

Submission

to

**Finance and Expenditure
Select Committee**

on

Water Services Legislation Bill

11 February 2023

1. Introduction

1.1 Communities 4 Local Democracy - He hapori mō te Manapori (“C4LD”) welcomes the opportunity to submit on the Water Services Legislation Bill (the “Water Services Bill”).

1.2 C4LD continues to oppose the expropriation without compensation of council Three Waters assets. In our submission on the Water Services Entities Bill (now Act) we made that submission strongly and advanced an alternative reform proposal that would respect council property rights and better preserve local voice.

1.3 C4LD is a coalition of like-minded territorial and unitary local authorities formed to develop and propose a set of reforms to Three Waters policy settings that will deliver similar outcomes to those proposed by the Government whilst respecting community property rights and local voice.

1.4 The 30 participating councils are:

1. Far North District Council;
2. Kaipara District Council;
3. Whangarei District Council;
4. Matamata-Piako District Council;
5. South Waikato District Council;
6. Thames-Coromandel District Council;
7. Waipa District Council;
8. Kawerau District Council;
9. Opotiki District Council;
10. Whakatane District Council;
11. South Taranaki District Council;
12. Central Hawke's Bay District Council;
13. Napier City Council;
14. Wairoa District Council;
15. Horowhenua District Council;
16. Manawatu District Council;
17. Ruapehu District Council;
18. Tararua District Council;
19. Masterton District Council;
20. Upper Hutt City Council;
21. Marlborough District Council;
22. Grey District Council;
23. Westland District Council;
24. Ashburton District Council;
25. Hurunui District Council;
26. Kaikoura District Council;
27. Mackenzie District Council;
28. Timaru District Council;
29. Waimakariri District Council; and
30. Waimate District Council.

1.5 All participating councils are the current owners of Three Waters assets on behalf of their respective communities. These assets have been bought and paid for by these communities over many generations. In all cases, C4LD participating councils wish to retain meaningful control and influence over the property that they own on behalf of their communities.

1.6 To be clear, C4LD supports reform of the Three Waters sector. Our disagreement with the Government is centred on its approach to asset reconfiguration in the sector. We do not disagree with achieving appropriate health and environmental outcomes nor do we disagree with ensuring local iwi and hapū have appropriate input into Three Waters decision-making at a local level.

1.7 At the time of writing, the new Prime Minister has signalled that a change approach to the Government's present 3 Waters policy position. However, he has not yet specified what policy changes may be made. C4LD would welcome productive changes in Three Waters policy. However, to be acceptable to C4LD members any changes to Three Waters policy settings would require the protection of council property rights in its Three Waters assets. This could be achieved by adopting an approach similar to the alternative reform model set out in C4LD's July 2022 submission to the Finance and Expenditure Select Committee. Cosmetic changes that continue to deprive councils of the right to govern and manage its own assets (albeit under a new regulatory system) would not address C4LD's concerns.

1.8 Pending knowledge of any possible change to policy settings, the remainder of this submission has been prepared on the basis that the present Water Services Bill is, and will continue to be, Government policy.

1.9 A delegation from C4LD wishes to appear before the Select Committee to speak to its submission.

2. Recommendations

2.1 C4LD has one primary and six secondary recommendations to make to the Select Committee. They are as follows:

Primary Recommendation

2.2 C4LD opposes the Water Services Bill and recommends that it not proceed any further pending the outcome of the 2023 General Election (currently set down for 14 October 2023).

2.3 The Government's Three Waters policy is widely opposed by communities in New Zealand. The breadth of the assault on community property rights by first, the Water Services Entities Act, and now the Water Services Bill, has never received an electoral mandate from the people of New Zealand. With only eight months to go to the General Election it is appropriate that a pause now occur and that any further work on the establishment of the water service entities ("WSEs") cease until either the Government receives an electoral

mandate for its policy or a new Government has the opportunity to recalibrate policy settings. This may require a legislative amendment to the Water Services Entities Act to delay the establishment date of the WSE's.

