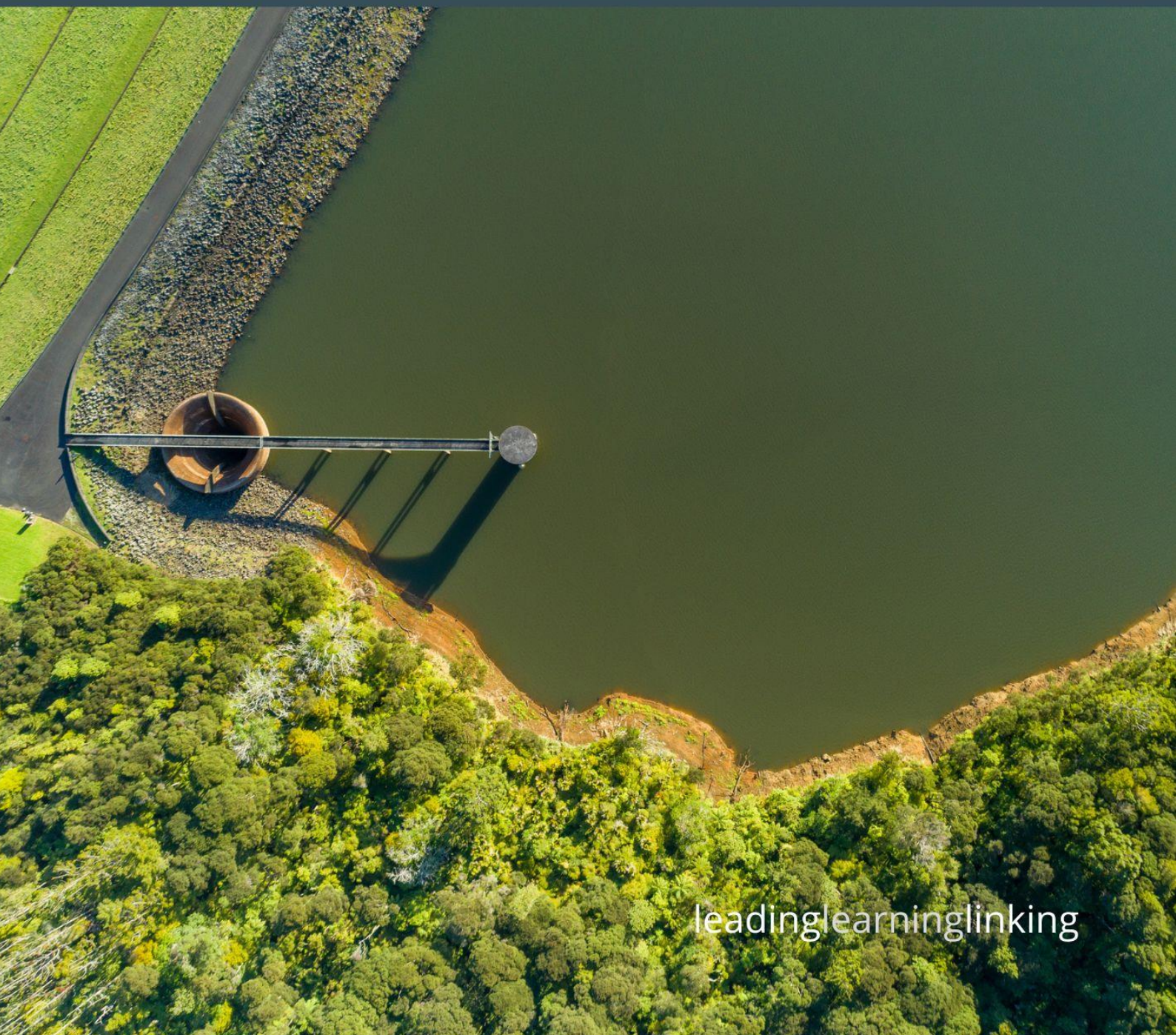
Taituarā
Local Government Professionals Aotearoa

Water Services Legislation Bill

Submission to the Finance and Expenditure Committee

February 2023



List of Recommendations

Taituarā recommends that the Select Committee:

Collaboration

1. amend clause 7 to add "collaboration with other infrastructure providers to promote social, environmental, and economic wellbeing" to the list of functions of water services entities.

Government Policy Statement: Water Services

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

3. amend section 130(2) of the primary legislation by adding a clause that requires the Minister to undertake an analysis of the costs and benefits of the objectives in the GPS: Water.

Drinking water catchment protection

4. amend the proposed new section 231(1) to require the establishment of a controlled drinking water catchment area by public notice.

5. amend the proposed new section 233 by requiring any drinking water catchment compliance notice be provided in writing.

6. amend clause 231(2) to clarify what constitutes long-term control for the purposes of establishing a controlled drinking water catchment area.

Stormwater network management plans

7. amend clause 22 by deleting the proposed section 254(1)(a) and replacing with a new (a) that reads 'a long-term direction for its stormwater network management'.

8. amend clause 22 to clarify the obligation to work with the WSEs on development of the stormwater network management plans and who funds any required work

9. amend clause 22 by extending the proposed section 257 to include obligations to work with public stormwater network operators.

10 . amend clause 22 by deleting the word "monitor" from the proposed 254(1)(a) and replacing it with the words "the means for monitoring".

11. amend clause 22 by adding the words "and regulatory" before the word "requirements" in the proposed section 254(1)(d).

12. amend clause 22 by removing the requirements to disclose non-strategic information set out in the proposed section 254(1)(h).

Service agreements

13. amend clause 22 (the proposed clause 279) to clarify that service agreements are deemed or implied and do not require the signature of both parties.

14. amend the Bill by adding further requirements for communication during engagement on the first/transitional service agreements with those who will be liable to pay WSE charges.

15. amend the Bill to by adding a requirement to notify in writing those who will become liable to pay WSE charges as to where they can find the first/transitional service agreement.

Links to legislated plans and strategies

16. amend clause 7 by adding a provision to the objectives of the entities that requires them to give effect to any lawful plans or strategies required by legislation.

17. amend section 136 of the primary legislation to allow Regional Representation Groups (RRGs) to advise WSEs of plans or strategies required under legislation as part of the Statement of Strategic and Performance Expectations.

18. amend section 154 of the primary legislation that requires the entities to include information in their infrastructure strategies about their intended responses to any plans and strategies that they have been notified of in, as per our proposed amendments to section 136.

19. amend section 157 of the primary legislation to require the entities to explain how they have given effect to plans and strategies advised to them by

regional representative groups under our proposed amendments to section 136.

Funding and charging

20. add a provision which requires water services entities to set charges in a manner consistent with the current funding and pricing plan.

21. amend the Bill to require the entity to levy stormwater charges from establishment date.

22. if the Select Committee rejects recommendation 21 then it clarify that the payment of a WSE levy is an activity for the purposes of the Local Government Act, and clarify how the levy is to be treated in the next long-term plan.

23. include a provision in the Bill ensuring that WSE charges are assessed and invoiced on a separate document .

24. amend clause 22 by changing the proposed section 336 to require the Minister to make a determination as to the amount of collection of costs where this is one of the matters referred to the Minister.

25. delete the proposed new section 342 from clause 22, and delete clause 63 in toto, this making the entities fully rateable.

26. amend clause 22 by adding a provision to the proposed section 319 that both requires the water services entities to contribute to the cost of preparing district valuation rolls, and provides a formula for apportioning costs where parties cannot agree and is based on section 43 of the Rating Valuations Act 1998.

27. amend clause 22 (the proposed section 326) by adding the words "subject to any operative policy that the entity has on the waiver of debt."

28. amend clause (the proposed section 326) by requiring that waiver policies must be published on an internet site maintained by the local authority.

Water industry contributions

29. amend clause 222 (the proposed new section 349) to include a definition of, or procedure for determining when the increased commercial demand trigger has been met.

30. add provisions to the water infrastructure contributions requiring the entities to meet the actual and reasonable costs of the transfer of resource and building consent information.

31. invite officials to provide further advice on the merits of water infrastructure charges being levied solely at the point of connection to a water service.

32. the Bill be amended to provide water services entities with a clear power to refuse to give a developer permission to connect to water services where the developer has not paid the water infrastructure contribution.

33. amend the Bill to provide more guidance regarding which development contributions revenue transfers to the entities and at what point.

34, amend the Bill to provide developers with the right to receive a refund if the entity does not complete significant work it charged for, or the entity substitutes another work that achieve the same purpose.

35. amend clause 22 by adding a power for developers to request formal reconsideration of a water infrastructure contribution. This power to be modelled on section 199A of the Local Government Act.

