

Chairperson and Committee Members

ENVIRONMENT AND COMMUNITY DEVELOPMENT COMMITTEE

19 JULY 2012

Meeting Status: **Public**

Purpose of Report: For Decision

**SUBMISSION ON LOCAL GOVERNMENT ACT 2002
AMENDMENT BILL**

PURPOSE OF REPORT

- 1 This report proposes a draft Council submission on the Local Government Act 2002 Amendment Bill for the Committee's comment and approval.

SIGNIFICANCE OF DECISION

- 2 This report does not trigger the Council's Significance Policy.

BACKGROUND

- 3 Elected members have discussed the key elements and implications of this Amendment Bill. As a result of that discussion, a draft submission on the Bill has been prepared for consideration and is attached at Appendix 1.
- 4 The deadline for submissions on the Bill is 26 July 2012.

CONSIDERATIONS

Issues

- 5 Elected Members have indicated the points they wish to make in the submission and the emphases they wish to place on certain aspects. They have indicated that they want to emphasise that:
 - there is already ample scope through formal consultation and more informal communications for communities to set priorities for their councils and to scrutinise their performance – there is no need to narrow the purpose of local government by removing the existing promotion of the four well-beings;
 - the financial prudence requirements (FPR) and assistance and intervention framework constitute an unwarranted intrusion into the sphere of local government which has the potential to undermine the checks and balances provided in New Zealand's constitutional democracy by the independence of local government;
 - there are practical problems with the implementation of the wider Mayoral powers for smaller councils as well as concerns for the provision of free and frank advice by officers; and

- the provisions relating to local government reorganisation contain problems relating to both the non-mandatory polling of affected electors and the equating of “community leaders” with the community itself for the purposes of determining support.

Provisions relating to polls

- 6 The Elected Members have indicated their strong preference for retention of a mandatory poll on any proposals for reorganisation. Further, they were of a view that such a poll should require majority support in each local authority area affected by the proposal. In this case, and in line with the Government’s quest for simplification, there would be no need for electors to request a poll via petition.
- 7 Reinstatement of a mandatory poll would;
 - simplify the Commission’s task in ascertaining “significant community support”;
 - resolve difficulties with defining “significant community support” including the inclusion of the phrase “or community leaders”;
 - eliminate the risk of lengthy legal disputes of results as a consequence of an insufficiently tight definition of “significant community support”;
 - retain the democratic rights of local electors.

Financial Considerations

- 8 There are no funding implications resulting from approval of this draft submission.

Legal Considerations

- 9 There are no legal considerations resulting from approval of this draft submission.

Delegation

- 10 Section 7.16 of the current Governance Structure and Delegations authorises the Committee to approve this submission to be made on behalf of Council:

“7.16 Authority to review and approve any submission on any issue that is being made on behalf of Council where such review and approval is requested by officers.”

Consultation

- 11 No consultation is considered necessary.

Policy Implications

- 12 There are no policy implications.

Tāngata Whenua Considerations

- 13 Te Whakaminenga o Kāpiti has been briefed on the issues addressed in this submission.

Publicity Considerations

- 14 A press statement will be released drawing attention to the fact that this submission is being made.

RECOMMENDATIONS

- 15 It is recommended that the Committee *approve* the submission contained in Appendix 1 to Report SP-16-620, with any amendments, to be made on Council's behalf to the Local Government and Environment Select Committee;

Report prepared by:

Approved for submission by:

Alison Lash

Pat Dougherty

Senior Advisor, Strategic Projects

Chief Executive

ATTACHMENTS: APPENDIX 1: SUBMISSION ON THE LOCAL GOVERNMENT ACT 2002 AMENDMENT BILL

DRAFT SUBMISSION ON LOCAL GOVERNMENT AMENDMENT BILL 2012

1. Introduction

Kāpiti Coast District Council welcomes this opportunity to comment on the Local Government Act 2002 Amendment Bill tabled in the House on 30 May 2012. The Council wishes to speak to this submission before the Select Committee.

The Kāpiti Coast District Council was established during the reforms of 1989. The District has seen very significant growth in its permanent population since then, particularly in the decade from 1995 – 2005, when it was one of New Zealand's fastest growing population areas¹, to reach a current population of 48,000. While much of the District's social and physical infrastructure is relatively new, the Council is still in catch-up mode trying to address the demands of rapid population growth.

