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THE WATER SERVICES ACT AND PUBLIC PARTICIPATION – WILL THE DEVIL BE IN THE DETAIL?

LLM RESEARCH PAPER

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I Introduction

The government has instigated a far-reaching reform of freshwater management. The first initiative to be put into law was the establishment of a new water regulator, Taumata Arowai, as part of the response to the Government Inquiry into Havelock North Drinking-Water 2016-2017 (the Inquiry).[1] There is also an ambitious reform agenda to replace the Resource Management Act 1991 (RMA), introduce stronger climate change regulation and reform local government.

This paper focuses on one very small piece of the puzzle: drinking water. It takes a critical look at the reforms through the development of the Water Services Act 2021 (WSA)[2] in the context of public participation in decision-making, access to information and access to justice. These form the "Three Pillars" of participatory and procedural rights in international environmental law recognised in the Aarhus Convention.[3]

Section II forms an overview of New Zealand's challenges and provides international and domestic context for freshwater management, highlighting how complex institutional arrangements are in practice. The analysis of the legislative design of the WSA in Section III reveals some of the likely challenges the new regulator will face. This includes a discussion on incorporating the concept of Te Mana o Te Wai from the National Policy Statement on Freshwater Management (NPS FM)[4] in the WSA. Section IV then takes a closer look at the provisions of the WSA and the implications for public participation using the Three Pillars as an analytical framework.[5]

[1] The Government Inquiry into Havelock North Drinking-Water, gazetted in September 2016 under the Inquiries Act 2013 [the Inquiry].

[2] Water Services Act 2021 (2021/36) received Royal Assent on 4 October 2021 [WSA].

[3] United Nations Economic Commission for Europe, Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters 2161 UNTS 447 (signed 25 June 1998, entered into force 30 October 2001) [Aarhus Convention].

[4] Minister for the Environment *National Policy Statement for Freshwater Management* (August 2020) [NPS FM].

[5] Each pillar draws on international law, recognising that "no meaningful public participation can take place with out due access to information", European Commission "Participatory and Procedural Rights in Environmental Matters" < www.ec.europa.eu/environment/legal/law/3/module_2_1.htm >.

Conclusions in Section V suggest that the overall design and intent of the WSA is sound and honours international conventions and natural justice principles in New Zealand law. However, three factors have the potential to affect participatory and procedural rights – which may or may not honour 'best practice' internationally. Firstly, the WSA and institutional arrangements for freshwater management (including through wider reforms) are adding to complexity in the freshwater management system. Secondly, there is duplication of functions across key agencies involved in environmental management. And thirdly, there are wide powers to make secondary legislative tools but there is a lack of detail and certainty over processes that will be used to develop, test and review them.

II New Zealand's Freshwater Management Challenges

The management of New Zealand's water resources is complicated. It is all about who uses what, how much they can/cannot use, who pays for what and who/what benefits. This is not easily understood from the range of statutes that currently affect freshwater or the enormous number of governmental and private sector organisations involved in water management and service delivery.[6]

New Zealand has committed to international initiatives, treaties and conventions regarding human rights, sustainable development, the environment and, more specifically, to water management. However, New Zealand still faces significant issues in terms of environmental management. Our clean green image is somewhat tarnished in light of failures to protect surface and ground waters from degradation and depletion; failures to invest and upgrade water infrastructure; failures to address Māori interests in management of land and natural resources; and prioritisation in law of economic

[6] In the year to 30 June 2020, there were 486 registered networked drinking water supplies (serving more than 100 people) that provided drinking water to 4,142,000 people. Ministry of Health *Annual Report on Drinking Water Quality 2019-2020* (April 2021) at v.

interests over environmental, social and cultural issues.

To some commentators like Mike Joy, New Zealand has put economic interests ahead of the environment. He cites examples of local government failure to enforce policies and resource consents under the RMA, and central government "weakening" limits on discharge contaminants to support farming intensification.[7] In 2016, the Parliamentary Commissioner for the Environment (PCE) observed that turning around the decline in water quality is not easy and will take time.[8] This is echoed by the Ministry for the Environment (MfE) that notes the time lag in how rainwater moves through the freshwater system and what we see now are legacies from previous generations.[9]

What is clear from the science is that for the foreseeable future, our freshwater resources will be significantly degraded, affecting the health of our people and the environment.[10] It could be decades before we know the full implications on our freshwater systems of

[7] Dr Mike Joy, Senior Researcher Institute for Governance and Policy Studies, Te Herenga Waka — Victoria University of Wellington has written extensively on freshwater systems. See for example: Mike Joy *Polluted Inheritance – New Zealand's Freshwater Crisis* (BWB Texts, November 2015); Mike Joy "New Zealand government ignores expert advice in its plan to improve water quality in rivers and lakes" (28 May 2020) < www.theconversation.com >; and a special documentary and podcast series on the vital role water will play in New Zealand's featuring Mike Joy, Newsroom "NZ's Polluted Waterways Threaten Our Health" (8 May 2020) <www.newsroom.co.nz >. See also critiques of Dr Joy's writings, for example MJ Winterbourn "Polluted inheritance: New Zealand's freshwater crisis" Journal of the Royal Society of New Zealand, 2016 46:3-4, 235-237.

[8] Dr Jan Wright, Parliamentary Commissioner for the Environment *Next Steps for Fresh Water Submission to the Minister for the Environment and the Minister for Primary Industries* (20 April 2016) at 3.

[9] Ministry for the Environment and Stats NZ *Our Freshwater 2020 Summary* (April 2020) at 2; and Ministry for the Environment and Stats NZ *Our Freshwater 2020* (April 2020) at 58 [Our Freshwater 2020].

[10] Acknowledged in Our Fresh Water 2020 above n 9. See also expert reactions to the release of this report by Science Media Centre "Our Fresh Water 2017 – Expert Reaction" (27 April 2017) < www.sciencemediacentre.co.nz >.

the land use changes we have seen over the last 20 years.[11]

A Havelock North 2016 – a Tipping Point

It took the death of three people and illness of over 5,000 people in Havelock North from contaminated drinking water and a subsequent government inquiry to confirm what many already knew — there is a systemic failure in the way New Zealand manages freshwater resources.

The Inquiry was gazetted in September 2016 under the Inquiries Act 2013 and produced three reports: an interim report in December 2016[12] and two further reports in May (Stage 1 Report)[13] and December 2017 (Stage 2 Report).[14] The two Inquiry reports documented a damning picture of failures across regulation, service provision and source protection of drinking water. The reports also highlighted "a lack of national-level oversight combined with limited central stewardship" and that the system was not able to provide assurances that outcomes are acceptable to communities.[15]

The 51 recommendations of the Inquiry have informed core components of the government's response (the Three Waters Review), which commenced in mid-2017.[16]

[11] See for example Parliamentary Commissioner for the Environment *Water Quality in New Zealand: Land Use and Nutrient Pollution* (November 2013). A 2015 update to this report noted the modelling in the 2013 report likely "underpredicted the nutrients that will be lost from land into water", Parliamentary Commissioner for the Environment *Update Report Water Quality in New Zealand: Land Use and Nutrient Pollution* (June 2015).