36. amend clause 22 by adding a power for developers to formally object to a water infrastructure contribution and have that objection heard by an independent commissioner. This power would be modelled on section 199c of the Local Government Act.

37. seek further advice from officials on the transfer of rights and duties under developer agreements.

38. delete the proposed section 348 from clause 22 making the Crown liable for infrastructure connection charges.

Taxation implications

39. amend clause 22 (proposed new section 325) of the primary legislation to clarify that penalties assessed under this section are exempt from GST, and section 14(3)(b) of the Goods and Services Tax Act 1985 should be amended along similar lines.

40. amend sections 5(7B), 5(7C,) 11B(1B) and 11B(1C) respectively of the Goods and Services Tax Act 1985 are deemed a supply for GST purposes.

41. amend section 9 of the Goods and Services Tax Act 1985 by adding a specific time-of-supply rule for water infrastructure contribution charges that are paid in instalments. This rule could be similar to the existing section 9(8).

42. amend the primary legislation to clarify that payments made by water services entities to local government organisations in respect of water service debt do not result in any tax liability for either a local government organisation or an entity under the Income Tax Act 2007 or the Goods and Services Tax Act 1985.

43. amend the primary legislation to clarify that the transfer of unpaid or unaccounted for development contributions and financial contributions revenue from local authorities to water services entities to do not result in any tax liability for either a local government organisation or an entity under the Income Tax Act 2007 nor the Goods and Services Tax Act 1985.

Transfer of undertakings

44. amend clause 40(2), schedule 1 to require that any Ministerial amendments to the allocation schedules submitted under clause 40(1), schedule 1 be forwarded to local authorities for comment within 14 days of receipt.

45. seek advice as to whether the term local government organisation includes council-controlled organisations providing civil construction services.

Long-term plans

46. amend clause 27, schedule six of the Local Government Act to exclude amendments to the 2021/31 long-term plans as indicated on page 46 of the submission. .

47. enact recommendations 55 to 57 of the Taituarā submission on the Water Services Entities Bill relating to the content of financial and infrastructure strategies and the repeal of powers to make non-financial performance measures.

Bylaws

48 authorise officials to further discuss bylaw-related matters with Taituarā.

Powers of Entry

49. amend the legislation by adding a clause modelled on section 171 of the Local Government Act, providing the entities with broader powers to enter property to carry out entity functions.

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Introduction

What is Taituarā?

Taituarā — Local Government Professionals Aotearoa (Taituarā) thanks the Finance and Expenditure Select Committee (the Committee) regarding the Water Services Legislation Bill (the Bill).

Taituarā is an incorporated society of approximately 1,000 members drawn from local government Chief Executives, senior managers, and council staff with significant policy or operational responsibilities. We are an apolitical organisation. Our contribution lies in our wealth of knowledge of the local government sector and of the technical, practical, and managerial implications of legislation.

Our vision is:

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

Our role is to help local authorities perform their roles and responsibilities effectively and efficiently. We have an interest in all aspects of the management of local authorities from the provision of advice to elected members, to service planning and delivery, to supporting activities such as elections and the collection of rates.

We offer the perspectives of a critical adviser.

Taituarā is a managerial organisation as opposed to a political one. Our role therefore is to advise on consequences, and to assist policymakers to design a policy that can be implemented effectively. We participated (and continue to participate) in the reform process to provide these perspectives. As with our work in this area, our submission takes the perspective of a 'critical adviser' in the reform process – supportive of the need for affordable, sustainable three waters services, while aiming to ensure the reforms work effectively.

This, primarily technical Bill, provides the entities with the detailed powers necessary to operate successfully together with limitations and accountabilities on their use. For the most part, our comments are either matters of clarification or in some cases identify what appear to be glitches in drafting, as opposed to challenges or reservations about the headline policy.

Relations with Other Infrastructure Providers

Our consideration of the provisions around the relationship with road-controlling authorities has led us to consider what the Bill says about relationships between the WSEs and other infrastructure providers. Collaboration between infrastructure providers is an enabler of the range of outcomes that the Bill aims to enable, and therefore what we expect of all infrastructure providers.

We were therefore a little surprised that the (now very exhaustive) list of functions of WSSs set out in clause 7 of the Bill says nothing about collaboration with agencies outside the water sector (the equivalent of the proposed new section 13(j). It seems to us that getting the WSEs working collaboratively with road controllers, telecommunications and energy providers is every bit as important as collaboration with overseas water agencies (as the proposed new section 13(k) sets out).

Recommendation: Collaboration with infrastructure providers

1. **That the Select Committee amend clause 7 to add collaboration with other infrastructure providers to promote social, environmental, and economic wellbeing to the list of functions of water services entities.**

Government Policy Statement: Water Services

Our submission in regards to the Water Services Entities Act expressed several concerns about the Government Policy Statement: Water Services (GPS:Water). These concerns included:

1. the scope of the GPS:Water and its potential to provide central government with substantial powers to exert operational control over the WSEs
2. the lack of Government support for implementation of the GPS:Water – including funding support and guidance
3. the lack of a mandatory regulatory/impact analysis on requirements of the GPS:Water.

The present Bill further extends the scope of the GPS:Water to empower the Government to set policy expectations with regard to:

- geographic averaging of residential water supply and residential wastewater service prices across each water services area, and
- redressing historic service inequities to some communities.

We observe that the first of these additional matters provides the Government with what is effectively a power to direct entities to average the pricing of residential services, and the second matter provides Government with some ability to direct where investment is directed.

The first of these items, the geographic averaging, is conducive to the stated rationale for reforms, i.e. ensuring that the cost of water services is affordable for all users over time. The Cabinet paper 'Pricing and charging for three water services' suggests that the historic inequities relate primarily to actual or potential breaches of Article III of Te Tiriti o Waitangi.

We submit that the extension of the role of the GPS provides further support for our earlier submissions that the GPS allows a future Minister to impose a set of priorities upon the WSEs that might, for example, override the policy positions of a Regional Representation Group (RRG) and the constituent territorial authorities. The Minister can set expectations as per clause 130(3) that will significantly direct investment decisions and the associated spending with very little by way of 'skin in the game'. That is to say, the Minister will exercise significant influence over WSE spending decisions yet need not make any financial contribution (or provide other support) towards the achievement of their own objectives.

We renew our recommendation that the Minister should be required to publicly state what support the Government intends to provide those agencies that are required to give effect to the GPS: Water in order to implement it. That would include funding but would not be limited to funding support alone. For example, the Government

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

Recommendation: Support for the Government Policy Statement: Water Services

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

A regulatory case

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

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

Recommendation: Regulatory analysis to support a Government Policy Statement: Water Services

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

Controlled Drinking Water Catchments

Part seven provides WSEs with powers to designate controlled drinking water catchment areas and prepare catchment management plans. Taituarā generally supports this part, noting that enhanced source protection was one of the key findings out of the Inquiry into the Havelock North Contamination Incident. We raise three matters for clarification.

It is unclear how WSEs give notice of a controlled drinking water area.

A WSE establishes a controlled drinking water catchment area by giving notice. The notice is important as it is the means for communicating the affected area or affected catchment to the public. However, it is not clear what is required when the WSE Board gives notice as there is no definition or specified process in this Part, the Bill, or in the primary legislation.

We suspect that the Government's intent was most probably that notice for this purpose would be akin to giving *public* notice (emphasis supplied). This term is defined in the Interpretation Act 2019 as a notice published -

(a) in the *Gazette*; or
(b) in 1 or more newspapers circulating in the area to which the act, matter, or thing relates or in which it arises; or
(c) on an internet site that is administered by or on behalf of the person who must or may publish the notice, and that is publicly available as far as practicable and free of charge.[1]

In a similar vein, the Bill should clearly set out how a compliance notice (as per clause 233) is given. As failure to comply with a direction is a prosecutable offence, a clear evidential chain would be necessary – any direction should be in writing.

<u>Recommendations: Notice requirements for drinking water catchments</u>

4. That the Select Committee amend the proposed new section 231(1) to require the establishment of a controlled drinking water catchment area by public notice.

5. That the Select Committee amend the proposed new section 233 by requiring any compliance notice be provided in writing.

[1] Section 13, Interpretation Act 2019

The term 'long-term control' needs definition.

WSEs can only establish a controlled drinking water area with permission of the landowner or on land that the WSE owns or has long-term control over. The term 'long-term control' is clearly quite critical to whether and where controlled areas can be established.

