



NEW ZEALAND
LAW SOCIETY

NZLS EST 1869

THE ENVIRONMENT CANTERBURY (TRANSITIONAL GOVERNANCE ARRANGEMENTS) BILL

19/11/2015

Submission on the Environment Canterbury (Transitional Governance Arrangements) Bill

1 Introduction and summary

- 1.1 The New Zealand Law Society (Law Society) welcomes the opportunity to comment on the Environment Canterbury (Transitional Governance Arrangements) Bill (the Bill).
- 1.2 This submission explains the Law Society's concerns about the Bill's proposal to extend the suspension of democracy for the Canterbury Regional Council (Environment Canterbury) to 2019. The Law Society is also concerned that the Government has not unequivocally committed to a return to full democracy with a fully elected council, in 2019.
- 1.3 The Law Society submits that a return to full democracy for Environment Canterbury should be made with elections being held in 2016.
- 1.4 The proposed further suspension of full democracy is inconsistent with core constitutional values. The justification for the proposed mixed-model governance structure is not sufficiently convincing and the need for the continuance of appointed Commissioners has not been demonstrated.
- 1.5 The Law Society wishes to appear in support of this submission.

2 Background to the Bill

- 2.1 The Bill needs to be considered in the context of the recent history of Environment Canterbury.
- 2.2 The elected members of Environment Canterbury were dismissed by the Environment Canterbury (Temporary Commissioners and Improved Water Management) Act 2010 (2010 Act). They were replaced with Commissioners.
- 2.3 The 2010 Act was introduced and passed through all stages under urgency on 30 March 2010. There was no public consultation on this legislation.
- 2.4 The Law Society wrote to the Attorney-General on 28 September 2010 outlining a number of rule of law concerns raised by the 2010 Act. In particular, the Law Society expressed its concern about the removal of elected members. It wrote:

Though the "purpose" clause of the Act refers to concerns about fresh water, the effect of the Act is to remove elected councillors and replace them with Commissioners who perform *all* the functions of the former elected councillors, many of which will not relate to water issues at all. This is a disproportionate response to the stated concerns in the region that prompted the legislation. It raises the concern that the people in Canterbury are, in matters of local government, not being treated equally with citizens in other regions. No reason is known to exist for this.

- 2.5 The Law Society attached to that letter an article by Professor Joseph, University of Canterbury, which explained why the removal of local body democracy raised rule of law concerns. Professor Joseph explained that:¹

Democratic decision-making in local government is ingrained in the national psyche and a legitimate expectation of the citizenry. Its suspension in Canterbury for a period in excess of three and a half years is, itself, a rule of law issue. Representative democracy and independent courts are the twin pillars of the legal system. The abrogation or suspension of the former, even at local government level, has menacing implications. The suspension of regional body elections in Canterbury until (at the earliest) October 2013 is a period longer than the maximum term of Parliament fixed at three years (Constitution Act 1986, s 17(1)). In the past, the New Zealand public has unreservedly voted down referenda proposals to extend Parliament's life beyond three years, which compounds the gravity of the situation under the ECan Act.

- 2.6 The 2010 Act was passed on the basis that the suspension of local democracy in Canterbury would only apply (in the words of the Bill's explanatory note) "until the long-standing systemic, institutional, and governance issues are satisfactorily addressed, or until new elected councillors take office following local body elections scheduled for late 2013, whichever is the earlier".²
- 2.7 Despite that indication, the suspension of local body democracy in Canterbury was subsequently extended by the Environment Canterbury (Temporary Commissioners and Improved Water Management) Amendment Act 2013 (2013 Amendment Act). The 2013 Amendment Act extended the application of the 2010 Act from 2013 to 2016.
- 2.8 The Law Society reiterated its concerns in the context of the 2013 Amendment Act. In its submission on that legislation, the Law Society noted that the extension of the Commissioners' tenure until 2016 exacerbated its initial concerns. The Law Society concluded by noting that only a demonstrable or overwhelming reason might justify the suspension of the democratic right to vote within a region for a period of six and half years; but none had been advanced. It observed that:³

Underlying the reasons and the Amendment Bill is a concerning idea: that effective leadership, at a regional level at least, is best achieved through a non-democratic and non-representative institution. This is misguided. The failure to involve citizens in regional decision-making that affects them so directly, and to draw directly on their knowledge and expertise, often has adverse and unexpected consequences. History has long shown the perils of non-democratic leadership, a matter that the New Zealand Government has railed against within the Pacific region.

The rights and freedoms affected may not fall within those affirmed by the New Zealand Bill of Rights Act 1990, but underlying those are core constitutional values, most importantly that of a "free and democratic society" (section 5). The proposed extension runs counter to those values.

¹ P Joseph "Environment Canterbury Legislation" [2010] New Zealand Law Journal 193 at 196.

² Environment Canterbury (Temporary Commissioners and Improved Water Management) Bill 2010 (130-1) explanatory note at 2.