[12] Department of Internal Affairs *Interim Report of the Havelock North Drinking Water Inquiry* (December 2017); included as Appendix 2 in Department of Internal Affairs *Report of the Havelock North Drinking Water Inquiry: Stage 1* (May 2017) [Stage 1 Report].

[13] Stage 1 Report above n 12.

[14] Department of Internal Affairs *Report of the Havelock North Drinking Water Inquiry: Stage 2* (December 2017) [Stage 2 Report].

[15] Department of Internal Affairs *Water Services Bill, Initial Briefing to the Health Committee* (10 March 2020) at [9-14].

[16] See Department of Internal Affairs "Three Waters Review" <www.dia.govt.nz >.

The recommendations cover matters for urgent implementation, and matters to prevent "recurrences of an outbreak of waterborne disease".[17] The Inquiry's recommendations relevant to this paper relate to:

(a) establishing a set of principles of drinking water safety to inform reforms;[18]

(b) enforcing the existing regulatory regime, and amending the Health Act 1956 to move drinking water provisions into a "separate Drinking Water Act";[19]

(c) reviewing the Resource Management (National Environmental Standard for Sources of Human Drinking Water) Regulations 2007 (NES DW);[20]

(d) strengthening enforcement of water safety plans;[21]

(e) updating and amending drinking water standards and testing methods;[22] and

(f) establishing a dedicated drinking water regulator to "oversee all other reforms".[23]

The Three Waters Review has also considered further, wide-ranging, reforms including how to fund infrastructure and institutional arrangements for infrastructure network ownership, governance and service delivery.[24]

[17] Stage 2 Report above n 14 at [920].

[18] Stage 2 Report above n 14 at [919].

[19] Recommendations 13-14, 19, 25-29, Stage 2 Report above n 14 at [919-920].

[20] Recommendation 17, Stage 2 Report above n 14 at [919]. Resource Management (National Environmental Standard for Sources of Human Drinking Water) Regulations 2007 [NES DW].

[21] Recommendations 37-39, Stage 2 Report above n 14 at [920].

[22] Recommendations 41-48, Stage 2 Report above n 14 at [920].

[23] Recommendations 9-12, Stage 2 Report above n 14 at [919]. Note that an additional recommendation is that the Controller and Auditor-General should monitor for five years the implementation of the recommendations was also included. A monitoring report is due at the end of 2022. See Recommendation 51, Stage 2 Report above n 14 at [920].

[24] Summarised from Department of Internal Affairs *Regulatory Impact Assessment: Decision on the Organisational Form of a New Drinking Water Regulator* (30 September 2019) at 9.

An added pressure on the government has been international criticism, as a United Nations (UN) member, and a signatory to a range of conventions, discussed below.

B The International Context – the Human Right to Water and Sanitation

Since 1948 when the Universal Declaration of Human Rights (UDHR) was signed, a range of principles, concepts and conventions have influenced New Zealand's regulatory frameworks.[25] The UDHR is recognised as the foundation of international human rights law and has formed the basis for nine treaties,[26] including the International Covenant on Economic, Social and Cultural Rights (ESCR)[27] and the International Covenant on Civil and Political Rights (CPR).[28] The UDHR and the CPR also provide for a right to a fair trial that applies to environmental matters.[29]

More recently, global efforts have redoubled to set goals and targets to achieve by 2030[30] and have culminated in UN resolutions that confirm access to a healthy and sustainable environment as a universal right.[31]

[25] *Universal Declaration of Human Rights* GA Res 217A (1948) [UDHR].

[26] Ministry of Foreign Affairs and Trade "Human Rights" < www.mfat.govt.nz >. New Zealand is a party to seven of the nine treaties under the UDHR.

[27] International Covenant on Economic, Social and Cultural Rights GA Res 2200A (1966) [ESCR]. New Zealand signed the ESCR 12 November 1968.

[28] International Covenant on Civil and Political Rights 999 UNTS 171 (signed 16 December 1966, entered into force 23 March 1976) [CPR]. New Zealand signed the CPR on 12 November 1968.

[29] European Commission "Module 4 Access to Justice in international law – Introduction" < www.ec.europa.eu/environment/legal/law/3/module_4_1.htm >.

[30]Sustainable Development Goal 6 under the Rio Declaration has eight targets agreed for 2030 and includes: 6.1 to achieve universal and equitable access to safe and affordable drinking water for all; 6.3 improve water quality; 6.6 protect and restore water-related ecosystems; and 6b support and strengthen the participation of local communities in improving water and sanitation management. Refer to <www.sdgs.un.org/goals/goal6 >.

[31] *The Human Right to Water and Sanitation*, GA Res 64/292 (2010); and. *The Human Right to A Safe, Clean, Healthy and Sustainable Environment* GA Res A/HRC/48/L.23/Rev.1 (5 October 2021). See also media release United Nations "Climate and Environment" (15 October 2021) <www.news.un.org/en/story/2021/10/1103082 >.

Figure 1 summarises the various international commitments New Zealand has made and international best practice relevant to freshwater management and participatory and procedural rights. In the green boxes on the right are the conventions mentioned above along with the Ramsar Convention;[32] and the Rio Declaration.[33]

The Rio Declaration provided universal authority to incorporate into law the principle of public participation (Principle 10) [emphasis added]:[34]

> Environmental issues are best handled with participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate *access to information* concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and *the opportunity to participate in decision-making processes*. States shall facilitate and encourage public awareness and participation by making information widely available. *Effective access to judicial and administrative proceedings*, including redress and remedy, shall be provided.

[32] Convention on Wetlands of International Importance Especially as Waterfowl Habitat, 996 UNTS 246 (signed 13 August 1976, entered into force 21 December 1975) [Ramsar Convention].

[33] *Rio Declaration on Environment and Development* A/Conf.151/26 (1992) [Rio Declaration].

[34] Rio Declaration above n 33, Principle 10. Note commitments were also made through Principle 15 to in-situ conservation and the precautionary approach that formed the Convention on Biological Diversity, 1760 UNTS 79 (signed 5 June 1992, entered into force 29 December 1993). The precautionary approach was also incorporated into the Treaty on European Union 92/C 191/01 (signed at Maastricht on 7 February 1992, entered into force 1 November 1993) art 174 [Maastricht Treaty].

Figure 1 Framework Influencing Law Affecting Freshwater Management in New Zealand

The blue boxes in Figure 1 show the UN instruments that are also significant influences on freshwater management, access to information and public participation. These are increasingly being applied globally. These include the UN Watercourses Convention;[35]

[35] Convention on the Law of the Non-navigational Uses of International Watercourses, 2999 UNTS (signed 21 May 1997) [UN Watercourses Convention].

the UNECE Water Convention;[36] the Aarhus Convention;[37] the UNECE Protocol on Water and Health;[38] and the European Union's Directive 2000/60/EC.[39]

Figure 1 also lists the main statutes in New Zealand domestic law relating to freshwater management and participatory engagement. The New Zealand Bill of Rights Act 2004 (Bill of Rights) is the overriding statute that is "designed to both affirm, protect and promote human rights and fundamental freedoms in New Zealand" and "to affirm New Zealand's commitment" to the CPR.[40]

The Aarhus Convention, built on Principle 10 of the Rio Declaration has the most developed articulation of the Three Pillars of the international conventions currently in place. The Aarhus Convention is based on the objective that each party "guarantees" the rights of access to information, public participation in decision-making, and access to justice.[41]

This is also supported by OECD guidance on urban water reform:[42]

[36] Convention on the Protection and Use of Transboundary Watercourses and International Lakes, 1936 UNTS 269 (Signed 17 March 1992) [UNECE Water Convention].