There is no definition of what constitutes long-term control. The dictionary definition of control is 'the power to influence behaviour or the course of events' and appears to rule out most other forms of land tenure (such as a lease). It is also not clear what long-term means – is it three years, five, ten, fifty etc. This is an issue that may well come up if anyone is issued with a compliance direction as per clause 233, or prosecuted for not meeting the terms of such a direction.

Recommendation: Long-term control

6. That the Select Committee amend the proposed section 231(2) to clarify what constitutes long-term control for the purposes of establishing a controlled drinking water catchment area.

Stormwater

Part nine of the Bill contains provisions relating to the management of stormwater, including requirements to prepare a stormwater management plan and the powers to make stormwater network rules. Assuming that stormwater services are indeed to transfer to the WSEs, then both of these requirements appear sensible. Again the points we raise in this section are more matters of clarification regarding the plan.

The purpose of stormwater management plans is unclear.

Clause 254 sets out the purpose of stormwater management plans. Purpose clauses are a critical part of any legislative provision in that they provide the users of legislation and the Courts with a statement of Parliament's intent, especially in the event that other aspects of the legislation are unclear.

Aspects of clause 254 are far from clear. Specifically the wording of 254(a) "(to provide a water services entity with) *a strategic framework for stormwater network management*". In particular, the term 'strategic framework' has little practical meaning outside the policy community (i.e. those who might write a plan as opposed to those who might want to use one), it is not a term imbued with any particular legal significance or meaning.

A stormwater management plan is meant to be long-term and provide the basis for managing stormwater services. Parliament should say just that.

Recommendation

7. That clause 22 be amended by deleting the proposed section 254(a) and replacing with a new (a) that reads 'a long-term direction for its stormwater network management'.

Responsibilities in developing stormwater network management plans are unclear.

A stormwater network management plan is an important document for the WSE, local authorities, and wider community. We therefore support the obligation as per clause 257(1).

Clause 257(2) places local authorities and transport corridor managers under an obligation to work with the WSE to develop the plan. It is not clear what 'working with' the WSE involves, for example, is this simply a provision that is intended to

require the sharing of information (such as the location of stormwater catchments, treatment methods). To what extent is it envisaged that 'working with' the WSEs also comes with some participation in the decision-making process. The Bill should clarify what the obligation is expected to 'work with' the WSE involves and who will fund the cost of any required work.

Also, clause 257 extends only to local authorities and transport corridor managers. Government departments and defence force installations may also have substantial interests in the stormwater network management plan. It seems to us that these bodies should also be working with the WSEs and others, and that the terms public entity or public stormwater network operator might be more appropriately applied to the entirety of Part 9, subpart 2.

Recommendations

That the Select Committee:

8. amend clause 22 to clarify the obligation to work with the WSEs on development of the stormwater network management plans and who funds any required work

9. amend clause 22 by extending the proposed section 257 to include obligations to work with all stormwater network operators.

Technical amendments are needed to the provisions governing content of stormwater plans.

We generally support the proposed contents of a stormwater management plan. These should provide the WSEs with the necessary understanding of what their stormwater networks are intended to achieve (and why) and provide the community with an overview of the issues, challenges, and requirements with respect to the management of stormwater.

We have several recommendations for minor technical amendments:
Under clause 256(1)(a) – a good plan of any sort should set out the means for measuring progress against the plan, for example a set of performance measures or indicators. The actual reporting against these measures should be taking place in some kind of 'mirror' requirement (such as in the annual reports the WSEs prepare). The Select Committee might add some specific requirements to report on this in the WSEs' annual reports.

We note that clause 251(1)(d) requires the WSEs to set out any statutory requirements. We agree with this as statute can be a key determinant of levels of

service, but we add that regulatory requirements have equivalent effects. Resource consent requirements are an example of this, but not the only such requirements (the requirements set by Taumata Arowai for example).

Clause 254(1)(h) requires inclusion of an overview of the maintenance and operations of each stormwater network. The clause further develops this by mentioning monitoring, maintenance, and operational procedures. Each of these is not a strategic issue; they are more operational matters and not appropriate for inclusion in the plan.

Recommendations

That the Select Committee amend clause 22 by

10. deleting the word "monitor" from the proposed 254(1)(a) and replacing it with the words "the means for monitoring"

11. adding the words "and regulatory" before the word "requirements" in the proposed section 254(1)(d)

12. deleting the requirements to disclose non-strategic information set out in the proposed section 254(1)(h).

Service Agreements

Customer agreements are a key aspect of the reform. The Cabinet paper 'Policy proposals for three waters service delivery legislative settings' suggests that these agreements are necessary to create a legal relationship between WSEs and their customers. This is a necessary step to the removal of bylaw-making powers envisaged elsewhere in the Bill. The intent was that the agreements would extend to all domestic customers and anyone billed for stormwater.

A key element of the Government policy decisions appears to be missing.

One of the important aspects of the policy proposals in 'Policy proposals for three waters service delivery legislative settings' was that:
"These agreements would be 'deemed' or 'implied' in the sense that individual customers would not need to agree to them, though it would be possible for the default agreements to be replaced by bespoke agreements or contracts (if both parties agree". [2]

Deeming is an important practical step. WSEs will serve hundreds of thousands of customers whom it will acquire from local authorities on 1 July 2024.

Unlike an energy or telecommunications network provider, the overwhelming majority of users are already connected to (or benefit from the protection provided by three water services). The WSEs will not have the option of discontinuing supply if the customer does not agree (and even if they did there would be public health and safety considerations), self-supply is not always practicable (or desirable from a public health standpoint). It is logistically impractical for the WSEs to obtain this number of individual agreements.

This Committee has previously considered what is now the Water Services Entities Act. Having received submissions, the Committee will be aware that there is public opposition to three waters reform. If agreements are not deemed, there is a risk, that those opposed to reform might exercise a right of protest by choosing not to agree to the terms of service agreements. That might extend further to, for example, a decision to meter water consumption or, in more misguided ways, oppose treatments such as fluoridation.

The Bill as it stands has not given effect to the intended deemed nature of the agreements. The general requirements are that an agreement must be in place, certain requirements around content, processes for consultation and for publication

[2] Minister of Local Government (2021), Cabinet Paper: Policy proposals for three waters services delivery legislative settings, page 26 (para 124).

of the final agreement. There is no reference to the deemed nature of the agreements.

Consumers do get the opportunity to engage on the customer service agreements with the consultation process as per clause 281 and publication as per clause 282. If the Committee agrees that agreements should be deemed, we suspect that there should be additional provisions around the first customer services agreements to reflect that this is not an agreement in the typical sense.

That first agreement may in fact be the first intimation that some users have that their supplier has changed (from their council to the WSE) and is even more likely to be among the first communications from the WSE. There should be requirements on the WSE to write to all those who are liable to pay charges advising:

- that the WSE will assume responsibility for delivery of three water services on and from the establishment date
- that the WSE has prepared, and is engaging on a customer agreement (including where the user can locate a copy of the proposed agreement and how and where the user might make their views known to the WSE)
- of the terms of the legislation including, but not limited to, that the final agreements are deemed.

Publication of the first agreement should also come with an obligation to communicate with all users advising where the published agreement can be found.

Recommendations: Service agreements

That the Committee:

13. amend clause 22 (the proposed section 279) to clarify that service agreements are deemed or implied and do not require the signature of both parties

14. amend the Bill by adding further requirements for communication during engagement on the first/transitional service agreements with those who will be liable to pay WSE charges

15. amend the Bill by adding a requirement to notify in writing those who will become liable to pay WSE charges as to where they can find the first/transitional service agreement.

Linkages to Resource Management Reform

Water legislation is one of an interconnected set of reforms on the Government's work programme. This includes (among other things): resource management reform, civil defence and emergency management reform, and the ongoing discussion about the future for the local government sector. That should come as no surprise given that water services are an enabler of a broad range of social, economic, environmental, and cultural outcomes.

The linkages between water services reform and the resource management reforms are clear and direct. Effective water services support local authority planning and the relevant housing, urban growth, and land use decisions. WSEs cannot act as a law unto themselves.

The Select Committee's report on what became the Water Services Entities Act recognised this when it said that:
"We consider that the bill should be clear that the entities' role would be to support planning processes as "plan-takers", rather than "plan-makers" (that is, territorial authorities would retain control over planning, and WSEs would give effect to their plans). To address this, we recommend amending clause 11(c) so that the objectives of WSEs include supporting and enabling planning processes, growth, and housing and urban development."[3]

While the amendment is not unhelpful in that it provides the entities with a clear objective, we concur with LGNZ that the primary legislation as well as this Bill signal a need for integration and partnering, but little to actually mandate it. In effect, the Act says that the WSEs should join up but contains little to actually 'direct' with regard to planning for urban development capacity.

