

**We are.
LGNZ.**

< Local
Councils play
an active role
in keeping our
communities
healthy. >

LGA 2002 Amendment Bill (No2)

Local Government New Zealand's submission to the Local
Government and Environment Select Committee

28 July 2016

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We are. LGNZ.

Local Government New Zealand (“LGNZ”) represents the national interests of local authorities and promotes excellence in performance. The organisation provides advocacy and policy services, business support, advice and training to its members so as to assist them build successful communities. Our purpose is to deliver our sector’s Vision: Local democracy powering community and national success.

The Bill before the Local Government and Environment Select Committee raises significant and potentially far-reaching and fundamental matters that cut to the heart of local democracy and the role of local government in New Zealand. That these matters are disguised within a very technical piece of amending legislation does little credit to the New Zealand’s membership of and commitment to the Open Government Partnership (the Open Government Partnership was launched in 2011 to provide an international platform for domestic reformers committed to making their governments more open, accountable, and responsive to citizens).

Accordingly, the leadership of LGNZ wishes to appear before the Local Government and Environment Select Committee to talk to the matters canvassed by this submission.

Summary

[To come]

Introduction

In preparing our submission LGZ has worked collaboratively with our colleagues in the Society of Local Government Managers (“SOLGM”). SOLGM’s submission provides the Committee with a detailed clause by clause analysis of the Bill. LGNZ’s submission provides a strategic analysis that addresses the significant impact of the Bill on our overall system of local government.

Our submission takes a principles-based analysis of the Bill and its potential impact on the ability of councils to meet the needs and preferences of their communities. The submission discusses the strengths and weaknesses of the proposed measures in relation to the principles of good local government and recommends a number of changes.

Some of the Bill’s provisions, if enacted, would undermine the fundamental nature of our local democracy by diminishing the decision-making ability of locally elected representatives and eroding the constitutional separation of local and central government.

That said there are a number of provisions in the Bill that LGNZ supports but these do not obviate our broader concerns.

The nature of local government

Like central government local government is established by Parliament, which determines the framework of rules and the powers within which local authorities operate. Councils are not, unless legislation expressly provides for it, a provider of central government services, rather they exist to allow citizens to make collective decisions about local and regional matters.

The international literature defines true local government as existing when democratically elected bodies have well defined discretionary powers to provide services to their citizens and finance them with the proceeds of one or more exclusive local taxes of which those elected representatives are empowered to set.

The critical characteristics of a local government system are the ability of elected members to make decisions about levels of services and how they are funded. Should these be compromised, a local government can cease to be either local or government becoming, in essence, no more than a decentralized central government agency. In such circumstances the constitutional structure will have been fundamentally changed and local democratic representation will, to all intents and purposes, have ceased.

Principles of good local government

In order to provide a basis for our analysis we have identified six principles which are critical to the effective operation of a local government system. We have based these on the principles in the Local Government Act 2002 and the Draft United Nation's Charter for Local Self Government (which is based on the European Charter). They are:

1. Processes are transparent and open;
2. Decision making powers are adequate to enable elected representatives meet community expectations and statutory requirements;
3. Accountability is clear and unambiguous;
4. The constitutional status of local government is recognised; and
5. Allocative efficiency is achieved.

For New Zealand's communities to flourish LGNZ believes that it is important that any legislative change promotes transparent decision-making; strengthens the decision-making capacity of elected members; results in clear and unambiguous accountability; recognises the constitutional role of local government and promotes allocative efficiency. Some provisions in the Bill fail to promote these principles.

Analysis of the LGA 2002 Amendment Bill (No 2)

The following analysis, which is principle based, does not look at the Bill in detail, for a detailed analysis of the clauses within the Bill we recommend that the Committee read the SOLGM submission, which has been prepared in consultation with LGNZ.

Strengthening transparency and openness

Councils are required to act in a transparent and open manner, as outlined by section 14 of the LGA 2002 which states "a local authority should conduct its business in an open, transparent, and democratically accountable manner". It is important that this principle should also apply to the processes employed by the Local Government Commission ("LGC"), however some aspects of the Bill are inconsistent with this principle, for example:

- The ability of the LGC to remove an activity from the direct oversight of a local authority and to corporatise it without the permission of, and potentially against the wishes of, the council and its community, contravenes this and a number of other important principles and assumes that communities themselves have no view on these activities, many of which have been identified as strategic assets in councils' Significance and Engagement Policies; and
- The proposal to exclude certain information, such as that related to an investigation, from the scope of the Local Government Official Information Act 1987 is unnecessary and may undermine community confidence in the LGC process.

The Bill lacks any clear checks and balances on the degree to which the LGC can corporatise and shift activities out of the direct control of a local authority. Given that water and transport services constitute such a large degree of a council's operational expenditure, particularly in rural districts, any action by the LGC to remove these from direct council control will be of significant community interest and also have major financial implications for the ongoing sustainability of the local authority. This issue will be particularly acute in rural and provincial New Zealand. We suggest that either council or community approval should be required before major activities are corporatised and removed from the direct control of the local authority.