[37] Arhus Convention above n 3, noting that this convention is now open to all UN members.

[38] Protocol on Water and Health to the 1992 Convention on the Protection and Use of Transboundary Watercourses and International Lakes, 2331 UNTS 202 (signed 17 June 1999) [UNECE Protocol on Water and Health].

[39] European Union's Directive 2000/60/EC Establishing a Framework for Community Action in the Field of Water Policy [2000] OJ L 327/1 [Directive 2000/60/EC].

[40] *The New Zealand Bill of Rights Act: A Commentary 2ed 2015 (academic)* (online ed, Lexis Nexis) at [1.2.1].

[41] Aarhus Convention above n 3, art 1.

[42] Organisation for Economic Co-operation and Development (OECD) *Report from the Project on Social Aspects of Urban Water Sector Reform for the Group of Senior Officials on Urban Water Sector Reform in Eastern Europe, Caucasus and Central Asia under the EAP Task Force* (2003) at 23 <www.oecd.org >. Noting that New Zealand is a signatory to the OECD Convention.

> Public consultations and hearings are among the most effective mechanisms of public participation in urban water sector reform and should be stipulated by law in the spirit of the Aarhus Convention.

Given the clarity of articulation of the Three Pillars in the Aarhus Convention, it has been used as the framework for analysis of the public participation-related provisions of the WSA (refer Section IV.

The challenges New Zealand is facing regarding drinking water have not gone unnoticed internationally. The UN Committee on Economic, Social and Cultural Rights (UNESCR) expressed concerns in 2018 regarding "persistent challenges in access to safe drinking water" and urged New Zealand to implement the findings of the Havelock North Inquiry.[43]

Pressure is not only building internationally, but also domestically, questioning why New Zealand's policy direction has not responded more strongly to the 17 Sustainable Global Goals (SDGs), including to SDG 6 to "ensure availability and sustainable management of water and sanitation for all".[44]

C Navigating Institutional Complexities

There are also system challenges in terms of institutional arrangements and stewardship over our resources that have created tensions in the responses to the Inquiry (and arguably the government's wider reforms).

1 Who is involved in freshwater management?

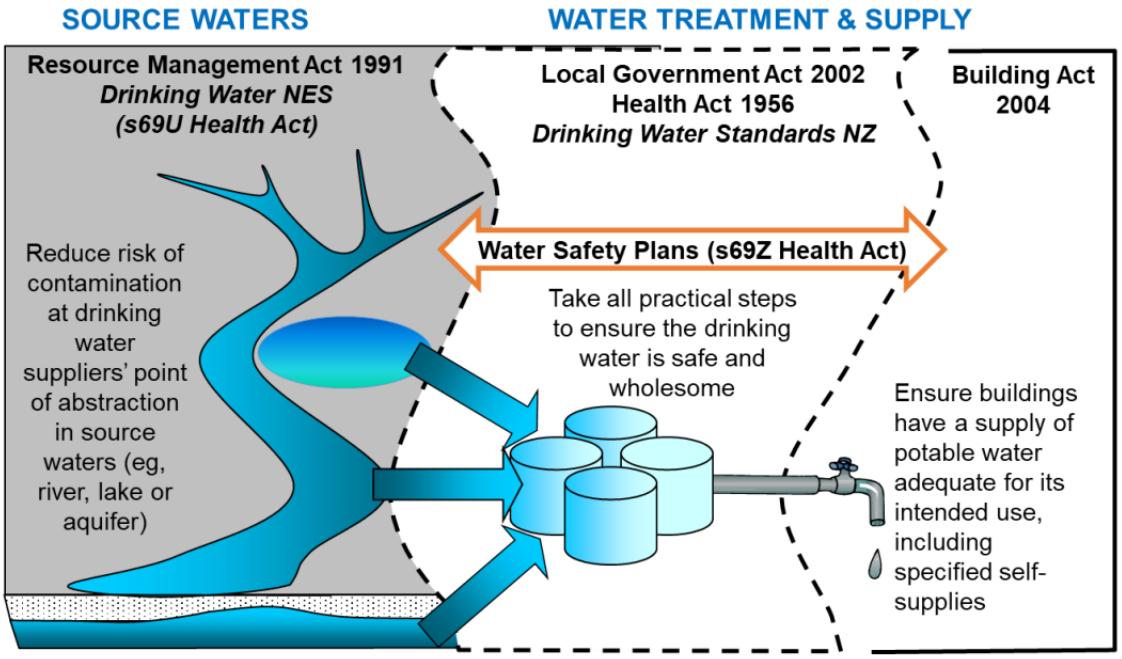
New Zealand already has a 'plethora' of agencies and a multitude of regulatory regimes

[43] Concluding observations, UN Committee on Economic, Social and Cultural Rights *Fourth Periodic Report of New Zealand* (March 2018) E/C.12/NZL/CO/4 at [42-43] [ESCR comments]. The Committee also commented that the Bill of Rights "lacks supremacy over other statutes", noting that economic, social and cultural rights do not have equal status with civil and political rights.

[44] See comments of the Human Rights Commission "Global Goals" <www.hrc.co.nz >.

involved in freshwater management. Figure 2 shows conceptually the various legislative regimes.[45]

Figure 2 Conceptual Model of Regulatory Regimes for Freshwater Management



Each institution involved in freshwater management has a variety of statutory obligations and responsibilities, summarised in Table 1.

Table 1 Governmental Agencies Involved in Freshwater Management (Pre-WSA)

Agency	**Roles / functions relating to freshwater management**
Ministry for the Environment (MfE)	Environment and resource management system oversight and monitoring including state of the environment reporting, Responsible for the RMA including associated "National

[45] Source: Ministry for the Environment *Review of National Environmental Standard for Sources of Human Drinking Water Summary Report* (2018) at 8.

Agency	Roles / functions relating to freshwater management
	Directions":[46] - NPS FM;[47] - NES DW.[48]
Department of Internal Affairs (DIA)	Oversight of policy relating to local government, leading the Three Waters Review and the future of local government.[49]
Ministry of Health (MoH)	Monitoring, advising on public health issues, administering the Health Act 1956. Drinking water responsibilities include:[50] - prescribing drinking water standards;[51] - registering drinking water suppliers; - providing public information about drinking water; - requiring water safety plans and enforce measures to protect drinking water sources; - appointing drinking water assessors; - enforcing compliance.

[46] RMA pt 5, sub-pt 1; National directions include National Policy Statement (NPS), National Environmental Standards (NES), the New Zealand Coastal Policy Statement and National Planning Standards [National Directions].

[47] NPS FM, above n 4.

[48] NES DW above n 20.

[49] See Department of Internal Affairs *Arewa ake te Kaupapa, Raising the Platform – The Future of Local Government Review – Interim Report* (October 2021) at 12 [Raising the Platform]. Note that the New Zealand Infrastructure Commission, established in 2019 has statutory advisory functions regarding infrastructure matters including through the Three Waters Review and the resource management reforms.