It has been suggested that these matters cannot be fully addressed until the resource management reforms are concluded. But here is the thing – obligations under documents such as the National Policy Statement – Urban Development (and other National Policy Statements) are active now. Those councils with obligations to prepare Future Development Strategies have responsibilities to provide plan-enabled and shovel-ready capacity.

The provision of development capacity has substantial cross-party consensus. It appears that the amendments described above were not disputed at Select Committee. We submit that the legislation needs to be more directive in its requirements to support legislatively-required plans and strategies.

[3] Finance and Expenditure Select Committee (2022), *Water Services Entitirs Bill as reported from the Finance and Expenditure Select Committee*, page 4.

The recommendations provided below aim to strengthen these links by:

- adding the role of giving effect to plans and strategies (required under legislation) as one of the objectives listed in clause 7
- enhancing the powers that Regional Representative Groups have to include requirements to give effect to plans and strategies in the Statement of Strategic and Performance Expectations. In effect the group would be able to specify how it expects entities to give effect to those plans and strategies adopted under a legislative requirement. It would sit alongside the equivalent provisions that sets expectations with response to Te Mana o te Wai statements
- the Committee should also consider providing similar legislative backing in the infrastructure strategy. This is important given the role the infrastructure strategy has in linking the statement of expectations with the more detailed and tactical asset management plans required under the primary legislation. This applies equally to the drinking water catchment plans and the stormwater management plans required under this Bill
- and, the planning requirements should be supplemented with a reporting 'mirror' i.e. a statement of, or information regarding, what the entities actually did in order to give effect to these plans and strategies. Again, this would be equivalent to the requirements that apply to Te Mana o te Wai statements.

Recommendations: Linkages with legislative plans and strategies

16. **That the Select Committee amend clause 7 by adding a provision to the objectives of the entities that requires them to give effect to any lawful plans or strategies required by legislation.**

17. **That the Select Committee amend section 136 of the primary legislation to allow Regional Representative Groups to advise WSEs of plans or strategies required under legislation as part of the Statement of Strategic and Performance Expectations.**

18. **That the Select Committee amend section 154 of the primary legislation that requires the entities to include information in their infrastructure strategies about their intended responses to any plans and strategies that they have been notified of, as per our proposed amendments to section 136.**

19. That the Select Committee amend section 157 of the primary legislation to require the entities to explain how they have given effect to plans and strategies advised to them by Regional Representative Groups under our proposed amendments to section 136,

Funding and Charging

Links with the funding and pricing plan

Taituarā submitted in favour of provisions in the Water Services Entities Act that require the WSEs to prepare and adopt a funding and pricing plan. The apparent intent of the plan is to provide a greater level of predictability and certainty for users of water services with regards to funding sources and levels.

It mirrors the financial management requirements that local authorities are placed under with financial strategies and revenue and financing policies. Unlike local authorities however, there is no obligation on a WSE to set charges in accordance with the funding and pricing plan.

Water services are an enabler of a wide variety of economic, social, and environmental outcomes. The way services are charged sends an economic signal about the true cost of providing the services that in turn influences decisions as diverse as opening a business reliant on water supply (such as a food processor or hairdresser), or investments in water-efficient technologies (e.g. half-flush options on toilets, use of grey water for washing trucks etc).

With this in mind the Committee should consider whether there should be a stronger link between the setting of charges and the funding and pricing plan.

Recommendation

20. That the Select Committee add a provision which requires water services entities to set charges in a manner consistent with the current funding and pricing plan.

The interim funding requirements for stormwater appear to require local authorities to act ultra vires.

The provisions governing charging for stormwater are a great deal more prescriptive. In short, from establishment, and for up to three years, the WSEs will levy their constituent territorial authorities for the cost of providing stormwater services in the area. It will then be left to local authorities to determine how to recover that cost from 1 July 2027 when the water entities will charge properties based on the capital value of each. As per the billing provisions, the WSEs may require local authorities to collect the charge until 1 July 2029. Cabinet papers suggest that the WSEs will be required to take account of the lower burden rural properties place on stormwater,

and the generally lower level of benefit they receive. They would do this by creating lower levies for unconnected properties or by designating urban and rural areas.

We have no concerns with the proposals to charge for stormwater using capital value. It is common practice in the sector to charge for this service using property value as a proxy for the degree of benefit.

However, we are unconvinced of the need to defer the WSEs charging their users. Although not explicitly stated in Cabinet papers, it appears that the rationale is that the Commerce Commission should develop input methodologies for determining the cost of stormwater.

In itself this does not seem sufficient reason as local authorities are providing the establishment entities with detailed information about the cost, funding, condition, and intended programmes of work for all services (including stormwater). There is more than sufficient information for the WSEs to charge fairly and transparently. And they will be bound to follow the pricing principles, which include recognition of different levels of service.

The longer-term requirement for the entities is that they rate for stormwater based on the capital value of each rating unit (property). That is a simple funding system based on information that is readily available from the local authorities, and needs no further manipulation or refinement. We see no reason for the interim funding requirement other than pure administrative convenience. If entities are truly not ready to bill for something as simple as this on establishment date, then we would have reservations about the capability and capacity of the entities in toto.

We observe that the Bill as it stands will not permit local authorities to 'pass through' the stormwater levy.

The Bill proposes to prohibit local authorities from placing any information on water services in their 2024 LTPs. While sensible from a plan preparation standpoint, it creates a conflict with the interim funding requirements for stormwater. Local authorities need to show details of the rates they propose to set in their long-term plans, and include the revenue in their forecast financial statements. How then, can a local authority show any rate they set meets the interim funding requirements for stormwater, when they cannot include information about stormwater in the plan?

Second, and as a practical point, the general public has been told that water services are being removed from local authorities. They will call any rate from a local authority into question, especially as stormwater services provided by a third party are not

legally deemed an 'activity' (see section 5 of the Local Government Act 2002).[4] This Bill gives WSEs the power to tax local authorities; it is not clear that the Bill allows local authorities to rate communities to meet the cost of that tax.

Recommendations: Charging for stormwater

21. That the Select Committee amend the Bill to require the water wervices entities to levy stormwater charges from their establishment date.

22. That if the Select Committee rejects recommendation 20, then it clarify that the payment of a levy is an activity for the purposes of the Local Government Act, and clarify how the levy is to be treated in the next long-term plan.

The interim funding arrangements impede the objectives of water reform.

The Bill provides that local authorities will (or at least could) be asked to collect WSE charges for up to five years after their establishment date (i.e. up to 1 July 2029).

The Cabinet Paper 'Pricing and charging for three water services' contains the rationale (such as it is) for the transitional collection arrangements. Paragraph 88 comments thus:
"The National Transition Unit is working towards water services entities being able to charge for three water services from day one (1 July 2024). However, if thus cannot be set up in time, the entities may need to use territorial authority billing systems for billing in the short-term."

In short, it is a matter of convenience and intended to be a short-term measure. Neither the Cabinet paper, nor any since, has made any case that the arrangements cannot be made in time – Cabinet made the decision 'just in case'. To date there have been no discussions with either ourselves, LGNZ, or the sector as to what the WSEs need to in order to do their own charging, and where this sits relative to other priorities such as the transfer of assets and revenues.

In our submission on the Water Services Entities Act, we asserted that the WSEs were created in order to achieve scale and financial capability and that they will have an asset base and financial capacity that many entities in New Zealand could only dream

[4] An activity is a good or service by, or on behalf of a local authority. The form of the WSEs, including the legal separation, makes it clear the WSEs provide the service in their own right. It might be argued this is a grant – however the degree of compulsion in the charge makes it a levy as opposed to a grant.

of. Furthermore, the balancing of transitional matters and the design of funding systems is a matter that the WSE Boards should be taking accountability for, from 'day one'.

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

The Bill creates a set of entities that are intended to have direct relationships with their consumers, with many of the drivers of a commercial provider of network utilities. The interpolation of a third party into something as fundamental as the billing and collection of water charges blurs the accountability of the WSE to the end user/consumer.

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

The Bill allows for the Chief Executive of the WSE and the relevant local authorities to agree upon a collection agreement. The costs might include postal and mail house costs, salaries of those answering queries or other administration such as reading meters. Where agreement cannot be reached, then clause 336 requires that the matter must be referred to the Minister for a binding decision within 28 days.

The provision/provisions most likely to give rise to such a dispute will be those around a fee for collection. The Bill should explicitly provide for an agreement on collection costs, and a requirement that any Ministerial determination provide for collection costs.

