministerial interventions. These are:

- democracy;
- subsidiarity;
- scale of the problem;
- importance and centrality of the function;
- timing;
- complexity;
- evidence and transparency;
- consultation;
- bipartisan support and apolitical decision-making; and
- minimising interventions.

Complete Constitution: Lessons from an Unwritten Constitution" (2006) 54 *The American Journal of Comparative Law* 587 at 608.

288 Constitutional Advisory Panel *New Zealand's Constitution: A Report on a Conversation* (November 2013) at 69.

289 Wanganui District Council "Councillors" <www.wanganui.govt.nz>; and Whanganui District Health Board "Board Members" <www.wdwb.org.nz>.

290 Dennis Shum "Role of District Health Board and Local Government" (LLM Seminar Paper, Victoria University of Wellington, 2010) at 11–18.

Such principles might inform use of intervention powers beforehand, or allow retrospective analysis, through judicial review or otherwise. Alternatively, they may clarify legislation through inclusion as mandatory considerations for decision-makers.

New Zealand's democratic subnational bodies are diverse, as are the accountability regimes which keep them in line. Ministers retain considerable influence over elected representatives, and are increasingly using it. This article has thus promoted a set of principles to better harmonise these regimes and increase their utility as accountability mechanisms while limiting concentration of power with ministers. Without formal recognition of subnational democracy in the New Zealand constitutional system, little else can be done.