[50] Prior to 2008 and the enactment of the Health (Drinking Water Amendment) Act 2007, much of the regulation of drinking water was voluntary. The amendment introduced the current risk management framework for drinking water. Most of the functions of the Ministry of Health regarding drinking water will pass to Taumata Arowai under the WSA. Refer Ministry of Health "Drinking Water Legislation" <www.health.govt.nz >.

[51] Ministry of Health *Drinking-Water Standards for New Zealand 2005* (Revised 2018).

Agency	**Roles / functions relating to freshwater management**
Environmental Protection Authority (EPA)	Manages the hazardous substances regime under Hazardous Substances and New Organisms Act 1996 (HSNO); and prescribes a range of controls for chemicals and contaminants.[52] Under the RMA, provides: - advice, recommendations and processes for resource consent applications and local authority policy and plans 'called in' by the Minister for the Environment eg for nationally significant applications;[53] - enforcement ("necessary or desirable") including, in some circumstances, taking over the powers of a local authority.[54]
Parliamentary Commissioner for the Environment (PCE)[55]	An independent officer who reports to Parliament and has broad powers to: - investigate environmental concerns; - produce independent reports; - provide advice aimed at improving the quality of the environment.[56]
Local government[57]	
11 Regional Councils and	Focused on physical and natural environments within their

[52] See also Environmental Protection Authority "Hazardous Substances" <www.epa.govt.nz >.

[53] Part 6AA RMA, Proposals of National Significance.

[54] RMA, pt 12A. This can cover any matter of administration under the RMA, including resource consent processing, compliance monitoring and enforcement functions of local authorities

[55] Established under the Environment Act 1986.

[56] Parliamentary Commissioner for the Environment "The Role" <www.pce.parliament.nz >.

[57] Note the purpose of local government is "to enable democratic local decision-making and action by, and on behalf of, communities;" and "to promote the social, economic, environmental, and cultural well-being of communities in the present and for the future." Local Government Act 2002, s10.

Agency	Roles / functions relating to freshwater management
6 Unitary Authorities[58]	boundaries:[59] - Statutory responsibilities for environmental regulation (eg discharges to air, land, water; flood control; resource management planning, land and maritime transport and biosecurity (eg pest control)). - Regional parks and bulk water supply (in some cases).[60]
61 Territorial Authorities (city and district councils)	Broad functions relating to local wellbeing:[61] - Own and manage local infrastructure (roads, drinking water, wastewater, stormwater networks, local parks, libraries and sports and community facilities). - Wide range of regulatory, statutory functions and services relating to: land use, town planning, building, food safety, liquor control, waste management, water reticulation, sewerage and stormwater. - Council-Controlled Organisations can be used to manage investments and infrastructure assets.

2 Potential conflicts and tensions

It is not guaranteed (statutorily) that all institutions exercising legislative controls in freshwater management in Table 1 are working, or will work, in unison to deliver outcomes for the common good. For example, a local authority must exercise its powers "wholly or principally" for the benefit of its district or the benefit of "all or a significant part of its region". This has set up potential conflicts for a local authority if the national

[58] Unitary Authorities have the functions of both a Regional Council and a Territorial Authority such as Auckland Council, Gisborne District Council, Marlborough District Council, Nelson City Council, and Tasman District Council.

[59] Raising the Platform above n 49 at 12-13; and Local Government New Zealand "Local Government Basics" at <www.lgnz.co.nz >.

[60] For example, Wellington Regional Council and Auckland Council manage large portfolios of regional parks.

[61] Raising the Platform above n 49 at 12 -13.

perspective does not benefit its district or region – unless there is a mandatory statutory requirement to do so.

There is no doubt that the reforms being developed by the government are ambitious and far-reaching, and are considering a massive range of issues affecting communities: local government, infrastructure funding, freshwater management and resource management. The reforms relating to drinking water also appear to be aiming to remove much of the 'local' or 'regional' perspective in decision-making by local government elected officials. Instead, more and more of the decision-making will be at national level.

With the signaled direction of the overall Three Waters Review, establishing Taumata Arowai, and passing the WSA, the governance arrangements are set to get even more complex as illustrated by The Department of Internal Affairs' summary diagram at Figure 3.[62]

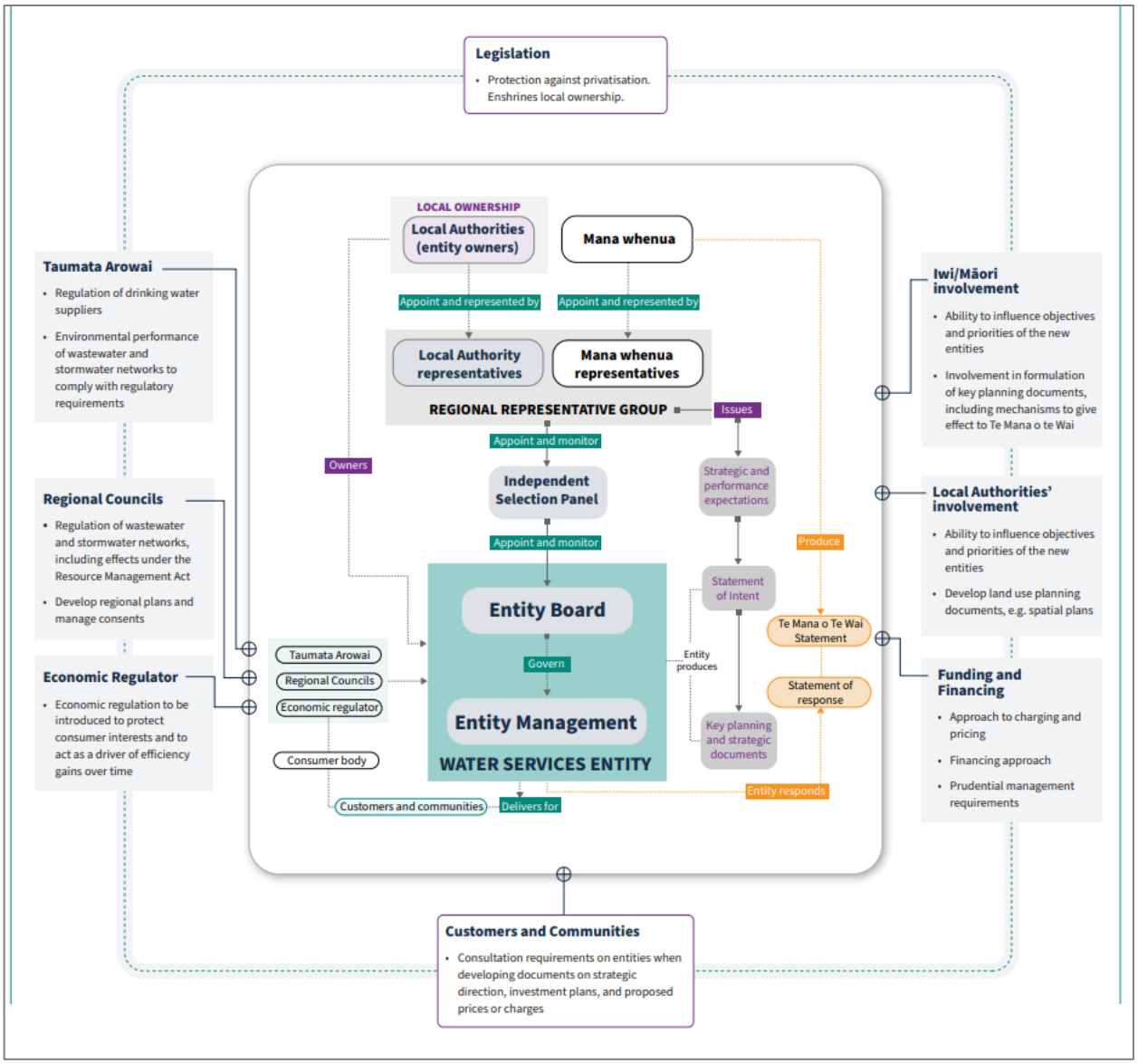
Along with the concept of 'national consistency' it was thought a new regulator, a Crown entity,[63] would be more 'independent' in decision-making on standard-setting and enforcement than existing central government agencies such as the MoH, the MfE or the EPA; and more 'independent', and less 'politically-influenced' compared with environmental decision-making by local authorities. Note that a Crown Agent must give effect to government policy when directed (in the case of Taumata Arowai, this will be the Minister of Internal Affairs).[64]