Recommendation: Collection of entity charges

23. That the Select Committee include a provision in the Bill ensuring that WSE charges are assessed and invoiced on a separate document.

24. That clause 22 is amended by changing the proposed section 336 to require the Minister to make a determination as to the amount of

collection of costs where this is one of the matters referred to the Minister.

The Bill contains a significant conflict on the rateable status of the WSEs.

Some of our members have noted a significant conflict between aspects of clauses 22 and 63, and between both of these and the Cabinet's policy decisions.

The Cabinet paper 'Pricing and charging for three water services' (at paragraph 160) notes *"the intention of the reforms is that water services are fully funded."*. We entirely agree with this sentiment – as economists tell us if an activity does not meet its true cost we get an economically inefficient outcome (overproduction).

But the Bill does not live up to this expectation. And what appears in the Bill is subject to an internal conflict.

So, clause 22 adds a proposed new section 342, which establishes that the WSEs are not liable for rates in respect of any reticulation that run through property the WSE does not own, and any assets on land the WSE does not own. Clause 63 appears to go even further by adding WSEs to the schedule of non-rateable property in Schedule One of the Local Government Rating Act 2002.

Of the two provisions, it is clause 22 that actually gives effect to what is in the Cabinet paper. We refer the Committee to recommendations 60-62 in the Minute of the Cabinet discussion in relation to the 'Pricing and charging for three waters services'. This reads:

"(That Cabinet)

60 agreed that land transferred to water services entities should become rateable;

61 agreed that water services entities will not be liable for rates on their pipes which run through land that they do not own (an interest in land);

62 agreed that water services entities will not be liable for rates on any assets which they own which are located on land that they do not own" (sic)

This is quite a different treatment from that of energy and telecommunications providers where the network elements of the assets (such as power lines, gap pipes, cellphone towers etc) are all fully rateable.

The Committee might also note that the assets exempted from rates are still rating units (i.e. property for rating purposes) and must be valued and placed on the District Valuation Roll (DVR). In short, local authorities will be required to value assets they do not rate.

Recommendation

25. That the Select Committee delete the proposed new section 342 from clause 22, and delete clause 63 in toto, thus making the entities fully rateable.

The cost of preparing rating information should be shared.

Regardless of the position that the Committee takes on the WSEs collecting their own charges, the WSEs will require (or at least benefit from) the information in the District Valuation Roll (DVR). As it stands, the Bill requires local authorities to subsidise the operating costs of the WSEs by providing tax information *free of charge*.

WSEs will be drawing on DVRs from up to 21 different local authorities, in each WSE area that will cover more than a million properties in most entities and costs millions of dollars. WSEs will be making major use of the information – in most cases the WSE will be collecting more revenue using the DVR than regional councils. Yet unlike regional councils, the WSEs are not currently required to contribute to the preparation of the DVR.

There is a statutory formula for sharing the cost of preparing the DVR where the different parties are unable to agree on an alternative. Section 43 of the Rating Valuations Act 1998 provides for the division of the costs of preparing the DVR based on the proportion of revenue collected using the information.

Recommendation

26. That clause 22 be amended by adding a provision to the proposed section 319 that both requires the Water Services Entities to contribute to the cost of preparing District Valuation Rolls, and provide a formula for apportioning costs where parties cannot agree based on section 43 of the Rating Valuations Act 1998.

Should powers to waive debt be completely unfettered?

Clause 326 allows a WSE Chief Executive to waive payment of any charges that any user faces. Of course, this is a sensible operational power that mirrors the rates remission and postponement powers local authorities enjoy. To take an example, a water user paying a volumetric charge on a property where a leak has occurred might have some of that charge waived if they can demonstrate that there was a leak and they have taken steps to fix it. Waivers might be considered in cases of hardship.

As it stands its completely open to the Chief Executive. We submit that the WSEs are publicly accountable, and are using powers that in some instances are close to a coercive tax (particularly stormwater charging). An unfettered power also leaves the WSE, and the Chief Executive open to 'special pleading' (e.g. I/we are a special case because ….).

We submit that the WSEs should be required to prepare a formal policy on the waiver of debt, and publish this in a similar manner to the funding and pricing plan. This might be modelled on the revision and postponement policy provisions that apply to rates and are set out in sections 109 and 110 of the Local Government Act 2002.

Recommendation

27. That the Select Committee amend clause 22 (the proposed section 326) by adding the words "subject to any operative policy that the entity has on the waiver of debt."

28. That the Select Committee amend clause 22 (the proposed section 326) to require that waiver policies must be published on an internet site maintained by the local Water Services Entity.

Water Infrastructure Contributions

Acknowledgement: Taituarā acknowledges and thanks the members of the Development Contributions Working Group for their assistance with this aspect of the submission.

The Bill has provided water entities with powers to levy Water Infrastructure Contributions (WICs). The model for charging is broadly based on the powers territorial authorities have to assess development contributions to fund the capital costs attributable to development.

One of the challenges that the entities will face is meeting the needs of urban development and housing. Developers should meet an equitable and transparent share of the capital costs of getting water services in place in order to service development.

In preparing our submission we have received an early draft of advice prepared by the Development Contributions Working Group (DCWG - an informal grouping of local authority officers involved in the preparation and administration of development policies). We also provided them with a working draft of our own commentary regarding the Crown exemption and various taxation matters. We generally support what they have said and would like to emphasise the following matters.

Some differences exist between the WICs regime and that which applies to development contributions.

The two models are similar, but not identical. Indeed, the provisions that local authorities operate under are a little more stringent that will be the case with WICs. For example, the DCWG highlights the following differences:

- the methodology for calculating WICs is less rigorous than that for development contributions
- the principles that apply to water services entity funding and charging are less onerous than the equivalent requirements of section 101(3) of the Local Government Act
- the policies giving effect to WICs have a five-year shelf-life, whereas development contributions policies have a three-year life
- there appear to be no equivalents to the objection and reconsideration processes that apply to development contributions
- additionally, the powers to remit development contributions.

Parity would be desirable. Developers will be dealing with two different infrastructure providers (the water services entities and the territorial authorities) under slightly different rules. We observe that developer concern is more likely to arise with the WICs regime, as they have less opportunity to formally challenge charges, less frequent opportunities to be consulted, and so on.

We are uncertain how the proposed new 'increased commercial demand' test will be defined or operate in practice.

One substantial area of difference between WICs and development contributions is that a WIC can be triggered by 'increased commercial demand' that is not the result of development (see the proposed new section 349). It is unclear how this increased commercial demand will be detected and how it will be differentiated from increased volumetric usage captured by the general user charges. This should be made clear in the Bill.

Recommendation

29. That section 349 be amended to include a definition of, or procedure for, determining when the increased commercial demand trigger has been met.

We are uncertain as to how water services entities will access the information necessary to administer WICs.

As with development contributions, the liability to pay WICs arises on certain trigger events in the development cycle, such as the granting of a resource consent or a building consent, or connection to a service (see the proposed new section 349). Local authorities can also elect to assess the development contributions on connection to a network.

Local authorities administer consents under the Resource Management Act 1991 and the Building Act 2004. They have access to the information they need to assess development contributions. Water services entities will be reliant on receipt of this information from the local authorities.

The Bill appears to have been drafted on the assumption that the transfer of information would be of around the same complexity as the transfer of rating information. That is far from the case. A local authority's rating information database

is, by law, locked for the year each 1 July. Consenting information is not static. The DCWG observe that the consenting records of mixed-use developments and large multistage consents with substantial consenting histories will be difficult to transfer effectively without delay, especially because staff familiar with the complexities and history will be within the territorial authority not the water services entity. The water services entities should be meeting the reasonable costs of any information transfer, and the Bill should be amended to require this.

The DCWG have suggested that WICs are levied on infrastructure connection alone. We consider that this suggestion requires further and more detailed consideration as we cannot see any evidence that this was considered in the policy development process.

Recommendations

30. That the Select Committee add provisions to the water infrastructure contributions requiring the water services entities to meet the actual and reasonable costs of the transfer of resource and building consent information.

31. That the Select Committee invite officials to provide further advice on the merits of water infrastructure charges being levied solely at the point of connection to a water service.

Building a policy for multi-regional water services entities will be challenging, especially in an environment where development might occur in a wider variety of places.

