



NEW ZEALAND  
LAW SOCIETY

NZLS EST 1869

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# Local Government Act 2002 Amendment Bill (No 2)

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## Local Government Act 2002 Amendment Bill (No 2)

### Introduction

1. The New Zealand Law Society (Law Society) welcomes the opportunity to comment on the Local Government Act 2002 Amendment Bill (No 2) (Bill). The Bill amends the Local Government Act 2002 (Act). The Bill is intended, among other matters, to introduce increased powers for the Local Government Commission (Commission) with accompanying checks and balances.<sup>1</sup>
2. The Law Society comments on two technical matters in the Bill:
  - a. the selective application of the Crown Entities Act 2004 to the Commission; and
  - b. the definition of the expression “non-statutory function”, and whether this expression is adequate to refer to local authority responsibilities, duties, powers or obligations not expressly set out in statute.

### The Local Government Commission and the Crown Entities Act

3. The Commission, in its current form, is described as *“an independent statutory body (not a Crown Entity or Public Service department). Its formal accountability arrangements are limited compared with other public bodies. There are no requirements for it to produce any kind of annual plan (such as a statement of intent). However, the [Act] requires it to produce a report of its ‘proceedings and operations’ annually (which typically comprise a brief summary of its activities).”*<sup>2</sup>
4. The Bill proposes to *“build on existing accountability arrangements [for the Commission], by retaining the core provisions and introducing additional accountability measures that draw substantially on the accountability framework applying to Crown entities.”*<sup>3</sup>
5. The Bill proposes that the Commission would be subject to the Crown Entities Act in a number of respects:
  - a. the Commission will provide to the Minister a statement of intent every 3 years – proposed new section 31B applies sections 141 – 149A of the Crown Entities Act to the Commission's statement of intent;<sup>4</sup>
  - b. the Minister can direct the Commission to have regard to a Government policy that relates to the Commission’s responsibilities, duties, and powers under Schedule 3 – proposed new section 31D applies section 115 of the Crown Entities Act to the Commission;<sup>5</sup>
  - c. the annual report will have information that complies with the Crown Entities Act – proposed new sections 31F and 31G apply sections 150, 151 (in effect, but without specific reference to the Crown Entities Act) and 152, 154, 155 and 156 (directly) of the Crown Entities Act;<sup>6</sup> and

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<sup>1</sup> See the explanatory note to the Bill and the Regulatory Impact Statement (25 May 2016), page 28, at [https://www.dia.govt.nz/diawebsite.nsf/Files/RIS-Options-for-improving-local-government-June-2016/\\$file/RIS-Options-for-improving-local-government-June-2016.pdf](https://www.dia.govt.nz/diawebsite.nsf/Files/RIS-Options-for-improving-local-government-June-2016/$file/RIS-Options-for-improving-local-government-June-2016.pdf).

<sup>2</sup> Regulatory Impact Statement (25 May 2016), page 28.

<sup>3</sup> Regulatory Impact Statement (25 May 2016), page 28.

<sup>4</sup> Clause 17 of the Bill.

<sup>5</sup> Clause 17.

<sup>6</sup> Clause 17.