The challenges of this are compounded by the fact that the steep upward growth trajectory has slowed significantly since 2008 at the same time as council costs here and across the country have risen at more than the CPI rate due to world price rises in materials costs. Simultaneously, the Government is reducing its subsidy for local roads in an area where costs have risen particularly steeply.

Kāpiti has more than double the proportion of people aged 65 and over than the national average (26% as opposed to 12%). Partly as a result of this, the district also has a higher proportion of residents on low fixed incomes than is usual in New Zealand. This, coupled with the issues of rising costs and the Council's need to catch up in the infrastructure area, leaves the Council in a position of quite limited resources and needing to find very fine balances between the affordability of rates increases and achieving the service levels the community requires.

In making these judgment calls, the Council is always mindful of the directions given to it during very extensive community engagement in the development of its seven Community Outcomes in the lead up to the 2006 Long Term Council Community Plan (LTCCP). The Council won an award for the thoroughness of this process during which literally thousands of people – from school students to elders' groups - had input into the final Community Outcomes statements which outline the kind of community they want to live in. Repeat consultations on the 2009 LTCCP and the 2012 Long Term Plan (LTP) have indicated no desire on the part of the community to change these directions for the Council's mandate. Community debate on the proposed LTP has been particularly vigorous this time and the Council is subject to continual intense scrutiny over its expenditure.

Our submission indicates a number of problems with the Bill and suggests some ways of addressing those we believe can be mitigated. The problems arise from a number of causes ranging from lack of clarity through to impacts on constitutional arrangements.

¹ Statistics New Zealand population data.

2. Executive Summary

We believe strongly that it is elected councils, working closely with their communities, that are best placed to decide the range and scope of services that they should deliver.

The annual planning process provides an environment for open disclosure and discussion between elected councillors and the communities they represent. Our communities do not hesitate to provide very direct feedback to councillors and staff to ensure that prudent decisions are made and local authorities act within their mandate.

Kāpiti Coast District Council shares the Government's commitment to improving transparency and accountability. We also recognise the accountability mechanisms already in place for ratepayers. In a smaller community such as ours, even more than in the cities, the actions of the Council are one of the major focuses of attention for local media and groups such as the Chamber of Commerce, Grey Power, and groups focused on particular issues. We are constantly reminded of the ultimate sanction of the ballot box every three years by speakers at Council meetings, letters to the editors of our local newspapers and other direct contacts.

We are concerned about provisions within the Bill that allow the Minister to overrule the existing democratic processes and also allow the Local Government Commission, acting on Ministerial direction, to develop a reorganisation scheme without directly seeking statistically robust evidence of the community's wishes through a mandatory poll.

We note that the Regulatory Impact Statement acknowledges considerable risks to the community from this legislation resulting from a lack of options development and assumption clarification. In short, there is little or no evidence that the proposed changes are necessary. It is our view that the legislation, as currently drafted, is very unlikely to achieve the Government's aims and may well deliver negative, although unintended, consequences.

3. Specific comments

3.1 New purpose statement

The Bill introduces a new purpose for local authorities. The stated intention is to provide more direction to local authorities and a tighter framework within which to operate because the current purpose of "promoting the social, economic, environmental, and cultural well-being of their communities, taking a sustainable development approach" is deemed to lack focus. We accept that the new wording takes account of the broad role councils take, the current and future needs of communities, and the broad scope of public services. We are concerned that it removes the purpose of promoting "the accountability of local authorities to their communities" and limits the ability of those communities to set priorities for their councils. In the Kāpiti Coast District our community has given clear direction over three iterations of the Council's long term plan that it wants the Council to prioritise taking a sustainable development approach. It is clear that our community does not take a "dollars first and most important" view: they are at least equally concerned about social, environmental, economic and cultural outcomes.

