Submission by the
Human Rights Commission

LOCAL GOVERNMENT ACT 2002
AMENDMENT BILL

To the Local Government & Environment Committee

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1. INTRODUCTION

1.1 This submission on the Local Government Act 2000 Amendment Bill is made by the Human Rights Commission (the Commission). As the Commission has noted in the past when making submissions on local government legislation, human rights underpin New Zealand's system of government and the responsibility for promoting and protecting human rights is not limited to central government but also applies to regional and local government.

1.2 Local government decisions, including how services are provided, are often the most direct concrete expression of the democratic process (or the lack of it). As Professor Josephs has noted recently, *Democratic decision-making in local government is ingrained in the national psyche and a legitimate expectation of the citizenry*.[1]

1.3 The Commission has always promoted the importance of clear, transparent and accountable decision making as integral to effective and democratic local governance. This Bill, with its emphasis on transparent governance, is a step in the right direction but there are a number of matters which the Commission considers have the potential to undermine a truly participatory, human rights approach[2].

2. COMMISSION'S CONCERNS

2.1 The Commission welcomes the Bill's intention to promote an approach to local government that is designed, at least theoretically, to ensure clearer accountability and greater transparency. It does, however, consider that aspects of the Bill (particularly some of the changes designed to facilitate increased private sector participation in local government activities) have the potential to undermine this. They include:

- reduction in community consultation requirements;
- integration of community outcomes into long term planning;
- potential for privatisation of the management of water delivery and infrastructure development.

[1] Joseph , P *Environment Canterbury Legislation* NZLJ June 2010 at 196
[2] For further on this issue see International Council for Human Rights, *Local Government and Human Rights: Doing Good Service*, Geneva (2005) at 4

3. A HUMAN RIGHTS APPROACH TO GOVERNANCE

3.1 The Bill proposes amending the Local Government Act 2002 (LGA 2002) to ensure that local government decision making is clearer, more transparent and accountable. Strategically this will be accomplished by changing the way in which local authorities set their direction and in how local communities can influence and assess the process. Operationally, it will be achieved - at least in part - by reinforcing the need for local authorities to focus on, and deliver, certain defined core services. The Bill therefore amends the provisions in the principal Act relating to the role of local government, by qualifying the existing (and relatively flexible) role of local councils with a requirement that councils focus on certain core services.

3.2 Core services are defined as:

- network infrastructure;
- public transport services;
- solid waste collection and disposal;
- the avoidance or mitigation of natural hazards; and
- libraries, museums, reserves, recreational facilities and other community infrastructure.

3.3 We note that the Regulatory Impact Statement on the Bill recognises that some people may chose to interpret the list literally which could result in litigation or constrain debate on whether certain services are to be transferred to other providers[3]. While acknowledging these concerns, our disquiet is more basic. Namely, that services that do not fall within these criteria but are equally critical to healthy and effectively functioning communities - in particular social housing, environmental activities or cultural facilities - could be at risk.

3.4 The Commission considers that simplifying and directing local government to concentrate on certain core services - when coupled with the changes designed to reduce “unnecessary” consultation - has the potential to undermine the ability of the public to have a say in how their community is run and the type of services they would prioritise, which runs counter to the purpose of the Principal Act and effectively contravenes the right to effective participation.

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[3] *Improving Local Government: Transparency, Accountability and Financial Management: Regulatory Impact Statement* at para 115.

4. OBLIGATION ON COUNCILS TO CONSULT

4.1 The Principal Act states that the purpose of the LGA 2002 is to (inter alia) provide for democratic and effective local government that "recognises the diversity of local communities and, to that end … promotes the accountability of local authorities to their communities"[4]. This is reinforced in ss.10 and 11 which refer to enabling local democratic decision making and action by, and on behalf of, local communities.

4.2 Clearly, the Act envisages councils acting in a manner that is consistent with the views of their communities yet the Bill introduces provisions that will "remove unnecessary consultation"[5]. The Commission considers this is at odds with the stated intent to ensure that local decision making is clear, transparent and accountable[6].