- d. the Crown Entities Act process will apply to the appointment of the Commissioner’s Chief Executive: the new clause 29 of Schedule 4 (Schedule 3 of the Bill) applies sections 118 and 119 of the Crown Entities Act.<sup>7</sup>
6. The Bill also repeats and applies sections from the Crown Entities Act to the Commission without express reference to the Crown Entities Act:
  - a. proposed new section 31E (review of Commission’s operations and performance) repeats section 132 of the Crown Entities Act;<sup>8</sup> and
  - b. proposed new clause 3 in Schedule 4 (Schedule 3 of the Bill), (relating to removal of a member), repeats parts of sections 36 – 39 of the Crown Entities Act.<sup>9</sup>
7. The effect of these provisions is that the Bill will apply parts of the Crown Entities Act to the Commission. The Bill does not amend the Crown Entities Act or include the Commission in that Act.
8. There are other legislative examples where parts of the Crown Entities Act are applied to entities, without those entities being expressly listed in the Crown Entities Act. These examples include:
  - a. the New Zealand Council of Legal Education;<sup>10</sup>
  - b. the Queen Elizabeth the Second Trust;<sup>11</sup>
  - c. the Vice-Chancellors Committee;<sup>12</sup> and
  - d. entities listed in Schedule 4 of the Public Finance Act 1989 (these entities are subject to set accountability provisions from the Crown Entities Act).
9. However, the majority of entities subject to the Crown Entities Act are listed (and categorised) in the Crown Entities Act itself. This approach is more consistent with the purpose of that Act, which is, among other matters, to *“provide a consistent framework for the establishment, governance, and operation of Crown entities and ... to provide for different categories of Crown entities and for each category to have its own framework for governance (including the degree to which the Crown entity is required to give effect to, or be independent of, government policy).”*<sup>13</sup>
10. The Law Society questions whether the approach taken in the Bill is the most appropriate approach. The Bill would effectively create the Commission as a new category of government entity, standing apart from the Crown Entities Act, but applying many (although not all) of its provisions.
11. One purpose of the Crown Entities Act was to create a standardised approach to the governance and financial management of state sector bodies (other than government departments), which had previously been under an array of different regimes. This is a laudable aim, has been very useful for public administration and for people dealing with Crown entities and other Crown-related organisations, and is an approach that should not be departed from without good reason.
12. There may be good policy reasons for the approach taken in the Bill. The Law Society, however, has not been able to identify any explanation of why the Crown Entities Act is not applied in full.
13. This point is especially relevant where the Bill repeats requirements from the Crown Entities Act without reference to that Act (e.g. see paragraphs 6 and 8 above). If those parts of the Crown Entities

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<sup>7</sup> Schedule 3 of the Bill.

<sup>8</sup> Clause 17 of the Bill.

<sup>9</sup> Schedule 3 of the Bill.

<sup>10</sup> See Part 8 of the Lawyers and Conveyancers Act 2006.

<sup>11</sup> See The Queen Elizabeth the Second National Trust Act 1977.

<sup>12</sup> See Part 19 of the Education Act 1989.

<sup>13</sup> Section 3, Crown Entities Act 2004.

Act were to be amended in the future, there would have to be separate consideration of whether the Act (as amended by the Bill) should also be amended.

14. Accordingly, the Law Society recommends that the Bill's selective application of the Crown Entities Act to the Commission be reconsidered, especially taking into account the intention that the Crown Entities Act sets out a standardised approach to the governance and financial management of state sector bodies.

#### **Definition of “Non-statutory function”**

15. The Bill proposes to insert a new definition of “non-statutory function” into the Act (clause 4):

***Non-statutory function** means any activity or service that a local authority is not specifically authorised or required to undertake or provide by or under an enactment*

16. This definition is applied in relation to reorganisation plans. Under the Bill, the Commission can adopt a reorganisation plan for reorganisation of local government in a particular area.<sup>14</sup> A reorganisation plan can provide for the transfer of “a responsibility, duty, power, or non-statutory function” from one local authority to another, in the same way that a reorganisation plan can transfer responsibilities, duties or powers.<sup>15</sup>

17. Where the reorganisation plan provides for the transfer of a “non-statutory power”, the reorganisation plan can:

- a. *“prohibit the local authority from which the non-statutory function is to be transferred from undertaking any specified activity or incurring expenses for any specified purpose; and/or*
- b. *require the local authority to which the non-statutory function is to be transferred to achieve specified service levels in the provision of that function.”<sup>16</sup>*

18. The definition of “non-statutory function” in the Bill is new – the Act does not expressly list or describe what non-statutory functions a local authority carries out. Instead, the Act sets out that:

*“(1) A local authority is a body corporate with perpetual succession.*

*(2) For the purposes of performing its role, a local authority has—*

- (a) full capacity to carry on or undertake any activity or business, do any act, or enter into any transaction; and*
- (b) for the purposes of paragraph (a), full rights, powers, and privileges.”<sup>17</sup>*

19. This is commonly referred to as “the power of general competence”, where local authorities can, within the limits set out in the Act, and any other enactment or restriction, choose the activities that they carry out, and how they should do so.<sup>18</sup>

20. Under the Bill, for any reorganisation plan, it will be the Commission (and not the local authority) that will be responsible for identifying and describing a local authority’s “non-statutory function” for

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<sup>14</sup> Schedule 2 of the Bill, amending Schedule 3 of the Act.