The new purpose statement implies that councils are insufficiently focused on delivery of what the Government considers "core" infrastructure and services. However, the majority of local authority expenditure is committed to what the Government would term "core" services and there is not a significant component of discretionary expenditure. For the Kāpiti Coast District

Council, the transport network and the three waters account for 48% of rates; all infrastructure and related services account for about 75%. In common with other councils, our Annual Plans and LTP show expenditure on the social, environmental and cultural wellbeings comprises a small part of the Council's budget (typically 10 – 15% for us) but is often highly cost effective in addressing issues at a very local scale.

Kāpiti Coast District Council does not agree that the current purpose statement lacks focus and sees no evidence that it diverts councils from delivery of “core” services. What it does do is put the setting of priorities clearly and unambiguously in the hands of the communities they serve which is where we believe it belongs. *“Local government’s unique proposition is that it has the capacity (within its powers as defined by Parliament) to act as the agent of the local community allowing it to make choices that reflect local values and priorities.”*²

The changed purpose statement may lead to legal challenges of councils in relation to the services they provide. It requires services to be delivered in “a way that is *most cost effective*” [our italics], thus introducing an absolute test which cannot be proven. When taken with the other provisions within the Bill, it may lead to complaints to the Minister who may then require the local authority to justify its position. In this case the result may be increased compliance costs and effort for both central and local government. In our view, existing arrangements with access to both the Office of the Auditor-General and the Ombudsman for those wishing to have perceived problems investigated provide ample opportunity to ensure the scrutiny any interested party might require beyond the evidence of annual audits.

There will always be a range of services that could be undertaken by central or local government or another party, and there will always be a range of views on whether a service is most cost effective or not. The change in definition provides a legal basis for these services to be challenged rather than set by community consultation.

Local ways of addressing local issues should be developed by local councils in collaboration with local communities.

Council's position

Kāpiti Coast District Council **opposes** the changes to the purpose statement and proposes that the existing purpose statement focused on the four well-beings be retained.

3.2 Financial prudence requirements

The Bill provides powers for the Minister to set under regulation benchmarks for Council performance. These are to be used to assess “whether a local authority is prudently managing its revenues, expenses, assets, liabilities, investments, and general financial dealings.”

We support the requirement that if these benchmarks are introduced they be developed in consultation with Local Government New Zealand (LGNZ) and we note that there can be different measures for different types of local authorities. We also support these benchmarks being used to inform and guide local decision-making rather than placing limits within which a council must act.

² Department of Internal Affairs 2001

Benchmarks

Benchmarking and the use of this information must recognise the differences between councils and the communities they represent. The nature of long term council infrastructure, differences in population growth, differences in revenues sources, and the age of assets result in different investment strategies being required for different local authorities. What is prudent in one local authority may not be in another.

Councils typically spend about 70 – 75% of rates on infrastructure and related services: roads and paths, pipes and pumps, buildings such as libraries and swimming pools and so on. An internationally-recognised system of best practice for managing infrastructure was developed in New Zealand and is now used by most councils here and in Australia, South Africa and the UK. It prescribes how to set levels of investment in renewals and maintenance regimes appropriate for the local community. These standards are very widely understood by asset managers, councillors and auditors. It is difficult to see how an alternative set of criteria to ensure financial prudence could be developed in a short period of time which would be as rigorously tested and benchmarked. It would also be extremely challenging to develop a system which is more suitably flexible in its application to the widely varying circumstances different councils find themselves in.

Council position

Kāpiti Coast District Council **opposes** the FPR provisions in the Bill.

If the FPR provisions are introduced, Kāpiti Coast District Council **supports** the requirement that the benchmarks are introduced in consultation with LGNZ.

Caps on rates

The proposal to introduce benchmarks by regulation, which will be tied to a new capacity for central government intervention, give rise to likely rates capping. An example of expenditure limits of CPI (plus growth) is provided in the Bill. For a council like ours with no revenue source other than rates, any revenue or expenditure cap will be a rates cap in effect.

We note that LGNZ's 2009 study of international experience with rates capping states "International experience with restrictions on local government revenue raising indicates that they are effective in terms of the single objective of constraining rates increases, but the evidence is compelling that they fail to result in an optimal mix of local services and rates."³ We are very concerned that using this mechanism to achieve the aim (that we share) of safeguarding the affordability of rates for ratepayers may result in the situation experienced in New South Wales where asset condition is known to have deteriorated significantly leaving a catch up legacy for future generations. This has serious negative implications for inter-generational equity.