4.3 The Courts have stated on a number of occasions that, while there is no required form consultation should take, it is never to be treated as a "mere formality" and a genuine effort must be made to accommodate the views of those being consulted. Consultation must be "a reality, not a charade".[7]

4.4 The Bill will significantly limit the opportunity for different communities to consult, and act in partnership, with local councils. For example, in addition to qualifying section 11 by the provision emphasising core services, the Bill will:

- repeal ss.91 and 92 of the Principal Act which create a process for identifying community views and an obligation to report against community outcomes and which requires councils to work in partnership to address local issues. (clause 12);
- no longer require decisions to construct, replace or abandon a strategic asset to be expressly provided in long term plans - even though in the past councils have resiled from selling strategic assets following submissions from the public opposing such sales (clause 14);
- repeal the present requirement in s.102 which requires local authorities to have a policy on partnerships between the authority and the private sector in their funding and finance policies (clause 18).

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[4] S. 3 LGA 2002
[5] *Explanatory Note: Local Government Act 2002 Amendment Bill* (142-1) at 2
[6] Ibid. at 1
[7] *Wellington International Airport & Ors v Air New Zealand Ltd* [1993] 1 NZLR 671 (CA)

4.5 The repeal of ss.91 and 92 is particularly concerning since it effectively "writes out" of the legislation the process for identifying and accounting for community outcomes, the rationale being that this function is subsumed within the long term community plan even though Schedule 10 (which we comment on further below and which deals with such plans) has itself been amended to ensure that the community outcomes are limited to those "determined to be appropriate by the local authority".

4.6 At present s.91 outlines a process for identifying the purposes of community consultation and includes allowing communities to discuss their desired outcomes in terms of the future social, economic, environmental and cultural well-being of the community[8]. This is consistent with the purpose of the principal Act that refers to promoting accountability of local authorities to their communities and promoting their social, economic, environmental and cultural well being[9]. There is no analogous requirement in the Bill. The only reference to the community's social, economic, environmental and cultural well being is couched in negative terms - that is, the long term plan will only need to outline any significant negative effects that any activity may have on "social, economic, environmental and cultural well being of the community." The Commission considers that this is inconsistent with the requirement that local councils should be accountable to their electorate.

4.7 The Bill will also repeal s.78(2) which relates to how community views in relation to decisions are incorporated in council decision making. Although ostensibly not removing the obligation to take community views into consideration (ss.78(1) & (3) are retained), clause 8 will remove that part of the provision which indicates the points in the decision making process where a local authority must consider the view and preferences of people likely to be effected by, or to have an interest in, the matter under consideration.

4.8 A local authority will be able to pay lip service to the requirement to consider community views by claiming that it took the views of those affected into consideration in reaching a decision even if it had not consulted with them. Section 79 is no protection against this possibility since it confers a discretion on a council about how it complies with s.78, the significance of the matter under consideration and reinforces the importance of the principles in s.14.

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[8] S. 91(2)(a) LGA 2002
[9] S.3 (c)(d) LGA 2002

4.9 The cumulative effect of the changes listed above will be to transfer the focus of the Act to councils and what they wish to achieve, rather than what communities want to see happen and how that might occur. The underlying reason for this appears to be the concern that some councils have found community consultation in its present form both challenging and costly to comply.[10]

4.10 The Commission considers that the changes will limit community input particularly when viewed in conjunction with the changes to the content of long term community plans (which are described below) and – in our view – are likely to undermine the ability of different communities to influence the activities of local government. As such they significantly undercut the right to participation.

5. INTEGRATION OF COMMUNITY OUTCOMES IN LONG TERM COUNCIL PLANNING

5.1 Community outcomes are to be integrated with long term planning processes to "encourage better prioritisation of community aspirations."[11] Rather than the current system of reporting separately on community outcomes, outcomes will be reported as part of long term council plans which will become "the main vehicle for debating outcomes"[12] .