<sup>15</sup> Schedule 2 of the Bill, inserting new clause 20 into Schedule 3 of the Act.

<sup>16</sup> Schedule 2 of the Bill, inserting new clause 21 into Schedule 3 of the Act.

<sup>17</sup> Section 12(1) and (2) of the Act.

<sup>18</sup> See, for example, the Department of Internal Affairs website comment on the review of the Local Government Act 1974 and the changes introduced by the Local Government Act 2002:

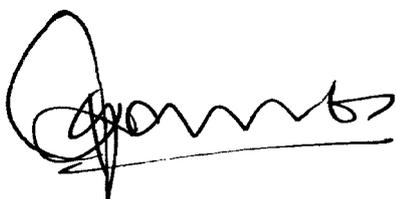
[https://www.dia.govt.nz/diawebsite.nsf/wpg\\_URL/Legislative-Reviews-Local-Government-Act-Review-Local-Government-Act-Review?OpenDocument](https://www.dia.govt.nz/diawebsite.nsf/wpg_URL/Legislative-Reviews-Local-Government-Act-Review-Local-Government-Act-Review?OpenDocument)

any reorganisation plan with the ability to place prohibitions or requirements relating to that function.<sup>19</sup>

21. The Law Society makes two comments on the proposed new definition of “non-statutory” function and the Commission’s powers:
- a. The Bill already provides for the transfer of “*responsibilities, duties and powers*” under a reorganisation plan. It is not clear that specific reference to “*non-statutory function*” is required, given that local authority “*responsibilities, duties and powers*” will generally include those specifically set out in statute, as well as those included generally under the power of “general competence” under section 12 of the Act. In other legislation, similar expressions have been understood to include non-statutory functions.<sup>20</sup> By inserting the new term “*non-statutory function*”, the Bill raises a risk that “*responsibilities, duties and powers*” will not be interpreted to include non-statutory functions.
  - b. If retained, it may be useful to consider whether the meaning of the expression “*non-statutory function*” could be further clarified, given that the local authority’s power of general competence arises from statute. Other phrases have been used in similar situations, for example:
    - the Crown Entities Act uses the term “*natural person act*” to refer to acts that a natural person of full age and capacity can do,<sup>21</sup> and acknowledges that a statutory entity can do anything that a natural person may do (subject to any limits as provided in an Act or rule of law),<sup>22</sup> and
    - the Act already contains a definition of a “*responsibility*” in section 17 which in effect includes non-statutory functions. Section 17 applies where one local authority transfers responsibilities to another. For the purposes of section 17, “*responsibility*” means “**any responsibility, duty, or legal obligation except a responsibility, duty, or legal obligation conferred by or under any other Act, and includes— a responsibility that has previously been transferred under this section; and any powers associated with the responsibility, duty, or legal obligation**”.<sup>23</sup> (The Law Society acknowledges that the Bill proposes to extend this definition to include statutory powers that have an express reference that they may be transferred under section 17).

### **Conclusion**

22. The Law Society wishes to appear in support of this submission.



Tim Jones  
**Vice President**  
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<sup>19</sup> New clause 21 of Schedule 3 (Schedule 2 of the Bill).

<sup>20</sup> See, for example, the Schedule to the Fisheries (Transfer of Functions, Duties, and Powers to The New Zealand Seafood Industry Council Limited) Order 2001, made under section 296B of the Fisheries Act 1996.

<sup>21</sup> Section 24 of the Crown Entities Act.

<sup>22</sup> Section 17 of the Crown Entities Act.

<sup>23</sup> Section 17(8) of the Act (emphasis added).