[62] Source: Department of Internal Affairs *Three Waters Reform Programme Overview A3, A New System for Three Waters Service Delivery* (June 2021).

[63] Taumata Arowai is a 'Crown Agent', see Crown Entities Act 2004, ss 7 and pt 3; and TAWSRA, s 9.

[64] Crown entities Act 2004, ss7, 107, 112-115; Sch 1. See also TAWSRA s11 (l).

Figure 3 Overview of Three Waters Review –Governance and Institutional Arrangements for Drinking Water Supplier / Network Operators



Not only are the institutional and governance arrangements for freshwater management significant for local government and the service delivery entities, they are also significant for the public and consumers.

Arguably, a new water regulator as recommended by the Inquiry[65] can be considered a

[65] Recommendations 9-12, Stage 2 Report above n 14 at [919].

logical first step to bring a stronger 'national' focus on generating greater and more consistent adherence to national drinking water standards. However, this might also create more complexity, bureaucracy, duplication and tension between institutions operating at local, regional and national scales — matters that will need significant coordination across and between agencies and engagement with communities:[66]

Are we seeing the freshwater management system becoming unnecessarily complex, "sliced and diced for all manner of managerial and bureaucratic reasons" as the PCE has described in relation to estuaries? [67] Are consumers and the public being moved further and further away from decision-makers?

The next section takes a closer look at the rationale for establishing Taumata Arowai and looks at the main design elements of the WSA regime.

[66] Local Government New Zealand *New Zealand Infrastructure Commission's Strategy Consultation* (May 2021) at 3. As was noted by many submitters during the Health Committee's consideration of the Water Services Bill 2020 (314-1) [WSB 314-1].

[67] The PCE was commenting on the complexity of managing "a single interconnected ecosystem" in Parliamentary Commissioner for the Environment *Managing our Estuaries* (August 2020) at 3 <www.pce.parliament.nz >. The PCE has advocated strongly for better resourcing of regional councils for effective and proactive monitoring and enforcement and that the EPA is the most appropriate agency to enforce environmental standards. See Parliamentary Commissioner for the Environment *Managing our Estuaries* (July 2021) at 76; and Environment Committee *Report of the Parliamentary Commissioner for the Environment, Managing our Estuaries* (July 2021) at 4. See also submission of Local Government New Zealand to the Infrastructure Commission "…there is no one institution with sufficient powers to look across the large number of organisations involved in not only planning, building and operating infrastructure, but also shaping the institutional settings and structures", Local Government New Zealand *New Zealand Infrastructure Commission's Strategy Consultation* (May 2021) at 3.

III Developing the New Drinking Water Regime

A Rationale for Creating Taumata Arowai

Instead of consolidating functions in an existing entity, or strengthening existing institutional arrangements, the government chose to create Taumata Arowai, another Crown entity. A new regulator was seen as important to regain public confidence and build capacity and capability in the system. This is despite the regulatory impact statement for the proposal acknowledging the costs to the Crown and regulated parties being "substantial" and would "greatly exceed" the benefits.[68]

Taumata Arowai was established in 2021 through the Taumata Arowai-the Water Services Regulator Act 2020 (TAWSRA). It is tasked with protecting and promoting drinking water safety and administering the drinking water regulatory system. It has a range of oversight, monitoring and enforcement functions in addition to building capability and capacity of drinking water suppliers.[69] In terms of governance it has a board of between five and seven members[70] who is advised by a Māori Advisory Group.[71] Taumata Arowai can also establish technical advisory groups to provide independent advice.[72]

Through the WSA, Taumata Arowai is tasked with creating a more coordinated response to human health factors in drinking water supplies across the Health Act 1956, the Building Act 2004 (including the Building Code), the Local Government Act 2002 and the RMA (specifically the NES DW)[73] and policies and plans of regional authorities and

[68] Department of Internal Affairs *Regulatory Impact Assessment: Decision on the Organisational Form of a New Drinking Water Regulator* (30 September 2019) at 5.

[69] Taumata Arowai–the Water Services Regulator Act 2020 [TAWSRA] ss10-11.

[70] TAWSRA s12.

[71] TAWSRA ss 14-17.

[72] TAWSRA s20.

[73] Including the NPS FM above n 4; and the NES DW above n 20.

district councils).[74]

Five governmental entities will continue to be directly involved in oversight of freshwater systems: MoH, MfE, DIA, Regional Councils and Taumata Arowai. It was also intended that regional councils would continue as the environmental regulator.[75]