5.2 Section 93 of the LGA 2002 requires a council to have a long term council community plan which describes the activities of the council, and is the vehicle for (inter alia) accountability to, and participation by, the community.

5.3 Presently Schedule 10 outlines the information that must be included in long term council plans. Clause 1 describes in some detail how the community outcomes were to be identified, how the local authority will contribute to furthering those outcomes and requires the council to work with Maori, NGOs and other organisations.

5.4 The Bill introduces a new Schedule 10 which will only require councils to describe community outcomes but not how they were selected. There is no obligation for councils to identify how they propose to engage with communities or which communities they choose to engage with. Again, the

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[10] Supra fn. 1 at para 119
[11] Supra fn 4 at 2
[12] Ibid. para 120

Commission considers that the changes will undercut the ability for communities to engage constructively with local authorities and influence the planning process.

6. PRIVATE SECTOR INVOLVEMENT IN WATER INFRASTRUCTURE & SERVICES

6.1 The Bill includes provisions designed to remove unnecessary barriers to water infrastructure development. It does this by reducing the restrictions on private sector involvement in the delivery of water services to allow local authorities greater flexibility in choosing methods for delivering water services and developing water infrastructure.

6.2 The Commission accepts that local authorities will not be able to sell or privatise water services, or enter into legal agreements that transfer the responsibility for delivering water services but notes also that the literature refers to "privatization" as broadly encompassing **all forms of asset and/or operations transferred** from the public sector to the private sector[13].

6.3 The provisions relating to water are possibly the most contentious aspect of the Bill as they are seen in some quarters as allowing for the privatisation of water and (the argument goes) as the right to water is a human right it should remain in public ownership. In terms of its actual wording the Bill is not intended to expedite the privatisation of water as a commodity but rather to facilitate the contracting out of the delivery of water services and how this is achieved.

6.4 The right to water can be described as a human right for a variety of reasons - most obviously as an essential constituent of the rights to life, health, food and an adequate standard of living found in the International Covenant on Economic, Social and Cultural Rights (ICESCR)[14]. While this suggests that the right to water is not an independent right in itself but rather one linked to more substantive rights, it is generally accepted that it merits protection because of its connection with those rights[15].

[13] See, for example, Fauconnier, I *The Privatisation of Residential Water Supply and Sanitation Services: Social Equity Issues in the California and International Contexts* Berkley Planning Journal 13(1999): 37-73
[14] Although the right to water has also been inferred as part of the right to life protected by Art.6(1) ICCPR
[15] Williams, M. *Privatisation and the Human Right to Water: Challenges for the New Century* Michigan Jnl of Intn'l Law [2007] Vol. 28, 469

6.5 In 2002 the Committee on Economic, Social and Cultural Rights (the ESCR Committee) recognised in its General Comment 15[16]that the right to water was *one of the guarantees essential for securing an adequate standard of living, particularly since it is one of the most fundamental conditions for survival*. For obvious reasons water is also integral to the realisation of the right to the highest attainable standard of health.

6.6 Human rights law does not support or oppose the privatisation of the management of the supply of water and associated services but rather promotes the introduction of a human rights perspective in how it is supplied as a way of indicating the minimum obligations of government and private suppliers in the context of privatisation[17].

6.7 The General Comment notes that there are certain procedural rights associated with the right to water including a right to information about water issues, a right to participate in decisions about water and the right to an effective remedy for violation of the right[18]. These rights have profound implications for how decisions should be made about water resources because they require transparency and participation.

6.8 The Regulatory Impact Statement accepted that there was likely to be considerable public interest in any local government organisation seeking to use the new options open to them but that existing statutory options for consultation should address any issue of public concern[19]. The Commission is less confident that this will be the case. For example, we note that one of the safeguards specifically identified is the s.78 process which we have already indicated [at para 4.5] may result (in our view) in diminished protection given the changes proposed in the Bill.