³ New Zealand Law Society submission on the Environment Canterbury (Temporary Commissioners and Improved Water Management) Amendment Bill (23 October 2012) at [21]–[22].

- 2.9 Following the passage of the 2013 Amendment Act, the Government responded to those concerns by publicly stating its “clear intention” to return Canterbury to democratic elections in 2016. In a press release the responsible Minister, Hon Chris Tremain, said:⁴

I acknowledge the concerns raised by many submitters to the Select Committee regarding the postponement of elections until 2016. This decision was not taken lightly. The Government’s clear intention is to transition the regional governance of Canterbury back to elections by 2016, with a review in March 2014.

- 2.10 This “clear intention” has not been implemented. Rather it is now proposed that there will not be a return to full democracy until at least the 2019 elections, nine and a half years after the initial “temporary” suspension of the democratic process.

3 Environment Canterbury review

- 3.1 In March 2015 the Ministry for the Environment released a discussion document, *Environment Canterbury: A discussion document*, proposing the mixed-model governance structure that is now contained in the Bill.

- 3.2 In its response to the discussion document,⁵ the Law Society said that:

- (a) It viewed positively the proposed re-introduction of a degree of democracy, by way of some elected members. However, it noted that this did not represent a return to full democracy.
- (b) It agreed with certain goals in the discussion document (high quality leadership, economic growth, strong environmental stewardship, strong accountability to local communities and value and efficiency for ratepayer money), but considered that there was inadequate rationale advanced for why those goals could not be achieved by elected members.
- (c) If, as the discussion document suggested, those goals had been achieved, the justification for only partial democracy for a further term of three years (2016 – 2019) was unclear.
- (d) There was sufficient time before 2016 to enable transitional arrangements to be put in place and effected, with elected members governing from 2016, after the expiry of the arrangements made under the (extended) 2010 Act.
- (e) Even if there was any justification for the derogation from democracy in the 2010 Act, the time for a return to full democracy has passed.

- 3.3 The Law Society maintains the position taken in that submission and its previous submissions in relation to the 2010 Act and the 2013 Amendment Act. In its view the time has come for the full return of democratically elected members of Environment Canterbury and there should be no extension of only partial democracy for a further three years under

⁴ Chris Tremain “Environment Canterbury bill passes second reading” (Press release, 13 February 2013).

⁵ New Zealand Law Society submission to Ministry for the Environment (1 May 2015).

the proposed mixed-model governance structure. There is inadequate justification for the continuation of the term of non-elected Commissioners beyond 2016 to 2019.

4 Additional submissions

- 4.1 Public consultation on the March 2015 discussion document was confined to the preferred option of a mixed-model governance structure, whereas the Regulatory Impact Statement (RIS) for the Bill examines a range of options. The RIS acknowledges that “this still limits our [i.e. the Ministry for the Environment and Department of Internal Affairs] ability to present full community views on other options in this Regulatory Impact Statement which were not described in the discussion document”.⁶
- 4.2 The mixed-model structure provided for in the Bill is the same as that presented in the discussion document, namely seven elected and six appointed council members.⁷ One of the options considered in the RIS (option 3) is a return to a normal local government (fully elected) structure.
- 4.3 The RIS provides this rationale for the preferred option continuing to be the mixed-model governance structure:

[4] Although the Commissioners have made good progress, there is further work to do, especially in the area of fresh water management. Key statutory documents governing the allocation and use of freshwater will require further work to fully implement. Implementation of the National Policy Statement for Freshwater Management (NPSFM), and the final chapters of the Land and Water Regional Plan are not expected to be completed until at least 2020. The quality of decision making and momentum under the Commissioners needs to be maintained in order not to disrupt this work.

[5] It is essential then, that the transition from the Commissioners is well managed and provides some certainty that the new council can make critical decisions effectively and that ECan’s current work programmes do not stall or lose direction.

- 4.4 These arguments do not provide a robust justification for the continued suspension of full democracy in Canterbury. In particular:
- (a) It is difficult to understand why it is considered that the concerns expressed in the RIS should have largely been dealt with by 2019 but that this is not going to be possible by 2016, bearing in mind that there has not been a full democratic model for the council since the 2010 Act was enacted. By 2016 regional council democratic processes will have been suspended in Canterbury for some six and a half years. By the time the proposed extended arrangements in the Bill come into effect from October 2016 a period of six years will have elapsed since the Christchurch September 2010 earthquake and nearly the same period since the 2011 earthquake. A fully elected council should now be able to deal with the remaining steps required to complete the implementation of steps to deal with the issues

⁶ Regulatory Impact Statement at 1.

⁷ Ministry for the Environment “Environment Canterbury Review: A discussion document” (March 2016) at 21; and Regulatory Impact Statement, Appendix A1.

regarding earthquake recovery and improved management of fresh water in Canterbury.