One of the major purposes behind the changes introduced in the Local Government Act 2002 was to ensure that asset condition was adequately maintained by local authorities and upgraded as local needs change. As a result, councils' asset management plans have been becoming increasingly rigorous and are closely scrutinised by auditors to ensure they provide robust input into Long Term Plans. The requirement recently introduced for councils to adopt a financial strategy with agreed debt ratios and other controls provides a transparent mechanism

³ *Rates Capping: A Study of the international Literature and Experience*, LGNZ 2009

for councils to agree with its community what are, in effect, caps on its expenditure and debt based on that community's needs and aspirations. The effects of this more rigorous approach are only just beginning to be seen. The benefits of this approach should be given time to "bed in" rather than being tossed out by the new requirements proposed in the Bill.

We believe that thorough on-going community consultation on LTPs and Annual Plans provides more effective means for each community to decide what assets and levels of service it needs for its particular circumstances, what it is willing to pay for and through what mechanisms. Further, the community is well able to determine how it wishes to balance the needs and contributions of current and future generations.

Council position

Kāpiti Coast District Council **opposes** the imposition by central government of caps on expenditure, revenue or debt.

3.3 Assistance and intervention framework

Councils are already subject to public scrutiny by ratepayers, nowhere more so than in smaller communities where the council's activities loom large. The Kāpiti Coast District Council has no problems with being held accountable for its decisions by its electors or by the wider public.

Definition of "problem"

We are concerned that the trigger for assistance or intervention is only that a problem must exist in the reasonable opinion of the Minister. The definition of "problem" is broad and in effect gives the Minister sweeping powers to trigger an intervention.

Assistance

We struggle to see any value that the proposed assistance steps would add to the standard input provided by the annual audit process. Indeed, in contrast to unasked for assistance instigated by the Minister at any time and on the basis of as yet undefined criteria, the annual audit has the advantage of being fully independent, well-understood and governed by internationally accepted standards.

With regard to the levels of assistance this Council believes that they should be triggered only by clearly defined criteria developed by the sector. A staged approach should be taken to the implementation of this assistance beginning at step one and only progressing to the next level based on the agreed criteria.

We agree that assistance for under-resourced councils could be beneficial in some circumstances and propose that, rather than running the risk of the Minister being seen to be acting on a whim or flimsy evidence, a mechanism for offering such assistance in tandem with the annual audit process be established by the Office of the Auditor-General.

Council position

Kāpiti Coast District Council **supports in principle** providing access for councils to varying levels of assistance with problems **with the proviso** that it be delivered through the Office of the Auditor-General as part of the annual audit process and that progression through the levels of assistance be staged and based on clearly-defined criteria.

Costs

We note that the costs of either assistance or intervention are likely to be born fully or in part by the council concerned. Our experience of annual audit costs suggests that these costs are quite high. Funding to cover this would need to be found from within budgets approved through the LTP and Annual Plan processes and may have considerable impacts for councils which do not enjoy large revenue bases. Annual audits are a known quantity and can be budgeted for.

Intervention

With regard to the intervention measures proposed in the Bill, this Council has major concerns with the proposal to allow the Minister to appoint a Crown Manager. It is difficult to see how a Chief Executive could continue to work alongside such an appointee. Further, given that the Crown Manager would report directly to the Minister, the elected council would also be sidelined.

It has been suggested that the Crown Manager might manage only a part of the operations where the problem occurs. In our view, this demonstrates a failure to understand the integrated nature of operations in local government. Given that this intervention will be triggered by a failure to meet the financial prudence requirements, it is safe to assume that many problems will be located in the area of financial control. There is no possibility of 'ring-fencing' financial operations from the rest of a council's operations or governance.

In practice such an appointment would represent a direct take-over of both management and governance by the Minister. This represents a very considerable blurring of the management/governance distinction and is directly contrary to a fundamental tenet of internationally- recognised best practice that the spheres of governance and management should be clearly delineated and kept largely separate.