Secondary Recommendations

2.3 **New section 137A** – C4LD recommends that this clause be deleted from the Water Services Bill.

2.4 **New section 334** - C4LD recommends that where cross-subsidisation occurs, that the WSE be required to make transparent to water consumers in its region where that cross-subsidisation is occurring and why.

2.5 **New section 336** – C4LD recommends that local authorities should not be able to be compelled to carry out the water services billing function against their will. Instead and as part of the establishment process, WSE's should be required to introduce, and then operate on start-up, the billing function.

2.6 **New section 348** – C4LD recommends that the proposed exemption for the Crown from paying water infrastructure contribution charges should be removed.

2.7 **New section 353** – C4LD recommends that the proposed new Director of Compliance and Enforcement be truly independent of WSE's by specifying that the Director must be legally independent of a WSE i.e. there should be no employment relationship or other form of remuneration funded by a WSE for that role.

2.8 **New clause 43 of new Part 2 of Schedule 1** – C4LD recommends that this clause should be accompanied by a further clause requiring the Crown to pay compensation to councils for the expropriated assets. This is consistent with accepted procedure for the taking by the Crown of property owned by another legal person.

3. Three Waters Reform Legislative Process

3.1 The Water Services Entities Act 2022 received the Royal Assent on 14 December 2022 following a protracted debate about whether provisions of a non-constitutional nature should be “entrenched” or not. At the Third Reading, the now statute received only votes from the Labour Party. No other parliamentary party supported the legislation. The statute itself reflects a broken promise made by the Government that councils would have the option to opt into the Government's preferred mode of Three Waters reform. That statute deprived councils of that choice.

3.2 The Water Services Bill was introduced to Parliament on 8 December 2022, i.e. six days before the Water Services Entities Act received the Royal Assent. The Water Services Bill proposes significant amendments to the Water Services Entities Act. We are unaware, in the case of utilities reform, of a Bill purporting to amend a statute ever being introduced prior to the statute being amended receiving Royal Assent. Given that many of these amendments

might have been made by a supplementary order paper to the Act (before it was passed and after referral back to the select committee for consideration) we are concerned about the legislative approach that the Government has chosen to take.

3.3 The amendments proposed are not minor. For example, the statute states at section 13 that the functions of water services entities are:

- (a) to provide safe, reliable, and efficient water services in its area; and
- (b) any functions that are incidental and related to, or consequential on, its functions set out in (a).

3.4 Those functions are straightforward and unsurprising and leave to the Board and management team of a WSE, substantial discretion subject to the oversight set out in the Act.

3.5 Clause 7 of the present Bill amends section 13. It adds an **additional 18 functions** to the two specified in the Act. 18 additional functions is not an oversight or correction of a drafting error. Either the policy is flawed and this is a desperate attempt to shore up the model, or a decision was taken to adopt this legislative approach and impose on submitters to the Water Services Bill a very short timeframe to consider these amendments (it is well short of the six months or so that submitters had to consider the statute during its process through the parliamentary process).

3.6 As an aside, the new Functions section appears to indicate that the Government has little faith in the Boards of the new WSE's appropriately governing the entities given the level of function specificity clause 7 sets out. This is significant micro-management and shows clearly that these WSE's effectively are creatures of the Crown. They are not truly owned by local authorities.

3.7 C4LD asks the Select Committee to consider whether the Water Services Bill, given its substantial changes to a statute only very recently brought into force, is appropriate and whether the short time for submitters to consider its extensive clauses (over the holiday period) treats the current owners with the respect to which they are entitled.

3.8 This Bill should be paused pending the outcome of the 2014 General Election.

3.9 Given the constraints on time to prepare a submission, the remainder of this submission focuses on high-level matters of particular concern to C4LD members. Individual councils are likely to address specific matters of detail in their respective individual submissions.

4. Charges as Security

4.1 Clause 15 of the Water Services Bill introduces into the statute a new section 137A relating to security charges.

4.2 Under this new section, if a WSE has granted a security interest over a revenue stream, and the WSE is in receivership, the receiver may unilaterally impose, and collect, a charge on a rateable property to meet the debt commitment entered into by the WSE.