B Analysis of the WSA Regulatory Design

1 A standard regulatory scheme design

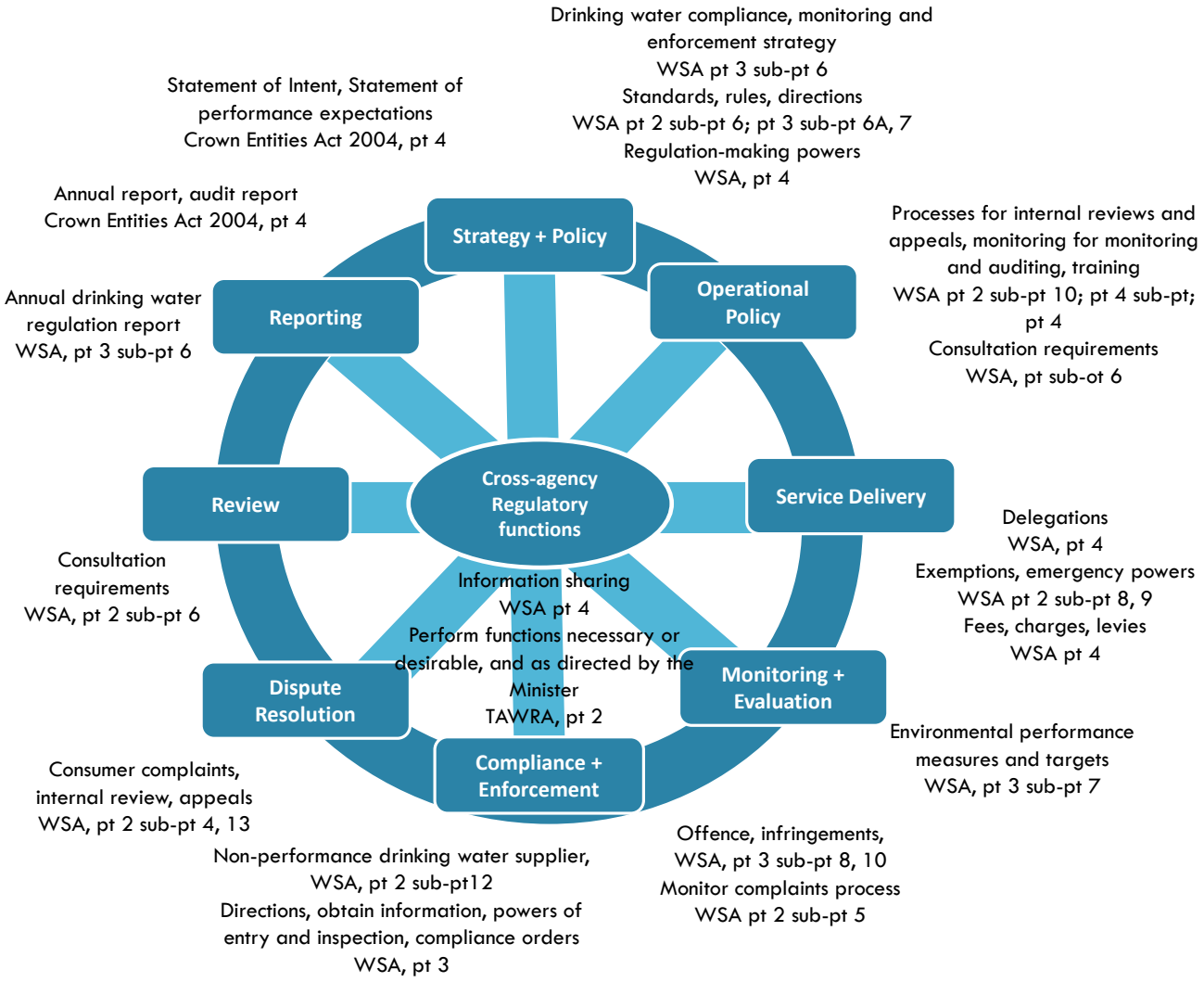
From a regulatory design perspective, all the element expected to be incorporated into such a regime are present in the WSA[76] as shown in Figure 4. Examples to illustrate provisions of the WSA are also shown, noting the links to the Crown Entities Act 2004 and the TAWSRA in terms of reporting, financial management and board responsibilities.

[74] Department of Internal Affairs *Water Services Bill, Initial Briefing to the Health Committee* (10 March 2020) at [15].

[75] Department of Internal Affairs *Water Services Bill Overview of Bill as Referred to the Select Committee* (February 2021) < www.dia.govt.nz > at [slide 9] [DIA Overview].

[76] Note it could also apply to the TAWSRA.

Figure 4 Typical functional elements in regulatory design with sample of WSA provisions[77]



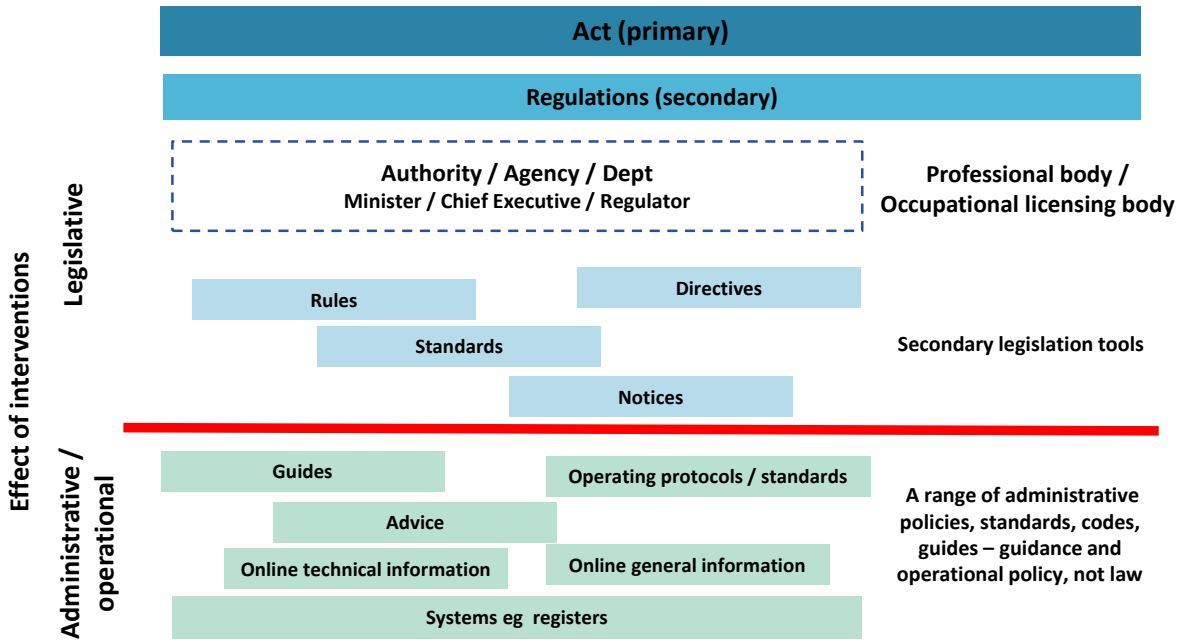
The tools that the WSA regime has are also typical of highly technical regulatory regimes such as the Land Transfer Act 2017, the Cadastral Survey Act 2002 and the Radiocommunications Act 1989. Such legislative and administrative tools are shown in Figure 5.[78] Above the red line, tools become law and include secondary legislation

[77] Adapted from a range of government agency regulatory stewardship resources including: "LINZ Regulatory Stewardship and Strategy Our regulatory systems" Toitū Te Whenua Land Information New Zealand.

[78] Figure 5 was developed from Sara Player "Perceptions and Reality – Scrutiny of Subordinate Instruments Under the Cadastral Survey Act 2002" (LLM research paper, Victoria University Wellington, 2016) at 19.

tools like regulations, directives, rules and standards. Below the red line are various operational or administrative tools needed to implement a regulatory regime. While both legislative and administrative tools are important for implementation, a higher level of public scrutiny is needed over legislative tools as they are enforceable as law.

Figure 5 Features of Highly Technical Regulatory Regimes



Source: Developed from Sara Player *Perceptions and Reality – Scrutiny of Subordinate instruments under the Cadastral Survey Act 2002*

2 *Key requirements and obligations*

Key requirements on drinking water suppliers are to:[79]

(a) register with Taumata Arowai;

(b) ensure that drinking water is both safe, and complies with drinking water standards;

(c) comply with water standards;

(d) prepare and implement a 'drinking water safety plan' and a 'source water risk

[79] Summarised from DIA Overview above n 75.

management plan' (with input from regional councils on risks).