6.9 One issue where there is clear comment from a human rights perspective is in relation to the cost. The Office of the High Commissioner for Human Rights has issued a statement which notes that:

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[16] UN Committee on Economic, Social and Cultural Rights, *General Comment No.15: the Right to Water* (2002) UN Doc.E/C.12/2002/11

[17] See comments by the Office of High Commissioner for Human Rights, *Background paper: Human Rights, Poverty Reduction and Sustainable Development: Health, Food and Water* ¶ 12 World Summit on Sustainable Development, South Africa (2002); ILO, *Report of Tripartite Meeting on Managing the Privatisation and Restructuring of Public Utilities* (1999) Geneva; and Fauconnier, I. *The Privatisation of Residential Water Supply and Sanitation Services: Social Equity Issues in the California and International Contexts* Berkley Planning Journal 13(1999): 37-73.

[18] Supra fn 10 at paras 12, 48 and 55

[19] Supra fn 1 at para 47

Affordable water requires that direct and indirect costs (including both connection and delivery costs) related to water should not prevent a person from accessing safe drinking water and sanitation and should not compromise access to other basic services, including food, health and education.

It is important therefore that irrespective of who is responsible for its delivery, the price of water remains affordable for the most vulnerable sectors of the population.

6.10 A further issue that may impact on human rights includes the intention to lengthen the period that local authorities can enter into contracts from 15 to 35 years[20]. Longer term arrangements are considered to lead to less flexibility to ensure standards are met because the private provider will not be exposed to the same competitive pressures to retain the contract[21]. On the other hand, longer contracts make it easier to impose stricter standards as the private manager has longer to recoup their expenditure.

6.11 As we noted in para 6.4, although the right to water can be conceptualised as a human right, human rights law does not specifically proscribe the privatisation of water[22] but it does provide guidance on what States' obligations are under such circumstances. In the words of the General Comment:

Where water services … are operated or controlled by third parties, States parties must prevent them from compromising equal, affordable and physical access to sufficient, safe and acceptable water. To prevent such abuses an effective regulatory system must be established, in conformity with the Covenant … which includes independent monitoring and genuine public participation … [23]

6.12 The Commission encourages the Committee to approach the issue of privatisation with these concerns in mind and to ensure that government retains sufficient control to ensure that human rights commitments are observed by third party providers. It is also important that private providers are aware of their human rights obligations, particularly the principles of non-

[20] A period that is considered to be at the optimum end of the spectrum and more akin to granting a concession than entering into a contract for services: Fauconnier, I. Supra fn 13

[21] Supra fn 11 at 494

[22] It is fair to say that the human rights issues relating to the right to water are still evolving. The UN Independent Expert on the Human Rights to Water and Sanitation, Catarina de Albuquerque, is currently compiling a compendium of best practice in relation to the provision of water which will address the issue of privatisation.

[23] General Comment 15, supra fn 12 para 24

discrimination and public participation, in giving effect to contracts with local bodies for the supply of water.

7. CONCLUSION

7.1 The Commission recognises the Bill is designed to promote a more participatory approach to local government and ensure greater transparency and accountability. As they are consistent with a human rights approach to local governance, the Commission supports these objectives.

7.2 Aspects of the Bill undermine its intent. In particular, the repeal of certain provisions that are considered to require unnecessary consultation may have the effect of limiting public participation and restricting the ability of the community to have meaningful input into decisions which affect them. We recommend, in this regard, retaining s.78(2) - which specifically identifies the stages at which a local authority should consider community views - and ss.91 and 92 - which indicate how community outcomes are established and monitored.

7.3 In relation to the issue of privatisation of the management of water delivery and infrastructure, as the right to water is recognised in human rights law - but accepting there is no definitive position on private versus public management – the Commission considers it important there is an obligation in the Act that any arrangements with private providers reflect human rights considerations.