4.3 Presently, charges on rateable properties are subject to democratic accountability at the local government level. Granting such a power to a receiver without any form of democratic accountability for that charge is not acceptable.

4.4 From an incentives point of view this power is even more egregious. If a WSE has entered into a debt obligation (presumably after a management recommendation and Board agreement), then it should be the WSE that is responsible for that debt. In the alternative, the Crown (as effective owner of the WSE's) should be responsible for meeting that debt obligation, given that it is expropriating the Three Waters assets from councils.

4.5 Instead, the Water Services Bill provides that the effective owners of the WSE's (the Crown), the directors of the WSE's, and the management teams of the WSE's will be given a free pass to make poor investment decisions by knowing that not they, but poor long suffering ratepayers will be required to meet the costs of bad decision-making in circumstances where they no longer own the Three Waters assets nor have any democratic oversight of either the WSE or the actions of a receiver.

4.6 In such circumstances, this power is not acceptable and should be deleted from the Water Services Bill.

5. Cross-Subsidisation

5.1 Clause 22 inserts into the statute a new section 334. That new section allows a WSE to charge geographically averaged charges. This empowers a WSE to spread i.e. cross-subsidise in a region, the costs of an investment in one area across the whole region.

5.2 This is likely to mean that water consumers who have paid to ensure that their area has good infrastructure, will pay, once again, to fund areas where investment was not up to scratch.

5.3 Cross-subsidisation is likely to be an unavoidable short to medium term response to poor governorship by some councils. However the fact remains that this is a form of moral hazard. Poor governors are being rewarded by good governors for their lack of investment.

5.4 C4LD suggests that where cross-subsidisation occurs, that the WSE be required to make transparent to water consumers in its region where that cross-subsidisation is occurring and why.

6. Pass Through Billing

6.1 Clause 22 inserts into the statute a new section 336 authorising a WSE to empower a local authority to collect charges on its behalf. It is assumed that this will be pursuant to an agreement between the WSE and a local authority. However, if an agreement cannot be reached, the matter may be referred to the Minister who can compel an agreement to be reached, and specify the terms of that agreement.

6.2 A core function of any utility is a billing system. There are many off-the-shelf billing systems for use by utilities that are available for purchase. As part of the establishment function, a competent WSE Board and management would be selecting and implementing a billing system prior to assuming its responsibilities.

6.3 Local authorities should not be able to be compelled to carry out this function against their will. They will no longer be responsible for Three Waters services yet could be compelled to undertake the function that is most likely to create disputes and rancour with water consumers. If the Crown insists on expropriating council Three Water assets, then at the very least it should accept the responsibility that goes with that and require the WSE to undertake the billing function.

7. Crown Exempt from Water Infrastructure Contribution Charges

7.1 New section 348 of the statute exempts the Crown from paying water infrastructure contribution charges. No rationale for that exemption is provided in the Explanatory Note to the Bill.

7.2 This exemption continues a core problem with local government funding and financing. The Crown is exempt from rates for no justifiable reason other than it has the power to exempt itself. This is free-riding of the worst sort. It exemplifies the deeper problems with the Three Waters system which are derived from a poor incentives structure and a financing system that is not fit for purpose.

7.3 Competent Three Waters reform would have focussed on these matters whilst respecting council property rights. An approach to achieve this does exist and it was set out in C4LD's submission on the Water Services Entities Bill in 2022.

7.4 This Crown exemption should be deleted from the Bill.

8. Director of Compliance and Enforcement

8.1 Clause 22 of the Water Services Bill inserts a new section 351 into the statute requiring a WSE to appoint an employee of the WSE as Director of Compliance and Enforcement. New section 353 requires this Director to act independently when performing their functions.

8.2 Independence requires two attributes. First, and as a matter of fact, a person must be independent of the entity that is being regulated, and second, that person must be perceived by outside parties to be independent. New section 351 breaches both aspects.