Proposals to create multiply-owned CCOs for major activities (as defined in the Bill) should have the support of the majority of councils involved or their communities.

Ensuring elected representatives have sufficient decision-making authority

An effective democracy enables citizen to vote for representatives on the basis of a policy platform with the expectation that, if elected, the platform will be implemented (should it have the support of a majority of members). It is not clear how an individual council will be able to require a multiply-owned CCO to abide by a local policy for which they have an electoral mandate.

This principle is highlighted within the European Charter for Local Self Government which states that "local authorities shall, within the limits of the law, have full discretion to exercise their initiative with regard to any matter which is not excluded from their competence nor assigned to any other authority". A number of provisions within the Bill, if enacted, may undermine this principle. For example:

- The mechanism for funding a multiply-owned CCO requires councils and elected members to raise property taxes for levels of expenditure over which they have little control. The proposed funding formula will, in practice, make it difficult for an individual council to exercise judgement and discretion over what may be a large part of its income;
- In addition to the lack of discretion with regard to the funding of multiply owned CCOs individual shareholding councils have limited opportunities to influence levels of service within their districts, as these decisions must be agreed by all shareholders and, in practice, will be determined by the joint committee;
- Councils make decisions and adopt policies for the benefits of their communities today and for the future. An unanswered question in the Bill is how an individual shareholding council require a multiply owned CCO to apply specific levels of service or policies within its specific jurisdiction, for example;

- Implementing a buy local procurement policy to strengthen local businesses;
- Adopting policies to promote better transport such as electric cars, cycling and walking; and
- Implementing a strategy to improve streetscapes, from slow roads to extensive urban tree planting.

The Bill fails to provide individual councils with sufficient levers to ensure that substantive, and especially multiply-owned, CCOs deliver services that meet local policies and priorities. Over time this will have a detrimental effect on the willingness of people to participate in local government, either as candidates or voters, given the range of significant decisions likely to be placed outside direct democratic control if this Bill proceeds.

LGNZ recommends that the Bill is amended to give councils better mechanisms, including the right to appoint elected members as directors, for ensuring multiply-owned CCOs are required to meet local priorities.

Promoting clear and unambiguous accountability

An important governance principle requires that decision-makers should be able to be held accountable for their decisions. This enables citizens and consumers to exercise both voice and exit if they are unhappy with the outcomes of those decisions. It is a principle reinforced in the Productivity Commission's 2013 report on Better Local Regulation. Some proposals in the Bill fail to meet this principle. For example:

- The ability of multiply-owned and substantive CCOs to require their shareholding councils to amend a development contribution policy, even though the CCO has undertaken its own consultation, fails this principle as voters will ultimately hold the specific councils and their elected members to account; and
- The extent of the discretion given to the Minister of Local Government to set performance measures for activities which are funded by communities themselves effectively diminishes the accountability of local representatives. The same discretion can also result in 'cost shifting' where, for example, a performance measure is set at a level of service which is greater than the level of service agreed between the council and its community.

The impact of the measures addressed above is such that they contravene the fundamental principle that we (correctly or otherwise) attribute to the Magna Carta that there should be no taxation without representation. This is a highly probable outcome in some districts should extensive use of the multiply owned CCO model be implemented as currently prescribed.

If councillors are to be held accountable for the performance of multiply-owned CCOs then additional mechanisms for holding them to account must be introduced. The situation is exacerbated by the proscription preventing the appointment of elected members as directors of the new CCOs. If councils are funding organisations which operate services owned by the local authority, such as water and waste water services, then the relationship should be a contractual one that allows the local authority, as owner, to change providers.

LGNZ recommends that the Bill be amended to provide shareholding councils in a multiply-owned

CCO with additional mechanism to hold the CCO for its performance, including the right to appoint elected members as directors.

Ensuring that the constitutional role of local government is not undermined

Although not written in a single document New Zealand does have a constitution, which is made up of a collection of statutes and conventions. Local government plays a role in our constitutional arrangements, a role that is often not appreciated. The nature of this role was clearly described by Prof. John Roberts, former professor of Public Administration at Victoria University when he stated:

the growing power of government ... constitutes another reason for the existence of an efficient system of local government. ... Local government is not solely a matter of the management of local services; it provides the democratic machinery for the expression of local opinion on all matters of public policy (Local Government in the Wellington Region 1968)

As Professor Roberts noted, it is important that local government has the policy and decision-making freedom to represent the interests and needs of their communities. Some provisions in the Bill run counter to this principle, for example:

- The proposed power of the Minister to direct the LGC provides future ministers with an unprecedented ability to intervene in the affairs of a local authority. There is no guarantee that such a power will be used responsibly and, given the current intervention framework in the LGA 2002, is unnecessary; and
- The proposed power for the Government to set benchmarks for CCOs and performance measures for discretionary activities similarly erodes constitutional distinction between the two spheres of government as it undermines the contract that exists between local elected members and their communities. Of similar concern is any requirement that Transport CCOs report on the achievement of Government objectives.

