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Finance and Expenditure
Committee Parliament Buildings
Wellington

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Submission on the Water Services Legislation Bill 2022

1. The Hurunui District Council (HDC) thanks the Select Committee for the opportunity to comment on the Water Services Legislation Bill 2022.

2. **The Hurunui District Council wishes to appear before the Finance and Expenditure Committee to speak to its submission**.

3. The Hurunui District is located in North Canterbury. It has approximately 13,450 residents and cover an area of 8,640km^2. The Hurunui District is primarily a rural district with large areas dedicated to primary production interspersed with small service towns. Hurunui District Council operates and maintains the assets of twenty community owned water schemes, seven wastewater schemes and a stormwater network.

4. HDC remains strongly in opposition to the proposed three waters reforms. Nothing in this submission should be read as indicating that HDC now concurs with the reforms. Nevertheless, HDC recognises that it is important that any new legislation which may be passed is well drafted, and hence is submitting on the Bill in this spirit.

5. Interpretation of Stormwater Network

   The Water Services Legislation Bill 2022 amends section 6 of the Water Services Entities Act 2022 such that the definition of a stormwater network excludes a transport stormwater system.

   During engagement with the Department of Internal Affairs, HDC has highlighted the challenges associated with the draft three waters legislation relating to stormwater networks. Water being discharged from an urban stormwater network travels downstream, in many instances impacting rural stormwater networks. Hence, the distinction between urban and rural stormwater is artificial.

   The scope of the stormwater assets, liabilities and other matters being transferred is made more complex by the exclusion of transport stormwater systems. A significant component of the urban stormwater network is situated in the roading corridor. After establishment date, small/medium local authorities are unlikely to retain dedicated three waters staff, vehicles and other assets. Hence there are likely to be challenges for local authorities in seeking to carry out residual three waters services.

It is recommended that the scope of stormwater network services to be transferred to the water services entities be reviewed to ensure that the resulting arrangements are practicable for both the water services entity and local authorities.

6. Part 6 – Provisions relating to water services infrastructure – Clause 218

   HDC notes that this Part of the Water Services Legislation Bill 2022 relies on the Public Works Act 1981 for determining compensation in relation to work carried out on or below land. It notes that the government could have used the Public Works Act 1981 to effect some of the objects of the three waters reforms, rather than establish additional legislation.

7. Part 7 – Controlled drinking water catchments

   HDC concurs with the proposal to establish drinking water catchment areas. Under clause 231, this requires that the land is owned or within the long-term control of water service entities and/or that the land owner consents. It is noted that the Regional Council is responsible for consents.

   It is recommended that the water services entity is also required to obtain the consent of the Regional Council prior to establishing drinking water catchment areas.

8. Part 8 – Transfer of small mixed-use rural water services

   (a) ***HDC supports the principle of "alternative operators" being able to manage small mixed use rural water services***. One reason is that management by an alternative operator may help ensure that adequate and reliable stock water is prioritised by the operator at an affordable cost.

   It is recommended that the health and wellbeing of stock is prioritised alongside the health and wellbeing of persons.

   It is recommended that consideration is given to how alternative operators may access the land on which three waters assets are situated.

   (b) HDC considers the proposed threshold in clause 234(a) of 85% of the total volume of water supplied by the service being for agricultural or horticultural purposes is too high. It notes that the percentage used in the drinking water standards NZ 2005 (revised 2008) as part of its criteria is 75%. HDC has sought information about the source of the 85% threshold and it appears that the figure was not evidence-based.

   It is recommended that the 75% threshold used by drinking water standards NZ 2005 (revised 2008) ***be used instead of 85% in defining a small mixed-use rural water service.***

   (c) Clause 244(b)(iv)(A) indicates that all assets and liabilities relating to a small mixed-use rural water supply which is transferring to an alternative operator will take on all assets and liabilities relating to the service. HDC rejects the proposal to transfer the liabilities to the alternative operator because the operator will have had no control over the acquisition of liabilities while the supply has been within the control of the water services entity.

It is recommended that clause 244(b)(iv)(A) be modified such that only the assets associated with the supply are transferred and that the liabilities remain with the water services entity.

9. Clause 342 – Water Services Entity not liable for rates in respect of three waters assets on land it does not own

   Clause 342 provides that a water services entity is not liable to pay rates to any local or territorial authority in respect of (a) any pipes that run through property that it does not own; or (b) any assets that it owns and that are located on property that it does not own.

   This approach is contrary to that used for telecommunications network assets. It also differs from the situation for irrigation scheme operators.

   Water services entities will be heavily reliant on the goodwill of landowners to ensure the smooth operation of water services. It will be important that water services entities are seen as paying an equitable share of costs.

   It is recommended that clause 342, which specifies that water services entities, are not liable for paying rates to local or territorial authorities in respect of three waters assets that it owns which are located on land which it does not own, be removed from the Bill.