The DCWG has raised a second concern about the charging model. The information on development location, timing, and capital progammes is, of necessity, very detailed even in a single catchment or single territorial authority. The DCWG notes

"TA's are recovering DCs based largely on their LTP growth programme, and to a lesser extent their long term infrastructure strategy programme. These programmes are in a form and format that suit the calculation of DCs, and have a level of certainty and continuity. In order to meet the tests set out in s343-344 Entities will need specificity of costs, timing and location of its future programme of works in order to include in cost recovery. But, given the size of the Entities jurisdiction setting a detailed programme based on aggregated capital programmes inherited from TA's will be challenging. The IC regime as proposed may be too prescriptive to allow capture of these large and more uncertain future investments under the proposed IC regime set out in the Bill.

Unmitigated, or in the short term at least, this may lead to significant under-recovery by the Entity of its long-term cost of growth infrastructure programme."

Where growth is largely driven by additions to existing and known catchments the model will work fine. But the intent of new planning rules is to empower a wider range of developments and in a wider range of places. It is therefore very hard to predict exactly where it will occur to a level that will trigger the need for new investment. Without this knowledge it may be hard to for the WSE to commit to investment early enough to ensure all development contributes fairly to the cost. The cost share that is not met by early growth can only come from the ongoing customer payments for water, wastewater and stormwater – from customers who are clearly not causing the need for the investment nor benefit from it.

Water infrastructure charges may lack real enforcement 'teeth'.

Local Government Act provisions give local authorities the right to withhold resource consents or building consents where a development contribution has not been paid. That is open to them as the agency that issues these consents in most parts of New Zealand.

Neither power is open to the water services entities. In practice, the water services entities then only have one tool left to them: refusing to allow connection to services. Yet this is not explicitly authorised, meaning that in practice the water services entities will be left to enforce these as a civil debt.

Recommendation

32. That the water services entities be provided with a clear power to refuse to give a developer permission to connect to water services where the developer has not paid for the water infrastructure contribution.

More clarity is needed regarding the transfer of development contributions revenue to water services entities.

The Bill provides that unpaid or unaccounted for development contributions transfer to the water services entities. We are unclear whether this covers those development contributions that have been invoiced and not yet paid, to the more complex development scenarios such as multi-staged submissions that get invoiced incrementally. The intent was probably more the latter, but we agree that capturing all the potential circumstances will be challenging. What about consents that have been lodged but not granted?

In any case this is a small amount of the total. The Bill does not contain a methodology for calculating the substantive DC revenue amount to be included in a settlement package on establishment, the majority of which will be the DCs collected by territorial authorities in previous years in advance of delivering the infrastructure.

There is also uncertainty as to when revenues are to transfer to the water services entities. Will this be a lump sum based on some estimate of all those expected future payments, paid at establishment? In which case local authorities might well be paying revenue they have not yet received and may be left 'holding the bag' for what is left. This is not just a matter to be determined through the allocation schedule mechanism – some clear principles and limits are required.

Recommendation

33. That the Bill be amended to provide more guidance regarding which development contributions revenue transfers to the water services entities and at what point.

Developers should be afforded the same protections as they have under section 200 of the Local Government Act.

Another one of the differences between WICs and the development contributions provisions is that there is a protection that ensures local authorities deliver on what they assess development contributions. Section 200 of the Local Government Act provides that a refund applies where a consent lapses or if councils do not complete significant work that is included in a charge, or substitute for other work that achieves the same purposes. WICs will be a significant impost on development – we suspect developers would welcome the same protections.

Recommendation

34. That the Bill be amended to provide developers with the right of a developer to receive a refund if the water services entity does not complete significant work it charged for, or the entity substitutes other work that achieves the same purpose.

The Select Committee should consider adding objection and reconsideration processes.

The Local Government Act provides for a process where developers can request that the local authority reconsiders the development contributions, and a process where the developer may formally object to the way a development contribution has been assessed. The former is a less formal and more limited power. Among other things, the latter requires determination by an independent Commissioner (selected from a list maintained by the Department of Internal Affairs).

Both processes are intended to provide a cost-effective and tailored option to seeking a judicial review. WICs will be significant amounts. Reconsideration and objection powers provide for some check and balance on entity decisions in this area. They force a degree of self-scrutiny (reconsiderations) and if needed, independence (objections).

We can see no evidence in Cabinet papers etc that either option was ever considered.

Recommendations

35. That the Select Committee amend clause 22 by adding a power for developers to request formal reconsideration of a water infrastructure contribution. This power should be modelled on section 199A of the Local Government Act.

36. That the Select Committee amend clause 22 by adding a power for developers to formally object to a water infrastructure contribution and have that objection heard by an independent commissioner. This power would be modelled on section 199c of the Local Government Act.

It is not clear how transfer or assignment of developer agreements will be made.

Sections 207A-207F empower developers and territorial authorities to enter into agreements in lieu of development and financial contributions. In essence the developer agrees to provide infrastructure in return for the waiver of either or both contributions. On occasion a cash payment from one or other will occur.

These are common and do extend to water services infrastructure. Other submitters have drawn the Committee's attention to some practical examples of this power in action.

There will be a large number of developer agreements in place on establishment date that will need to transfer to the Water Services Entities, either in whole or in part, and in a robust way. This will include any obligations that councils owe to other parties under these agreements, including the delivery of certain water infrastructure within defined timeframes in some instances, and financial payments from WSEs in others.

How these rights and obligations sitting in private developer agreements are to be transferred is not clear in the Bill, and we expect this will be a complex and time-consuming task, the scale of which may not be foreseen. This will require more detailed discussion with the sector.

Recommendation

37. That the Committee seek further advice from officials on the transfer of rights and duties under developer agreements.

The Crown's exempting itself from infrastructure connection charges is an unwelcome subsidy from the water user.

We agree with LGNZ that:
"Under clause 348, the Crown is exempt from paying water infrastructure contribution charges. This is a concern, as Crown agencies are often major developers and can exacerbate issues that are the responsibility of the WSE (or local council). Such an exemption should be something that the Crown applies for and needs to justify. This application should reference the benefits derived for a particular community from such a Crown project – and those benefits need to be sufficient to justify the associated water services-related costs that will be borne by all consumers across the WSE service area."

Recommendation

38. That the proposed section 348 be deleted from clause 22 making the Crown liable for infrastructure connection charges.

Taxation

As part of our preparing this submission we asked the taxation arm of PwC to review the tax provisions contained in the Bill, and to identify any other tax consequences. This section draws on that advice.

Three of the matters we raise are directly relevant to local authorities, the other two relate more to the ongoing operation of the water services entities. All of the matters raised seek clarification of the application of the Goods and Service Tax (GST).

The status of penalty charges needs clarification for GST purposes.

Clause 22 of the Bill replaces Part 6 of the primary legislation. The proposed new section 325 provides that a penalty may be imposed for failure to pay water services charges and fees. The Bill does not address the GST status of this penalty.

Under current legislation, water services are included within the remit of territorial authorities, with rates being levied, including for water services under the Local Government (Rating) Act 2002. Pursuant to section 14(3)(b) of the GST Act, a penalty imposed on unpaid rates is an exempt supply for GST purposes.

If the intention is that water service charges are akin to a rate (which we understand is the case – especially for stormwater), then we submit that penalties imposed under the proposed section 325 of the primary legislation should be exempt from GST and that section 14(3)(b) of the GST Act should be amended to clarify this accordingly.

Similarly the GST status of water infrastructure contributions is unclear.

This is a matter that has little direct consequence on local authorities but has a bearing on the ongoing operation of the water services entities.

Clause 22 includes the proposed sections 343 to 347 of the primary legislation and sets out the basis and principles etc. in relation to water infrastructure contribution charges.

The proposed section 349 sets out when an entity may invoice for water infrastructure contribution charges. Proposed section 350 provides that post 1 July 2024, a territorial authority may no longer charge or use development contributions under the Local Government Act or financial contributions under the Resource Management Act 1991 to fund infrastructure or other assets that the entity holds.

The impact of these proposed sections is that the water services entities will have powers to invoice for water infrastructure contribution charges. Currently, this is something that territorial authorities do and there are specific provisions within the GST Act that deal with the GST implications - sections 5(7B) and 5(7C) of the GST Act deem supplies to take place for GST purposes, whilst sections 11B(1B) and 11B(1C) of the GST Act treat supplies made under section 5(7B) and 5(7C) as zero-rated if the contribution is made by a registered person and consists of land[5] and if both the supplier and local authority are GST registered[6].

In order to ensure consistency with the current regime, similar provisions as those contained within section 5(7B), 5(7C,) 11B(1B) and 11B(1C) respectively of the GST Act should also apply to water infrastructure contribution charges imposed by water services entities.