Local government is not simply a provider of local services. It is an intrinsic part of a strong and healthy democracy. We must be careful and watchful that its democratic role, including its role to encourage participation of citizens, is not lost without a clear public debate. This Bill is very complex and disguises that it contains a debate of this kind.

LGNZ recommends that the Minister of Local Government's power to direct the LGC is removed.

Allocative efficiency

Allocative efficiency exists where the quality and quantity of public services matches the needs and preferences of those people receiving them. One of the strengths of local government is its proximity to users, knowledge of preferences and ability to tailor services to local needs and preferences. While it may be appropriate for some services to be operated at a level of scale in some areas this is not always the case. It is important that the LGC is prepared to assess options with an open mind given local circumstances.

There are also some provisions in the Bill which, as currently described, may not lead to improved efficiency, for example:

- The multiply-owned CCO model, despite additional accountability requirements such as the

service delivery plan, lacks the commercial disciplines to ensure efficient performance. In practice councils will be unable to sign off levels of service and CCO budgets through their LTP process as agreement is required by all shareholding councils – an agreement that does not appear to reflect the weight of different councils shareholding interests as well as undermining the purpose of the LTP; and

- In 2014 the Government amended the LGA 2002 to require that council services are reviewed at least once every 6 years to ensure they are delivered in an efficient manner. The substantive and multiply-owned CCO models appear to be outside the scope of these reviews. In other words there is no clear way of dis-establishing a multiply-owned CCO should, as a result of new technologies or poor performance, it be found to provide inefficient services.

LGNZ is concerned that the LGC process and resulting decisions will effectively ‘lock in’ service delivery models and seriously constrain the ability of future councils and communities to redesign their governance and service delivery approaches to meet changing needs and technologies.

LGNZ recommends that the establishment of a substantive or multiply-owned CCO be accompanied by a time frame, say 5 years, after which they will be subject to the provisions of s.17A. If this is not accepted then consideration may need to be given to the establishment of an external regulatory agency.

Conclusion

There are a number of provisions in this Bill that have LGNZ’s support. For example, we are pleased with the reintroduction of mandatory polls in relation to certain reorganisation options and we support the greater discretion given to the LGC to develop bespoke reorganisation models. It goes without saying that we support the modernisation of the LGC’s accountability framework.

However there are a number of proposed changes that cause us considerable concern for their potential impact on the ability of local authorities to properly fulfil their democratic and governance responsibilities. Those of most concern are:

- The ability of the LGC to establish multiply-owned CCOs without the agreement of either local affected local authorities or their communities;
- The open-ended authority given to the Minister of Local Government to direct the LGC;
- The new power for the Minister of Local Government to establish performance measures for discretionary activities which are fully funded by local communities.

These powers are simply unacceptable in a modern democratic society. They run directly counter to the Government’s own public commitment to, and membership of, the international Open Government Partnership.

The themes we have stressed in our submission concern the need to ensure that elected members have a broad range of decision making powers, as the international evidence shows that as local governments lose salience there is a strong drop off in the willingness of people to vote and similarly the willingness of people with talent to stand. The submission also highlights the need to reinforce the distinction between local and central government. They are different but complementary

spheres of government and we need to respect their particular roles. Finally we ask whether or not the changes will necessarily improve efficiency. There is a risk that the creation of multiple CCOs will fragment local governance and diminish the ability of local governments to develop local policies in order to attract investment and the talent we need to grow not only local economies but the national economy as well.

One conclusion we have come to in our analysis is that the Bill is 'under done'. Much of the detail necessary to understand the implications of the proposed changes is missing and as a result it is difficult for us to properly comment or give support. It is disappointing that this detail was not prepared in advance and LGNZ would note that the local government sector has had no involvement in the preparation of these proposals. The Regulatory Impact Statement drew particular attention to the lack of consultation. This is unacceptably poor process which leads to bad law.

Our concerns are partly summed up by the following comments by the former Minister for Local Government in the United Kingdom.

There was once a time when local government was at the centre of local decision-making. Councils had the power and authority to make a difference. They could bring about dramatic, positive improvements to the local area. Decades of centralisation, however, left councils distracted by bureaucracy and targets and often powerless to make changes. This government will restore local government to its former glory because we believe this is the best way to build a stronger economy and fairer society. – Rt Hon Eric Pickles MP, June 2011 (House of Commons Political and Constitutional reform Committee)

In contrast, New Zealand continues to centralise power in Wellington.

In this Bill the Government is saying that it does not trust local communities to make the right decisions for them.

We reject that position. But that does not mean that we do not agree that local government should not be accountable for the delivery of effective and efficient services to local communities. Of course they should. But the way to address that issue is to improve accountability of local representatives to their communities (LGNZ's recently launched Local Government Excellence Programme is design to do precisely that) not to remove that accountability or lessen the democratic input of those communities' citizens. That is a slippery slope that any progressive liberal democracy should shun, not embrace.

Democracy must be nurtured not legislated away.

We look forward to discussing our concerns with the Committee.