10. Part 11 – Charging

    Clause 329(1) provides that a water services entity may charge a consumer for the consumer's volumetric use of water services. The charging principles in Clause 331(1) suggest cost of services, simplicity/transparency and input methodologies/determinations are the key considerations. Clause 331(1) does not refer to geographic averaging, although clause 331(3) does. Clause 334(2) suggests that there are five situations in which a board may decide not to charge a geographic average price. Clause 334(2) could be read as suggesting that, where the specified situations do not apply, it is necessary to adopt geographic averaging. It is evident that geographic averaging may be applied by water services entities. However, it is not clear from the combined provisions as to whether geographic averaging might be obligatory in some situations.

    Geographical price averaging has been one of the cornerstones of the three waters reforms since they were first promulgated. Hence it is surprising that the charging provisions of the Water Services Legislation Bill 2022 are unclear, and that the Bill appears to suggest that geographical price averaging is a matter of water services entity board discretion.

    The charging principles in clause 331 apply from 1 July 2027, or a date appointed by the Governor-General by Order in Council, whichever is the earlier. It is unclear what principles will apply from establishment date until clause 331 takes effect.

    It is recommended that the wording in clauses 329, 331 and 334 be reviewed to ensure (a) greater clarity regarding the priority of the various charging principles, and (b) clarity regarding charging methodologies from establishment date.

11. Clause 329(3)(b) provides that a water services entity may charge a consumer for unpaid volumetric use, including for use that occurred before the water services entity was established. As the water services entities were established under the Water Services Entities Act 2022 and the Water Services Legislation Bill is likely to be passed in 2023, this clause appears to have retrospective effect. As it is not possible for consumers to retrospectively modify their behaviour to reduce water usage, this clause could be seen as unfair. Retrospective legislation is unusual and should not be adopted except with good reason.

    It is recommended that Clause 329(3)(b) be modified to preclude retrospective volumetric charging prior to the passage of the Water Services Legislation Bill 2022.

12. Clause 336 provides that the chief executive of a water services entity may authorise local authorities to collect charges on behalf of the water services entity.

    HDC has significant reservations about this provision for several reasons. One is that it is likely to increase confusion amongst community members as to which agency is responsible for three waters services.

    Because transition of water service entities may result in a local authority reviewing its support staffing complement, as well as its frontline staffing, any intention to apply clause 336 should be signalled at least 6 months prior to establishment date. Also, if clause 336 is not applied as at establishment date, it should be impossible for the chief executive of a water services entity to invoke the clause at a later date, as there may be insufficient staff to carry out the collection activity.

    It would be unreasonable for the chief executive of a water services entity to expect more of a local authority than the water authority has done in the past, or more than is possible given the staffing complement in place. It is not in the interests of the water services entity, the local authority or the community for the charges collection task to be delegated to a local authority with insufficient available resources.

    Local authorities have historically been set up to collect rates for three waters services, not water charges. Some have calculated rates on a volumetric basis, while others haven't. Following establishment date, collecting water charges will not be a core function of local authorities.

    For the above reasons, ***it is recommended that the chief executive of a water services entity may only authorise a local authority to collect charges on its behalf where:***

    - ***Notice is provided at least 6 months prior to establishment date;***
    - ***The commencement date for the collection activity is the establishment date;***
    - ***The local authority confirms it is willing and able to carry out the collection activity; and***
    - ***The parties agree the provisions of a charges collection agreement.***

13. Clause 348 provides that the Crown is exempt from paying any water infrastructure contribution charges. This exemption is not appropriate given that the Crown conducts significant development activity. This provision is unfair on other water users.

    It is recommended that clause 348, which exempts the Crown from paying water infrastructure contribution charges, be removed from the Water Services Legislation Bill 2022.

14. Part 12 – Compliance and Enforcement

    In principle, HDC concurs with the proposal to establish a compliance and enforcement framework. It is essential that there are safeguards in place to protect vulnerable members of the community (both people and stock).

15. Part 13 Subpart 3 – Relationship Agreements

    Clause 467(1) requires a water services entity to enter into a relationship agreement (separately) with territorial authority owners, regional councils and transport corridor managers. It is not clear from the Bill what happens if the parties are unable to agree a relationship agreement.

    It is recommended that an additional subsection be added to clause 467 stating that, in the event that the parties are unable to agree a relationship agreement, that the matter be referred to arbitration.

    HDC would strongly discourage disagreements being referred to the Minister for decisions, as it is important that the process is seen by the parties and the communities they serve to be equitable.

16. Clause 469(1) provides that the parties to a relationship agreement must act in good faith in giving effect to the agreement. Clause 469(2) provides that relationship agreements are not enforceable in any civil proceedings and there is no right of appeal against, or review, of the relationship agreement.

    While HDC concurs with the requirement for the parties to act in good faith, it is in the best interest of communities that appropriate mechanisms are available to parties in the event that the other party does not live up to the commitments it has made in writing (assuming that the other party agreed to them in the first instance). The absence of an enforcement mechanism may result in the parties not giving their full commitment to the provisions in the relationship agreements. It may also reduce community support.

    It is recommended that clause 469(2) is amended to provide for a mechanism for the parties to enforce relationship agreements. This would enable the parties to address and resolve breaches of relationship agreements.