Taumata Arowai can develop a range of secondary tools, such as regulations,[80] standards, compliance rules, notices and directives.[81] It also has emergency powers[82] and can develop occupational standards that specify prescribed skills, qualifications or experience to do particular certifying and testing activities – or linked to a specific professional body.[83] In carrying out its functions, Taumata Arowai is also required to consult.[84]

There are few details available yet for the secondary legislation tools or the processes that will be developed by Taumata Arowai.

3 Te Mana o te Wai – innovative coordinating principle?

The concept of Te Mana o te Wai has been fundamental to the development of National Directions under the RMA[85] and has been, perhaps, innovatively incorporated into the WSA. The concept, framework and principles are included in the NPS FM[86] which relates to "all aspects of freshwater management" and is about "restoring and preserving the balance between the water, the wider environment, and the community".[87]

Through the Te Mana o te Wai concept, the NPS creates a hierarchy of obligations that prioritises freshwater ecosystems over the health of people (second), and social and economic wellbeing (third).[88] It is therefore pertinent to development and use of all

[80] WSA, s200.

[81] WSA pt2 2 sub-pt 6.

[82] WSA pt2 2 sub-pt 9.

[83] WSA pt2 2 sub-pt 10.

[84] WSA s 52.

[85] National Directions above n 46.

[86] NPS FM above n 4 at 1.3(1)-(4).

[87] NPS FM above n 28 at 1.3(1)-(4).

[88] NPS FM above n 4 at 1.3(5).

government policy and tools for freshwater management.

Both the WSA and the TAWSRA directly link to the Te Mana o te Wai concept in the NPS FM. Taumata Arowai "must give effect" to the concept.[89] It follows that freshwater ecosystems *must* be prioritised over human health and will underpin the regulator's activities that affect people and the environment.

However, the inclusion of this concept requires Taumata Arowai (as opposed to other regulators) to balance delivery of environmental versus human health outcomes. Section 14 is unusual and could be confusing considering international law principles regarding the universal human right to a healthy and sustainable environment, to water and sanitation and sustainable development goals (discussed in Section II).

The Clerk of the House of Representatives raised concerns about including a key term used in delegated legislation (such as the NPS FM) in primary legislation, which could "create uncertainty if the delegated legislation is amended or revoked."[90]

How the concept will work in practice in terms of decision-making across the agencies involved is still to be determined. There are likely to be some difficult choices with potential for the needs of communities regarding access to water being overridden by the need to protect a fragile ecosystem. Worst case, this could result in inadequate drinking water supply in some parts of New Zealand or to specific households.[91]

More positively, despite the drafting. there is no doubt about the genuine intent to enhance ecosystem health by incorporating Te Mana o te Wai into primary legislation. If a healthy and well-functioning ecosystem is prioritised, it follows that there is a degree of protection of water sources and human interaction with those water sources —

[89] WSA s 14; and TAWSRA ss 4, 5, 10, 17, 18. Taumata Arowai Board must also ensure there is capability and capacity to uphold the obligations and principles under the Treaty of Waitangi.

[90] Office of the Clerk of the House of Representatives *Legislative scrutiny briefing memorandum, Water Services Bill* (March 2021) at [10.1] < www.parliament.nz >.

[91] For example water suppliers serving very small communities, or small numbers of households or businesses in remote or rural areas.

and therefore in a broad sense enhanced human health should result.

4 A minefield of environmental performance standards

The Inquiry did not just point out the poor performance of local authorities in the freshwater system. There was also significant poor performance of MfE in terms of oversight and willingness to use the full suite of tools available under the RMA. By creating Taumata Arowai, it appears that the government is satisfied that central government agency shortcomings highlighted by the Inquiry will be addressed.

The Department of Internal Affairs initially explained to the Health Committee[92] that responsibility to set environmental limits and performance standards will remain with the Ministry for the Environment through National Directions under the RMA.[93]

The RMA functions of MfE include *monitoring* the effect and implementation of the RMA,[94] the relationship between central government and local government,[95] and *investigation* "of any matter of environmental significance".[96] Added to this are the National Directions that are implemented primarily by regional councils as regulators through regional policy statements and resource consent requirements.[97] The EPA also has enforcement functions[98] and sets controls for specific contaminants under HSNO.

[92] DIA Overview above n 75 at [Slide 9].

[93] National Directions above n 46.

[94] RMA, s24(f).

[95] RMA, s24(g).

[96] RMA, s24(ga).

[97] Note that the resource management reforms might change processes and powers but it is unlikely to remove this function entirely from local authorities. See Ministry for the Environment "Resource management System Reform" < www.environment.govt.nz >; and Environment Committee *Natural and Built Environments Bill Parliamentary Paper on the Exposure Draft Updated (July 2021)* < www.parliament.nz >. Note that the Environment Committee is due to report on the Parliamentary Paper in November 2021.

[98] RMA, pt 12A, enacted in 2020.

The potential conflicts (and duplications) with responsibilities and obligations under the Local Government Act 2002, the Health Act 1956, the RMA and HSNO were pointed out in many of the close to 1,000 written submissions to the Health Committee considering the Water Services Bill 2020 (WSB).[99]

There were mixed views on the proposal to create a new agency in submissions to the WSB. Some submitters, like Forest and Bird advocated for a "national regulator" for environmental performance to hold local authorities to account to address gaps in the "willingness and capability of local and regional government to protect ecosystems and natural resources".[100] Some, like the Resource Management Law Association (RMLA)[101] and the Hon Simon Upton (the PCE)[102] raised concerns over duplication and of roles with those of MfE.

The PCE also appealed directly to the Minister for the Environment and the Minister of Internal Affairs. He noted that regional councils will set standards for industrial entities discharging wastewater; Taumata Arowai will set standards for territorial authorities, and for the new water supply entities in reforms proposed in the Three Waters Review; and the EPA will continue to regulate nationally for specific chemical and metal contaminants. The Parliamentary Commissioner concluded that this will "create a more fragmented approach to environmental regulation". [103]

[99] WSB 314-1.

[100] Forest and Bird "Submission to the Health Committee on the Water Services Bill 2020" at [8].

[101] Resource Management Law Association "Submission to the Health Committee on the Water Services Bill" at [17] and [32].

[102] Parliamentary Commissioner for the Environment "Submission to the Health Committee on the Water Services Bill (6 July 2021)" at 1; Hon Simon Upton, Parliamentary Commissioner for the Environment "Letter to Minister Park and Minister Mahuta 10 September 2021" <www.pce.parliament.nz >.

[103] Hon Simon Upton above n 102; noting that MfE can use National Directions to set environmental limits and standards which for freshwater this is mainly the NPS FM, above n 4; and the NES DW above n 20.

The Health Committee, having considered the nearly 1,000 written submissions made in March 2021 and through hearings, recommended that performance standards should be limited to "infrastructure performance measures" to focus Taumata Arowai "on the performance of the waste water, stormwater, and drinking water infrastructure".[104]

However, for the second reading of the WSB, the Minister of Internal Affairs, Hon Nanaia Mahuta, introduced a supplementary order paper (SOP).[105] The SOP did not follow the advice of the Health Committee in response to the submissions, but instead broadened the scope of the new regulatory powers relating to environmental regulation by:

(a) Replacing "infrastructure performance"' with "environmental performance" throughout the Bill.

