



11 June 2024

Mr Stuart Smith
Chairperson
Finance and Expenditure Committee
By email: fe@parliament.govt.nz

Dear Mr Smith

Ombudsman's submission on the Local Government (Water Services Preliminary Arrangements) Bill

I write to you on behalf of the Chief Ombudsman, Peter Boshier.

Thank you for providing the Ombudsman with an opportunity to submit on the Local Government (Water Services Preliminary Arrangements) Bill (the Bill).

New entities should be subject to accountability mechanisms

The Legislation Design and Advisory Committee's most recent guidelines, issued in 2021, make it clear that all public bodies, or all bodies performing a public function, should be subject to appropriate accountability mechanisms.¹ This includes an expectation that such bodies will be made subject to the Ombudsmen Act 1975 and the Official Information Act 1982 (OIA) or Local Government Official Information and Meetings Act 1987 (LGOIMA) (as applicable), unless there are compelling reasons for them not to be. These Acts are key mechanisms by which government bodies, or bodies exercising government functions, are held accountable for their activities.

The Bill proposes the creation of a handful of new entities, including:

- Crown facilitators (clause 20);
- Crown water services specialists (clause 23);
- Crown monitor with respect specifically to Watercare Services Limited (clause 60);
- Water services council-controlled organisations (Part 3).

These entities are clearly performing public functions, whether central or local government in nature. While the Bill proposes certain mandatory reporting requirements which may go some way to promoting accountability through transparency, this does not obviate the need for the bodies also to be subject to the usual accountability mechanisms. As was identified succinctly in

¹ Legislation Design and Advisory Committee, *Legislation Guidelines 2021 Edition*, available at: <https://www.ldac.org.nz/assets/Guidelines/LDAC-Legislation-Guidelines-2021-edition.pdf>

the Walkerton Report—concerning a significant failure in the safety measures intended to protect the water supply in Ontario—it is critical to: ²

...improve both transparency and accountability in the water supply system. Public confidence will be fostered by ensuring that members of the public have access to current information about the different components of the system, about the quality of the water, and about decisions that affect water safety. Public confidence will also be raised by ensuring that those who make decisions about drinking water safety are accountable for the consequences of those decisions.

The Chief Ombudsman therefore considers that each of the new entities, or category of entities, should be made subject to the Ombudsmen Act 1975, and the OIA and LGOIMA, as applicable. This can be done by:

- Adding ‘*Crown facilitators created under the Local Government (Water Services Preliminary Arrangements) Act*’ to Part 2 of Schedule 1 of the Ombudsmen Act;³
- Adding ‘*Crown water services specialists created under the Local Government (Water Services Preliminary Arrangements) Act*’ to Part 2 of Schedule 1 of the Ombudsmen Act;
- Adding ‘*the Crown monitor created under the Local Government (Water Services Preliminary Arrangements) Act*’ to Part 2 of Schedule 1 of the Ombudsmen Act; and
- Ensuring that the definition of ‘council-controlled organisation’ in section 6 of the Local Government Act 2002 includes ‘*Water services council-controlled organisations’ created under the Local Government (Water Services Preliminary Arrangements) Act*’.⁴

This being the case, the Select Committee may also wish to consider whether it is necessary for clause 39 of the Bill to provide that ‘specified entities’ may charge members of the public for the supply of ‘*copies of statements and information*’ relevant to a determination contemplated by clause 35. The OIA and LGOIMA already provide for information to be made available upon request and, where appropriate, to do so subject to a charge. The OIA and LGOIMA also permit the imposition of quantum of such a charge to be challenged by way of a complaint to the Ombudsman, seeking a review. It therefore may simply be desirable to let the already existing legislation operate as intended.

The Bill also contemplates ‘groups’ of territorial authorities banding together to jointly administer certain water-related functions, without necessarily making it clear how complaints against, or information requests made to, those groups would or should be handled. The Select Committee might wish to clarify the application of the Ombudsmen Act and LGOIMA to these groups. This can be done by requiring the relevant group of territorial authorities either to:

² The Walkerton Inquiry, The Walkerton Inquiry report, 2002, available at: https://www.archives.gov.on.ca/en/e_records/walkerton/report2/index.html

³ Any agency included in Part 2 Schedule 1 of the Ombudsmen Act is also subject to the OIA.