8.3 A regulatory function should be independent of the entity that is being regulated. An employee of a WSE, by definition, is not independent. Outside parties are highly likely to consider the person not to be independent by virtue of the employment relationship. This compromises the role from the outset.

8.4 Requirements on a person to act independently (see new section 353) do not correct these fundamental flaws. The clause should be redrafted to actually require the Director to be legally independent of a WSE i.e. there should be no employment relationship or other form of remuneration funded by a WSE.

9. Transfer of Assets

9.1 New clause 43 of new Part 2 of Schedule 1 to the statute provides for the vesting in the new WSE's of all council-owned Three Waters assets. It is the clause which gives effect to the expropriation of council assets.

9.2 This clause should be accompanied by a further clause requiring the Crown to pay fair market compensation to councils for the expropriated assets. This is consistent with accepted procedure for the taking by the Crown of property owned by another legal person.

10. Recommendations

10.1 C4LD's **primary recommendation** is that the Water Services Bill not proceed any further pending the outcome of the 2023 General Election (currently set down for 14 October 2023).

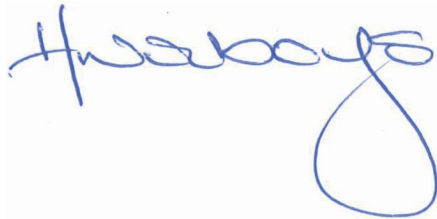
10.2 C4LD **secondary recommendations** in respect of the Water Services Bill are:

- I. **New section 137A** – C4LD recommends that this clause be deleted from the Water Services Bill;
- II. **New section 334** - C4LD recommends that where cross-subsidisation occurs, that the WSE be required to make transparent to water consumers in its region, where that cross-subsidisation is occurring and why;
- III. **New section 336** – C4LD recommends that local authorities should not be able to be compelled to carry out the water services billing function against their will. Instead and as part of the establishment process, WSE's should be required to introduce, and then operate on start-up, the billing function;
- IV. **New section 348** – C4LD recommends that the proposed exemption for the Crown from paying water infrastructure contribution charges should be removed;

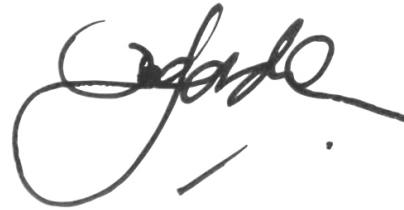
- V. **New section 353** – C4LD recommends that the proposed new Director of Compliance and Enforcement be truly independent of WSE's by specifying that the Director must be legally independent of a WSE i.e. there should be no employment relationship or other form of remuneration funded by a WSE for that role; and
- VI. **New clause 43 of new Part 2 of Schedule 1** – C4LD recommends that this clause should be accompanied by a further clause requiring the Crown to pay fair market compensation to councils for the expropriated assets. This is consistent with accepted procedure for the taking by the Crown of property owned by another legal person.

10.3 A delegation from C4LD wishes to appear before the Select Committee to speak to its submission.

Ngā mihi nui,



Mayor Helen Worboys
Chair
Manawatu District Council



Mayor Dan Gordon
Deputy Chair
Waimakariri District Council



Mayor Vince Cocurullo
Whangārei District Council



Mayor Craig Jepson
Kaipara District Council



Mayor Adrienne Wilcock
Matamata-Piako District Council



Mayor Len Salt
Thames-Coromandel District Council



Mayor Susan O'Regan
Waipa District Council



Mayor Faylene Tunui
Kawerau District Council



Dr Victor Luca, Mayor
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Mayor David Moore
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Mayor Kirsten Wise
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Mayor Alex Walker
Central Hawke's Bay District Council

Mayor Weston Kirton
Ruapehu District Council



Mayor Bernie Wanden
Horowhenua District Council



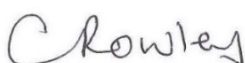
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Mayor Craig Rowley
Waimate District Council

Mayor Gary Petley
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Mayor Craig Little
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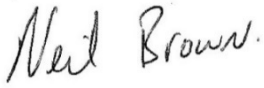
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