Further, it represents a removal of one of the few checks and balances in New Zealand's constitutional democracy provided by the independence of local government. An analogy has been drawn with the way Government manages problems in schools and hospital boards. Kāpiti Coast District Council rejects this comparison as inappropriate. Local councils are creatures of statute but they are not departments of central government. They have their own separate democratic structures and processes. The principle of maintaining local democracy with councils governed by the direct participation of local communities is an important feature of constitutional democracy, especially in New Zealand which lacks a second House of Parliament which might otherwise act as a counter-balance to the actions of a Government which is more remote from local needs, circumstances and aspirations.

This Council is strongly opposed to the inclusion of the power to appoint a Crown Manager and proposes that the Minister's powers be restricted to the ability to appoint a Crown Commissioner or order a new council election. We believe that a well-resourced, independent assistance effort by the Office of the Auditor-General in response to a council's failure, or potential failure, to meet its own benchmarks would obviate the need for such an appointment while preserving more of the constitutional safe-guards provided by the independence of *local* government.

Levels of assistance/intervention

While the Act appears to indicate that the taking of assistance or intervention steps will be linked to failure to meet the FPR and that specific levels of assistance or intervention will be

triggered by specific levels of failure, this does not appear to be the case for intervention triggered by the Minister's perception of a "problem". Rather it would appear that the Minister would be both judge and jury as to the existence of a problem, its scale and the appropriate level of assistance or intervention to be applied.

As with the assistance levels, with the exception of the appointment of the Crown Manager as discussed above, the intervention steps should only be triggered by well-understood criteria developed with the involvement of LGNZ. Further, it should be a requirement that the first step (appointment of a Crown Commissioner) be undertaken before progressing to the ultimate step of calling a new election.

Council's position

Kāpiti Coast District Council **opposes** the Ministerial power to appoint a Crown Manager.

Kāpiti Coast District Council **supports** the Ministerial power to appoint a Crown Commissioner or call a new council election **with the proviso** that intervention be staged through the two steps and that the criteria for both intervening and progressing from level to level are clearly defined with LGNZ involvement.

3.4 Local government reorganisation processes

The changes introduced in the Bill covering the reorganisation of local government are far reaching. Kāpiti Coast District Council has some concern about the current drafting of the Bill in this regard.

Criteria

The Bill enables anybody to present a proposal for reorganisation to the Commission. The proposal must promote good local government, and must also drive efficiencies, productivity and simplified planning systems. It does not set out other criteria, nor allow for their development by the affected communities, which should also be considered in any proposal.

For local authorities which have been the subject of a previous reorganisation proposal, the Commission **may** set a moratorium period (maximum 3 years) within which a new proposal may not be accepted. Equally, the Commission may choose not to set any such criterion.

This Council has serious concerns about the destabilising potential of serial reorganisation proposals inherent in these proposed provisions. Apparently, any fringe group with an ideological mission could submit any number of proposals covering any number of local authorities. Alternatively, anyone with an axe to grind with a particular council could submit serial proposals to have it abolished. In either case, a significant loss of productivity would be inevitable in the council(s) concerned and the ability to ensure continuing delivery of services, particularly in the planning and policy areas, would be noticeably compromised.

Council's position

Kāpiti Coast District Council **opposes** the criteria for local government reorganisation in the Bill.

Determining community support

A proposal needs to show that it has “significant community support” which is defined as being support from “a large proportion of the community, *or of the leaders of the community*” [our italics]. This definition is problematic on two grounds:

- Firstly, “a large proportion” gives no clearer indication than “significant”. Does it mean a majority? In common parlance, 30% may qualify as “a large proportion”. If it does not mean a majority one of the basic tenets of democracy as practised in New Zealand is undermined.
- Second, equating “leaders of the community” with the community itself is fraught with potential difficulties. Who defines who these leaders are? The community? The Government? The Local Government Commission (acting under the direction of the Minister)?

The Council is concerned that the Commission can proceed with a proposal without a poll unless sufficient ratepayers petition for a poll to be undertaken. These ratepayers have a minimum of 40 working days to petition the Commission for a poll to be taken on the proposal. Given the significance of the potential changes likely under the proposals this seems to be an undesirably hasty process. In Tasman District, it took 18 months to assemble the requisite number of signatures for a poll.