We submit that sections 5(7B), 5(7C,) 11B(1B), and 11B(1C) respectively of the GST Act should be amended so that they apply equally to water infrastructure contribution charges levied under the primary legislation.

What is the time of supply on water infrastructure contributions paid by instalment?

This is also a matter that relates more to the ongoing operation of the water services entities than to local authorities themselves.

The proposed section 349 of the primary legislation sets out that water infrastructure contribution charges may be repaid over quarterly or annual instalments (of no greater than 50 years) and that the entity is able to charge interest[7] on any unpaid balance.

From a GST perspective, there is a potential time-of-supply issue. Where the water infrastructure contribution charge is invoiced, but paid over an extended period, there is a risk that GST would be payable upfront (on the issuance of the invoice) and the water service entity would not necessarily have received sufficient funds to pay the full amount of the GST output tax to Inland Revenue. In this regard, it would be preferable if a specific time of supply provision was inserted into section 9(3) or potentially a new subsection created within section 9 of the GST Act that deals with this situation specifically (much like section 9(8) of the GST Act has specific time of supply rules for rates).

[5] Section 11B(1B) of the GST Act.

[6] Section 11B(1C) of the GST Act.

[7] The interest charge should be an exempt supply for GST purposes pursuant to section 14(1)(a) of the GST Act.

We submit that a specific time-of-supply rule similar to section 9(8) of the GST Act should be included within section 9 of the GST Act to deal with water infrastructure contribution charges that are paid in instalments.

Payments for water services entities' debt should not be liable for GST (and Income Tax).

Schedule 1 of the Bill proposes to insert a new Schedule 1, Part 2 into the primary legislation. Clause 54 of this proposed new Part 2 provides that:

> *"A water services entity must pay each territorial authority whose district is included in its service area an amount determined by the chief executive of the department that is equivalent to the total debt owed by that territorial authority in respect of any water services infrastructure wholly or partly used in the provision of water services and transferred to the entity under this Act".*

The Bill is silent as to how this payment would be treated from a GST perspective.

We submit that this payment should also be specifically included in the Schedule 1, Subpart 5 - clause 34 of the primary legislation such that it is explicitly stated within clause 34 that payments made under clause 54 of Part 2 of Schedule 1 of the primary legislation do not result in any tax liability for either a local government organisation or an entity under the Income Tax Act 2007 nor the Goods and Services Tax Act 1985.

The transfer of unpaid or unaccounted for development contributions or financial contributions should also be exempt from GST (and Income Tax).

Schedule 1 of the Bill proposes to insert a new Part 2 into Schedule 1 of the Water Services Entities Act 2022 (WSEA). Clause 62(1) of proposed Part 2 requires that:

> *"on the establishment date, a territorial authority must transfer to a relevant water services entity any unpaid or unaccounted for development contribution or financial contribution (or any part of a development contribution or financial contribution) that was required by the territorial authority in respect of the development of its water services infrastructure".*

The Bill is silent as to how this payment would be treated from a GST perspective.

We submit that this payment should be specifically included in the Schedule 1, Subpart 5 - Clause 34 of the primary legislation, such that it is explicitly stated within Clause 34 that payments made under Clause 62 of Part 2 of Schedule 1 of the Water Services Entities Act 2022 (WSEA) do not result in any tax liability for either a local government organisation or an entity under the Goods and Services Tax Act 1985 or the Income Tax Act 2007.

Recommendations: Taxation implications

39. That the Select Committee amend clause 22 (proposed new section 325) of the primary legislation to clarify that penalties assessed under this section are exempt from GST, and section 14(3)(b) of the Goods and Services Tax Act 1985 should be amended along similar lines.

40. That the Select Committee amend sections 5(7B), 5(7C,) 11B(1B) and 11B(1C) respectively of the Goods and Services Tax Act 1985 are deemed a supply for GST purposes.

41. That the Select Committee amend section 9 of the Goods and Services Tax Act 1985 by adding a specific time-of-supply rule for water infrastructure contribution charges that are paid in instalments. This rule could be similar to the existing section 9(8).

42. That the Select Committee amend the primary legislation to clarify that payments made by water services entities to local government organisations in respect of water service entity debt does not result in any tax liability for either a local government organisation or an entity under the Income Tax Act 2007 nor the Goods and Services Tax Act 1985.

43. That the Select Committee amend the primary legislation to clarify that the transfer of unpaid or unaccounted for development contributions and financial contributions revenue from local authorities to water services entities do not result in any tax liability for either a local government organisation or an entity under the Income Tax Act 2007 or the Goods and Services Tax Act 1985.

Transfers of Water Services Undertakings

The transfer process is critical to the overall success of the reform process. The transfer of assets revenue and debts resulting from the reform process will determine the long-run service and financial sustainability of the WSEs, and of the legacy left to local authorities. To take one example, the National Transition Unit is currently considering a number of different options for the transfer of debt, prior to entering discussions with each local authority.

Transfers of staff will go to whether the WSEs have the capability to deliver on the objectives of reform, and whether and where local authorities have capability gaps.

The Bill affords the Minister too great a level of discretion in making amendments to the allocation schedules.

The WSE Chief Executives are charged with the responsibility of developing an allocation schedule (a list of what will transfer to the WSEs). The current Bill adds two further obligations when preparing a schedule.

The first is that the establishment Chief Executive must consult with local authorities and other local government organisations (such as Wellington Water) when developing the schedule, including the supply of a draft. Obviously we support that provision as making explicit what a prudent Chief Executive would be doing anyway.

We are unconvinced of the necessity for the second, which is essentially that the Minister has to approve each allocation schedule. The Minister appears to have quite broad discretion in making approval, including the power to amend the schedule as they see fit. The only constraints are the limitations contained elsewhere in the schedule – for example, the definition of a mixed-use asset.

There is also no requirement as to any obligation to engage with the WSE or the constituent local authorities when making the decision. The allocation schedule is a fundamental for the WSEs and local authorities. With debts particularly, a Ministerial judgement now might create a long-term fiscal problem for local authorities. If a Minister intends to impose their own judgement on what gives effect to reforms and what is equitable, they should be expose that judgement to the local authorities and give them a chance to comment.

Recommendation

44. That the Select Committee amend clause 40(2), schedule 1 to require that any Ministerial amendments to the allocation schedules submitted under clause 40(1), schedule 1 be forwarded to local authorities for comment within 14 days of receipt.

Has water legislation inadvertently captured non-water services organisations?

The Bill adds six provisions that specifically relate to the transfer of assets owned by local government organisations. In the context of water legislation, the definition of local government organisation includes any local authority, council-controlled organisation (or subsidiary of a council-controlled organisation).

Closely reading the new transfer provisions (clauses 41 to 47, schedule 1 of the Bill) has raised an issue for us. There are a number of council-controlled organisations that operate in the civil construction business.[8] While often these are the historical legacy of roading reforms in the 1980s and for the most part, operate as road construction and maintenance businesses, it is common for them also to provide reticulation services such as renewals.

As council-controlled organisations there appears to be a prima facie case that these entities have been captured in the definition of local government organisation. We suspect that the intent related to the ownership of water services and the management of these services, and not the actual construction and maintenance activities. That would be consistent with Government policy in other spheres (such as transport) that support some degree of separation between the policy and management of infrastructure from the physical delivery of work programmes.

The definition of local government organisation was, in our view, intended to capture the asset-managing and asset-owning organisations (for example, Watercare and Wellington Water) and not those delivering civil construction services.

[8] Some examples include Citycare (owned by Christchurch Cty Counncil) and Whitestone Contracting (owned by Waitaki District Council).

Recommendation

45. That the Select Committee seek advice as to whether the term local government organisation includes council-controlled organisations providing civil construction services.

Long-term Plans

Some practical but critical points about three waters and the long-term planning processes of councils. The first has been raised with officials as needing urgent clarification, and if necessary resolution.

There is an apparent inconsistency between the primary legislation and the Local Government Act that makes amending an LTP in the transition practically challenging.

We have received advice from our legal counsel Simpson Grierson in regards to a potential inconsistency in the primary legislation and the Local Government Act. They comment thus:

*"The issue is that there is inconsistency between Clause 27 of Schedule 1AA to the Local Government Act 2002 (**LGA**), and Subpart 4 of Schedule 1 of the Water Services Entities Act 2022 (**WSEA**), in relation to the long-term planning that can be undertaken by local authorities during the establishment period.*

Both provisions form part of the transitional arrangements for the Government's Three Waters reform proposals, and have been enacted.