⁴ ‘Council-controlled organisations’ under the Local Government Act 2002 are subject to the Ombudsmen Act as a consequence of being listed as a class in Part 3 of Schedule 1 of the Ombudsmen Act, and are also subject, through the operation of section 74 of the Local Government Act 2002, to Parts 1 through 6 of the LGOIMA.

- Nominate a ‘lead’ territorial authority for each group which will, on behalf of the group, handle complaints or information requests regarding the provision of the relevant shared services. This could resemble, by way of example, section 26(2)(c) of the Public Service Act 2020, which requires one department to be a ‘servicing department’ of an interdepartmental executive board; or
- Create a standalone body which will carry out the relevant administrative functions, including handling information requests and complaints. The body should be added to the part 3 of schedule 1 of the Ombudsmen Act and to part 1 of schedule 1 the LGOIMA in its own right.⁵ This may parallel provisions in the Public Service Act 2020, which permits ‘interdepartmental ventures’ which carry out functions of two or more departments (section 32 of the Public Service Act refers).

Requirement to make publicly available certain information

The Bill contains a number of clauses which require certain information to be made publicly available. These include:

- Each territorial authority must prepare a water services delivery plan that ‘*demonstrates publicly its commitment to deliver water services*’ in an acceptable way (clause 8), and must, once it is accepted, publish that plan on its website (clause 19);
- The Commerce Commission determines what information a specified entity must make publicly available and disclose to the Commerce Commission (clauses 35 and 36);
- A territorial authority must make publicly available certain information when consulting in relation to establishing, joining or amending a council-controlled organisation (clause 54).

The OIA and LGOIMA each have non-derogation clauses which mean the Acts do not apply to information where there is ‘*any other enactment*’ which authorises or requires official information to be made available.⁶

To avoid any inadvertent carving out of information from the relevant official information regime(s), the Select Committee may wish to consider making it clear that the Bill does not intend to dis-apply the OIA or LGOIMA, as relevant. This might resemble a simple subclause, attached to each clause requiring an agency to make certain information publicly available, confirming that the publication requirement does not affect the application of the OIA or LGOIMA (as appropriate) to official information held by that agency.

Confidentiality of information provided to other agencies

Clause 41 of the Bill appears to authorise the Commerce Commission and the Department of Internal Affairs (DIA) to share information for certain purposes set out in the Bill, including understanding and assessing a territorial authority’s intention and commitment to delivering

⁵ I note, for completeness, that this would also make these standalone bodies subject to the ‘meetings’ provisions in Part 7 of the LGOIMA.

⁶ Section 52(3) of the OIA and section 44(2) of LGOIMA.

water services. Any information so shared would be, in essence, subject to an expectation of confidentiality as the information may only be used for those specified purposes.

The Chief Ombudsman observes that the OIA would continue to apply to information held by the Commerce Commission and by DIA, although clause 41 of the Bill may, in essence, raise a presumption that the relevant information is held confidentially by the recipient. The Chief Ombudsman observes that, if that information is subsequently requested under the OIA, the need to preserve the confidentiality by withholding that information will be subject to the countervailing public interest test set out in that Act.

Implications for consumers of Watercare charter

Clauses 68(2) and (3) of the Bill contemplate Watercare's performance being managed by the Crown monitor by the way of incentives. These including provision for the Crown monitor to affix penalties or rewards in the form of—respectively—a reduction or increase in Watercare's maximum prices or revenues, based on the extent to which Watercare has met or failed to meet minimum service quality standards, performance targets, or financial performance objectives.

Access to water and to sanitation are human rights recognised by the United Nations,⁷ derived from the right to an adequate standard of living under Article 11(1) of the International Covenant on Economic, Social and Cultural Rights,⁸ and are fundamental to health, dignity and prosperity. These rights should not be interfered with lightly, including by increasing charges to access clean water or basic sanitation.

The Select Committee may wish to examine whether there is a more human rights-consistent way in which to incentivise good performance by Watercare.

Conclusion

Thank you for considering the Chief Ombudsman's comments.

The Chief Ombudsman or his delegate would welcome the opportunity to speak to his submission in front of the Select Committee.

Yours sincerely



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⁷ United Nations Office of the High Commissioner, *OHCHR and the rights to water and sanitation*, available at: <https://www.ohchr.org/en/water-and-sanitation>.

⁸ United Nations General Assembly, International Covenant on Economic, Social and Cultural Rights, 19 December 1966.