We are aware that this may be precisely the kind of long-drawn-out process the legislation is trying to remedy. However, we submit that this proposal to ascertain a very ill-defined “significant community support” in lieu of a poll would open up any decision made on this basis to major opposition and potentially to extensive judicial challenge which may be even more drawn out. This problem of the lengthy process could be overcome by eliminating the need for a petition through reinstating the requirement for a mandatory poll on any final proposal.

The requirement for ratepayers to petition for a poll rather than it being mandatory that a poll be undertaken also places a great deal of power in the hands of the Commission. By determining a short period for assembling petition signatures and only consulting a list of community leaders selected by itself, the Commission could, in effect, override very significant community opposition to a proposal.

The abolition of the requirement for a poll of electors is undemocratic.

We note the proposal being considered by the Wellington region’s Mayors that

“If the LGA Amendment Bill becomes law without a provision for a mandatory poll before local government reform, member territorial Councils will conduct simultaneous polls of registered electors in their areas on any “final proposal” from the Local Government Commission that affects this region.”

This Council could well adopt this approach should the current provisions in the Bill become law.

Should the government pass this legislation without reinstating the mandatory poll requirement, this Council strongly urges the removal of the phrase “*or of the leaders of the community*” from the interpretation of “*significant community support*”.

Council's position

Kāpiti Coast District Council **supports** the local government reorganisation provisions in the Bill **with the proviso** that the requirement for the Local Government Commission to hold a poll of affected electors requiring majority support from each affected council area be reinstated and other provisions relating to ensuring significant community support be removed.

Should the Government *not* reinstate the mandatory poll provisions, Kāpiti Coast District Council **opposes** the inclusion of "*or of the leaders of the community*" in the definition of "*significant community support*".

3.5 Mayoral powers

The Bill allows for Mayors, at their discretion, to exercise powers to establish committees, appoint deputies and committee chairs and to lead the development of plans, policies and associated budgets. These powers are the same as those given to the Mayor of Auckland under its enabling legislation.

Appointment of committees, chairs and deputy mayors

Kāpiti Coast District Council supports the provision of powers to Mayors to establish committees, and to appoint deputies and committee chairs at their discretion.

Leading development of plans, policies and budgets

The Council has some concerns, however, with the powers to lead the development of plans, policies and associated budgets. There is potential for a return to pre-1989 reforms situations where assuring the continuity of initiatives was problematic because of a council's ability to make dramatic changes in policy direction. The scope and timeframes of many local government plans and strategies often require many years, sometimes decades, to achieve full effectiveness. In practice, it is often council officers who have the historical information and can advise councillors of the need for continuity. If these aspects cannot be considered when making decisions to change policy because the Mayor, in shaping the agenda from the outset, has eliminated them from consideration, local government's service delivery risks becoming the victim of political footballhood once again.

We note that the existing legislation does not appear to be a barrier to mayors setting rates levels and priority areas for council spending and focus, if they can gain the support of enough democratically elected councillors.

Practical considerations

We also have some concerns as to how these powers might be implemented, particularly in smaller councils which would be very unlikely to be able to afford to provide separate staff to a Mayor's office as in the Auckland model. Where these resources to assist the Mayor to develop the plans, policies and budgets must be located within the organisation a question arises as to who actually directs the work: the Chief Executive or the Mayor? Once again, this provision risks resulting in a major blurring of the governance/management boundaries and flies in the face of internationally accepted best practice where governance is concerned.

Provision of professional and non-partisan advice

Regardless of the practical implementation issues of this provision, we are also very concerned that councils' reliance on the professional and unbiased advice of officers could be significantly eroded.

While councillors make the final decisions on matters of policy, strategic direction and budget setting, they rely heavily on the provision of independently-developed, professional advice from council officers. The benefits of the non-partisan nature of this advice could well be lost if these proposed mayoral powers are confirmed.

The final form of this legislation should clarify how these provisions are intended to work in practice and how they should be integrated with the responsibilities of the Chief Executive and officers to offer frank and independent advice.

Council's position

Kāpiti Coast District Council ***supports*** the provisions in the Bill giving mayors the power to establish committees, and to appoint a deputy and committee chairs.

Kāpiti Coast District Council ***opposes*** the provisions in the Bill giving mayors the power to lead the development of plans, policies and associated budgets.