Schedule 1

17. Schedule 1 Clause 42 onwards provides for the transfer for assets, liabilities and other matters to water services entities. In the case of land, for example, it is provided that land which is predominantly used (or *planned* to be used) for three waters purposes will be transferred to the water services entity.

    It is not clear from the Bill what will occur in the event that assets (including land) which have been transferred to the water services entity are no longer required by the water services entity. This matter is particularly critical for territorial authorities and their communities where assets are used for mixed purposes (partly three waters and partly other purposes).

It is recommended that a provision be added that <u>requires</u> that any assets (including land), which have previously been transferred from a territorial authority to a water services entity, which are no longer required by that water services entity, to be offered back to the transferring territorial authority prior to being disposed of in any other way. To provide sufficient time for the matter to be considered by the territorial authority, the Bill should provide that territorial authorities have up to 90 days from the date of being notified to confirm whether they wish to resume ownership of those assets.

18. Schedule 1 Clause 43(1)(a) provides that "*all mixed-use water services assets or property owned or controlled by the local government organisation vest in the water services entity*".

    This provision is contrary to the draft asset transfer guidelines provided by the Department of Internal Affairs, which provides that only some assets and property transfers. For example, an extract from those draft guidelines is provided below:

> *Will all land that relates to the provision of Water Services transfer?*
>
> The policy intention of the Water Services Reform is to only transfer land that is necessary for the WSEs to maintain continuity of Water Services to the community. For this purpose, the focus of the transfer is on land owned by LGOs that has planned or existing Water Services assets on it. Whether a land parcel will transfer will depend on a number of factors, including:
>
> - the primary purpose or use of the land on which the Water Services asset is located or on which a Water Services asset is planned to be located;
> - whether the land is held for separate purposes or uses, each occupying different portions of the same land and could be easily subdivided; and
> - whether the land is held for a mixed or shared use, with non-Water Services being the primary purpose or predominate use.

It is recommended that Schedule 1 Clause 43(c) is modified to reflect that mixed-use water services assets or property owned or controlled in the local government organisation will <u>only</u> vest in the water services entity where the assets/property are primarily/predominantly for water services use.

19. Schedule 1 Clause 54(1) and (2) of the Water Services Legislation Bill 2002 state:

    (1) A water services entity must pay each territorial authority whose district is included in its service area an amount determined by the chief executive of the department that is equivalent to the total debt owed by that territorial authority in respect of any water services infrastructure wholly or partly used in the provision of water services and transferred to the entity under this Act.

    (2) A payment under subclause (1) must be made on the date and in the manner (including by instalments) agreed by the chief executive of the department and the territorial authority.

    There is no provision for territorial authorities to agree the process or the amount of the payment. In theory, the chief executive could determine that the amount was nil.

    There is no provision in the Bill requiring the chief executive to pay interest in respect of the outstanding debt.

It is also unclear what happens under clause 54(4) if the department has not paid the full amount of the debt by the time clause 54 is repealed (5 years after establishment date).

While it is to be hoped that the chief executive of the department would act in good faith, there are insufficient safeguards in the Bill to prevent arbitrary decisions surrounding the settlement of the debt.

In the event that a decision(s) made under clause 54 resulted in financial losses for territorial authorities (e.g. if a territorial authority is required to pay interest on three waters related debt but does not receive fully offsetting interest income from the department), the territorial authority has no means of recovering those costs through rates for three waters services.

It is recommended that Schedule 1 clause 54 is amended to provide that:

- ***interest is payable on any debt settlement amount payable but not yet paid by the department to the territorial authority from establishment date;***
- ***in all cases the full debt settlement amount must be paid within 5 years of establishment date (when clause 54 is repealed); and***
- ***in the event of a dispute regarding the amount to be paid (including interest) and/or payment dates, that the matter is able to be referred to arbitration.***

20. Schedule 1 Clause 63(1) provides that "on or after the establishment date, a water service entity may bill a territorial authority directly for all the stormwater services that the water services entity provides within the boundaries of the territorial authority".

    Schedule 5 Clause 27(2) of the Water Services Entities Act 2022 provides: "That long-term planning must, during the establishment period, exclude any content (for example, any proposals or associated information) relating to water services".

    There is an inconsistency between these two clauses in that any long-term planning during the establishment period, which extends beyond establishment date, needs to incorporate the costs of stormwater services which will be billed by the water services entity to the territorial authority.

    Other challenges with Schedule 5 Clause 27(2) of the Water Services Entities Act 2022 include that, based on the legislation currently available, some stormwater services will remain with territorial authorities after establishment date, e.g. rural stormwater, stormwater in roading corridors. If it is expected that territorial authorities will continue to provide some stormwater services, then it is essential that they should be able to include the residual services in their long-term planning.

    It is recommended that the Water Services Legislation Bill 2022 include a clause amending Schedule 5 Clause 27(2) of the Water Services Entities Act 2022 – such that it permits territorial authorities to include those three waters services <u>for which it is still responsible and/or will continue to incur expenditure</u> to be included in its long-term planning.

Hurunui District Council appreciates the opportunity to submit on this Bill and would be grateful for your consideration of the above matters.