- (b) It is not sufficient simply to allude to a hypothetical risk that Environment Canterbury's work may "stall or lose direction". If this argument was to be accepted there would never be a return to democracy.
- (c) In addition, the present Commissioners could stand for election in a fully democratic election in 2016. If they have the required skills, expertise and institutional knowledge, they can put those qualities before the people of Canterbury and seek their mandate. As the RIS notes, the people of Canterbury clearly have an incentive to elect competent councillors and democratic processes, such as election campaigns, serve to inform people about the effectiveness of each councillor.⁸
- (d) Further, any justification needs to be future-focused. There needs to be an explanation why democratically elected officials are thought to be incapable of seeing through the necessary implementation referred to in the RIS. It is not enough simply to speculate that this might be the case.

4.5 The mixed-model proposal is not justified by the fact that a similar model is employed in District Health Boards. The proposal must be judged against the model adopted for local government elsewhere in New Zealand. The RIS acknowledges that:

- Option One (the mixed-model governance structure) would represent a significant departure from the governance arrangements for regional councils in the Local Government Act 2002 in the short term.⁹
- While based on the District Health Board model, the proposed model has an element of uncertainty as to its effectiveness, as it has not been used previously in a local government context.¹⁰
- There would be increased variability in regional council arrangements, as Canterbury would have a different structure to other regions.¹¹ The RIS at [149] records that two regional councils have expressed concern about this aspect, and also at [146] that the Christchurch City Council opposes the mixed-model proposal being continued and supports a return to a fully elected council at the 2016 elections.

4.6 There should be an explicit justification as to why the people of Canterbury are, in matters of local government, being treated differently from citizens in other regions.

⁸ Regulatory Impact Statement at [70].

⁹ Regulatory Impact Statement at [160].

¹⁰ Regulatory Impact Statement at 1.

¹¹ Regulatory Impact Statement at 1.

- 4.7 The Law Society notes that of the 534 submissions received on the discussion document, 505 opposed the mixed-model proposal and that those in opposition generally favoured a return to a fully elected council.¹²
- 4.8 It is also unclear whether there will definitely be a return to a fully elected council for Environment Canterbury in 2019. The RIS states:
- In the long term, *if the planning frameworks for fresh water management and earthquake recovery have been effected as planned*, this model [i.e. the mixed-model governance structure] would provide *a mechanism for transition* to a fully elected body in 2019.¹³
 - The transitional features of Option One would *provide a pathway to a withdrawal of the intervention*, and restoration of full democratic participation.¹⁴
 - Therefore, representation arrangements will be set in legislation for the next three years and the new governing body will conduct a representation review before the next elections in 2019.¹⁵
- 4.9 The possibility that there still may not be a return to a fully elected council in 2019 is a matter of significant concern. As set out above, the original proposal in 2010 was that the present structure would initially be for a period of three years until 2013. In 2013 this was extended to 2016 with a public indication that the Government's "clear intention" was to return to democracy in 2016. Now a mixed-model structure is proposed to be adopted until 2019 but there still does not appear to be a definite commitment that in 2019 there will be a return to full democracy and a fully elected council.

5 Conclusion

- 5.1 The significance of the legislation enacted in 2010 should not be underestimated. The 2010 Act supplanted local government democracy in Canterbury and removed the underlying relationship between the citizen and the State at the local level. Representative democracy is a fundamental principle that gives legitimacy to government and the exercise of state power. Lord Cooke of Thorndon identified it as one of the "unalterable fundamentals" of our legal system (the other being independent courts).¹⁶ The proposed further suspension of full democracy is inconsistent with one of New Zealand's core constitutional values, namely a "free and democratic society".¹⁷
- 5.2 Suspension of the democratic right to vote within a region for any significant period could only be justified in exceptional circumstances. The partial suspension of that democratic

¹² Regulatory Impact Statement at [142] – [143].

¹³ Regulatory Impact Statement at [8] (emphasis added).

¹⁴ Regulatory Impact Statement at [53] (emphasis added).

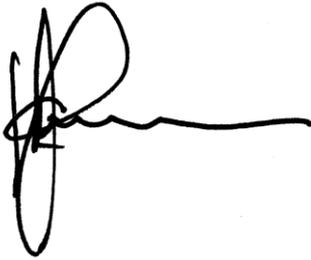
¹⁵ Regulatory Impact Statement at [157].

¹⁶ Sir Robin Cooke, *Fundamentals* [1988] NZLJ 158 at 164.

¹⁷ This constitutional value has been affirmed by Parliament in section 5 of the New Zealand Bill of Rights Act 1990.

right for nine and a half years requires particularly compelling justification. Such justification has not been provided.

- 5.3 In the absence of such justification, the Law Society submits that the Bill should not proceed. It recommends a full return to democracy in the 2016 elections.

A handwritten signature in black ink, consisting of a large, stylized initial 'C' followed by a horizontal line extending to the right.

Chris Moore
President
19 November 2015