In summary:

- *the provisions of Subpart 4 of Schedule 1 of the WSEA confer oversight powers on the Department of Internal Affairs for certain decisions proposed by local authorities (includes long-term plans and amendments to long-term plans); and*
- *Clause 27 of Schedule 1AA to the LGA **precludes** local authorities from including any content relating to water services from any long-term planning (which includes amendments to long-term plans).*

The preclusion in clause 27 means that local authorities cannot practically initiate any long-term planning that addresses the provision of water services during the establishment period, which in our view does not reflect the policy sitting behind Subpart 4 of Schedule 1 of the WSEA. Importantly, and of most concern to the sector, the preclusion captures amendments to long-term plans, which certain councils consider necessary this year (as part of their annual plan cycle, or separately).

Discussion

The sector is in receipt of advice from Local Government New Zealand which states that the phrase 'and amendments' in clause 27 (LGA) includes amendments to the current

(21/31) LTPs. We understand that this view is shared by the Office of the Auditor-General and has recently been communicated by Audit New Zealand.

The practical impact of clause 27 is that local authorities who need to initiate any amendments to the LTPs may not include any information relating to three water services (in their proposed amendment, or associated documentation). As local authorities retain full responsibility for the provision of water services up to the close of 30 June 2024, this is unduly constraining of their ability to make decisions relating to this service.

Any LTP amendment must show updated forecast financial statements, and so this preclusion creates an issue, as it will not be possible to include information on the costs of and funding for three water services. It will also mean that local authorities will not be able to describe or change their work programmes as they relate to three water services, if that is needed for development contributions reasons, or other reasons.

If there is no ability to amend LTPs to include or modify capital expenditure for the 2023/24 year, then there will be no ability for local authorities to levy development contributions for those capital works. This is a common reason why LTP amendments are initiated, and we understand that it is an issue impacting on several councils this year.

We note that the sector accepts the rationale behind the oversight powers conferred on DIA, and has no concern with DIA having an ability to confirm or decline LTP amendments if there is good reason to do so. Amending clause 27 as proposed below, to allow for LTP amendments, will still mean that the Department will have oversight of those decisions.

What is the solution?

We believe this to be a drafting error, with clause 27 inadvertently capturing LTP amendments. We suggest that it is addressed through an urgent legislative amendment, to amend clause 27 by deleting the reference to amendments to LTPs. This would mean that LTP amendments could be initiated, and that they would be subject to oversight by DIA. For example:

(1) This clause applies to the following long-term planning:
(a) a draft or final long-term plan ~~or an amendment to a long-term plan~~ (under section 93 and Part 1 of Schedule 10), or associated material or documentation:"

There may be other options, but this struck us as the simplest.

Recommendation

46. That clause 27(1)(a), schedule six of the Local Government Act be amended thus

(a) a draft or final long-term plan ~~or an amendment to a long-term plan~~ (under section 93 and Part 1 of Schedule 10), or associated material or documentation:

We repeat recommendations from our earlier submission about the removal of water services and aspects of the 2024 LTPs.

The Bill has provided some clarification of the schedule 10 Local Government Act disclosure requirements for LTPs. In essence, the Bill amends the LGA definition of network infrastructure by removing the three references to drinking water, wastewater, and stormwater; and flows through into other parts of the LGA.

These come as no surprise as they are, more or less, what we would have done had minimum change been the goal (we thank the Department of Internal Affairs for the two discussions and the opportunity to provide a more detailed commentary on what Taituarā would do).

We consider that there is an opportunity to do a little more place legislative "patches" on these provisions. Indeed, the removal of three waters services calls the value of the infrastructure strategy into serious question, and poses the risk of turning the financial strategy into a 'tick-box' exercise. The Committee should remember that its community that meets the cost of preparing these documents, and further that those who want to respond to an LTP in a robust way need an understanding of the issues in these documents.

Rather than repeat the discussion in toto, we refer the Select Committee back to recommendations 55, 56 and 57 that call for wider amendments to the content of financial and infrastructure strategies, and to the complete removal of powers to ser non-financial performance measures for roads and flood protection.

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

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

Recommendation

47. That the Select Committee enact recommendations 55 to 57 of the Taituarā submission on the Water Services Entities Bill relating to the content of financial and infrastructure strategies and the repeal of powers to make non-financial performance measures.

Bylaws

We invited our Regulation and Bylaws Reference Group to review the provisions relating to the extinguishing of bylaw powers and their operation in the lead-up to 1 July 2024. They have noted a number of concerns and have asked for further clarification. We suggest that the Select Committee 48 authorise officials to engage further with Taituarā and Local Government New Zealand.

There are concerns in the sector about being able to provide appropriate, robust, and meaningful regulatory stewardship on matters that are currently provided for through local authority bylaws, particularly during the transition period and up to the second anniversary of the establishment date.

This is primarily due to a lack of clarity on both the process intended for transitioning bylaw matters to the water services entities, as well as what 'elements' of 'three waters' are intended to remain under the authority of local authorities and for which a bylaw mechanism is required.

The Bill includes amendments to the Health Act and Local Government Act relating to bylaws. These replace the amendments to the Local Government Act previously provided in the principal legislation.

These amendments give effect to a set of high-level policy decisions as to what bylaw-making responsibilities will be retained in local authorities without clear definitions of some of the core concepts that define the scope of the remaining powers.

This includes "private drains" (amendment to section 64 of the Health Act 1956) as well as the following matters provided for in the amendments to sections 146(a) and (b) of the LGA:

- 'waste management' This is not defined in the Bill, nor in the LGA. However, it is generally understood to cover the three types of waste: solid, liquid, and gaseous. This existing inclusion in the LGA is already problematic as it seems to duplicate other provisions in the same section. However, to date this issue has not been of significant concern, given generally s146 provided for bylaws on all types of 'waste' and these were all responsibilities of local authorities. But with the removal of 'waste water' and 'trade waste' from 146 of the Local Government Act, it is unclear what a 'waste management' bylaw would be intended to provide for (given that solid waste is already provided for).
- 'on-site wastewater disposal systems'. No definition. Generally, this term is applied to *domestic* on-site wastewater disposal systems in the context of this section. However, with the removal of trade waste and waste water bylaws from s146 of the LGA, again this provides lack of clarity of what

responsibilities and expectations there are of local authorities to regulate these matters via a bylaw.

- 'drainage and sanitation'. Neither term is defined. In the context of the other proposed or existing matters provided for under section 146(b), which essentially provides for local authorities to be able to protect the relevant council-controlled or council-owned assets, it is unclear what 'drainage' or 'sanitation' related land, structures, or infrastructure would remain under the control of a local authority that it would be relevant to make a bylaw for.
- "stormwater drainage" is included in the Water Services Entities Act as an element of the definition of 'wastewater services', otherwise it is not defined, nor does the Act or Bill seemingly provide any clarity on what 'stormwater drainage provided by the local authority' would be.

Most fundamentally, although a definition of a 'water services bylaw' is provided, this does not clearly align with the proposed amendments to S146 LGA, thus resulting in a lack of clarity. Without clarity on the above matters, it will be a considerable challenge for council staff to identify which bylaws should be considered for deferral under the Water Services Entities Act 2022, and also to meet the requirements to identify 'specified' water services bylaws' by 1 January 2024. Equally, meeting the requirements to amend or revoke 'spent' water services bylaws will be difficult if the Bill is enacted in its current form.

In practice, councils will not be comfortable amending or revoking 'spent' water services bylaws until such clarity is provided. Errors here could create gaps in the regulatory framework with risks to people and assets. This will cause confusion as to which regulatory mechanism should apply to which situation, and the legal status of such bylaws.

Recommendation: Bylaws

48. That the Select Committee agree that officials be authorised to further discuss bylaw related matters with Taituarā.

Powers of Entry

And to finish, a bread-and-butter issue with practical significance.

As it stands the legislation limits the entities will significantly limit the entities from conducting routine maintenance. The legislation requires the property owner to provide written consent before the entities access the land.

In itself this will be time consuming, all the more so if the issue needs to be taken to the District Court. It could take a District Court some months to make an order. In that time what might have been routine maintenance may have migrating to a more significant issue.

Further the legislation empowers property owners to impose 'reasonable conditions' without defining the term reasonable. We suspect the legislation contemplates condition such as restricting the time of entry or limiting access to parts of the property not connected to a water service. But even here there may be disputes.

Section 171 of the Local Government Act provides a broad power of access to local authorities ranging from access for enforcement purposes to regular maintenance. We consider that this could be replicated in the legislation governing the entities.

Recommendation

49. That the Select Committee amend the legislation by adding a clause modelled on section 171 of the Local Government Act, providing the entities with broader powers to enter property to carry out entity functions.

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