(b) Extending obligations of Taumata Arowai to monitor and report performance of wastewater and stormwater networks to include drinking water networks.

(c) Introducing a wide range of environmental performance standards that Taumata Arowai can make including relating to: discharges to air, water, or land; biosolids and any other by-products from wastewater; energy use; and trade waste.

(d) Amending the RMA[106] such that local authorities "must not" grant resource consents contrary to a wastewater environmental performance standard;[107] and "must include" conditions that are "no less restrictive than is necessary to give effect to the wastewater environmental performance standard.[108]

These form what can only be described as direct duplications of regional council and

[104] Water Services Bill 314-2 (select committee report) at 19.

[105] Supplementary Order Paper 2021 (62) Water Services Bill 2020 (314-2); released 3 September 2021.

[106] WSB 314-3, sch 2 pt 1. The amendments to the RMA will come into force on 4 October 2023 or on a date appointed by the Governor General by Order in Council, WSA, s2(1)(a).

[107] RMA s 104 (2D)(a).

[108] RMA s 104 (2D)(b).

EPA functions.

In the committee stage the Hon Eugenie Sage (chair of the Environment Select Committee) noted the concerns of the PCE about the risk of regulation in the freshwater system becoming "quite confused".[109] Her understanding of the issues raised through the passage of the WSB was thorough as she had recently chaired hearings for the government's Inquiry on the Natural and Built Environments Bill.[110]

The Minister of Internal Affairs, the Hon Nanaia Mahuta, rejected the advice of the Health Committee. Her response was cutting:[111]

> The [Health] committee received advice and changed the name of these powers and functions to infrastructure performers. In retrospect, this was the wrong decision. The Government always intended Taumata Arowai to have oversight of the environmental performance of three waters infrastructure, and this role is reflected throughout the objectives and functions of Taumata Arowai—the Water Services Regulator Act 2020 which was passed last year.

Perhaps the expanded scope provided in the final form of the WSA was not fully anticipated when the TAWSRA was enacted [emphasis added]:[112]

> (k) perform any other functions or activities that are consistent with its objectives and that *Taumata Arowai considers are necessary or desirable* to enable the achievement of those objectives, *except functions or activities performed by any central government agency or another regulator*; and

[109] (23 September 2021) 754 NZPD (Hon Eugenie Sage); referencing concerns relating to clauses 136 and 140 of the WSB 314-1 (2020) and the Select Committee's recommendations incorporated into the WSB 314-2 (2020).

[110] Environment Committee *Inquiry on the Natural and Built Environments Bill: Parliamentary Paper* (referred 29 June 2021).

[111] (28 September 2021) 754 NZPD (Hon Nanaia Mahuta). The WSA received Royal Assent 4 October 2021.

[112] TAWSRA, s 11 (k)-(l).

> (l) *perform any other functions* relevant to its objectives *that the responsible Minister directs* in accordance with section 112 of the Crown Entities Act 2004.

While s 11 of the TAWSRA provides a mechanism to avoid duplication across regulators, there is clear duplication with the functions of MfE, regional councils and the EPA. This presents some obvious implementation challenges for Taumata Arowai in managing the duplication with other regulators in practice.

Section IV considers the details: the processes, mechanisms and safeguards that are put in place in legislation to ensure local communities and the general public have adequate information about decisions, that they can engage with decision-makers before decisions affecting them are made, and that they have recourse to challenge those decisions.

IV Analysis of the WSA Against the Three Pillars

> The Aarhus Convention is an emblematic instrument for environmental democracy. The convention and its protocol on pollutant release and transfer registers are the only legally binding international instruments that put principle 10 of the Rio Declaration on Environment and Development in practice.[113]

A key question for this paper is what the complexity in governance and institutional arrangements will mean for public participation in decision-making, access to information and access to justice? This section looks at the details of the WSA within the framework of the Aarhus Convention to demonstrate that with more institutional complexity brings more bureaucracy which might, as the new freshwater regime develops, increase barriers to participatory engagement.

[113] Summary of the importance of the Aarhus Convention in Council of the European Union "Aarhus Convention: Council decision to strengthen access to justice in environmental matters" (18 June 2018) <www.consilium.europa.eu >.

The parties to the Aarhus Convention are bound to take "necessary legislative, regulatory and other measures" to implement the provisions into their national legislation, regulatory and enforcement regimes.[114]

A Article 4 - Access to Environmental Information

In New Zealand, many of the requirements on government and local government agencies align directly to Article 4 in terms of process, grounds for refusal, exemptions from disclosure, and charging for supply of information. Article 4 states: [115]

> …. in response to a request for environmental information, make such information available to the public, ….. including, where requested …. copies of the actual documentation containing or comprising such information:
>
> (a) Without an interest having to be stated;
>
> (b) In the form requested unless:
>
> (i) It is reasonable for the public authority to make it available in another form, in which case reasons shall be given for making it available in that form; or
>
> (ii) The information is already publicly available in another form.

Executive processes usually involve release of relevant background papers and reports, and Cabinet papers and minutes of decisions. Also most governmental agencies are subject to obligations to release information if requested.

The Official Information Act 1982 (OIA) applies to central government agencies and Crown entities; and the Local Government Official Information and Meetings Act 1987 (LGOIMA) applies to all local authorities. Together with the establishment of the

[114] Aarhus Convention, above n 3 art 3.

[115] Aarhus Convention, above n 3 art 4

parliamentary office of "ombudsman",[116] and the Privacy Act 1993, these statutes provide a comprehensive framework for any person to seek information from public service bodies. If a person is not happy with the response, they can complain to the Ombudsman[117] or the Privacy Commissioner.[118]

Similar to Article 4, the key principle of the OIA is that "information shall be made available unless there is good reason for withholding it".[119] In the absence of public interest considerations, the reasons for withholding information are varied.[120] The main reasons that would apply to agencies involved in freshwater management include: protecting privacy, avoiding disclosing commercially sensitive information, avoid prejudice to the public interest, to health and safety or substantial economic interests of New Zealand; or to protect constitutional conventions (for example matters still the subject of government Ministerial decisions and maintain the public service's ability to advise freely). Similar to Article 4, 3(a) a request for information under the OIA or LGOIMA can only be successful for information that is in existence. A request is not a mechanism that can be used to "force agencies to engage in debate or to create justifications or explanations in relation to something a person might be interested in."[121]

[116] First established in 1962 under the Parliamentary Commissioner (Ombudsman) Act 1962, which was replaced by the Ombudsmen Act 1975. See commentary on the history of the OIA in *Human Rights Law* (online ed, Thomson Reuters) at [PR1.04 (2)].

[117] Noting that any person can also complain to the Ombudsman if they believe they have been treated unfairly by a public sector agency. However, the Ombudsman is "unlikely" to investigate if there is a right to appeal a decision. See Ombudsman "Your Ability to Request Official Information" <www.ombudsman.parliament.nz >.

[118] Internationally, the framework established has been considered "brave" as New Zealand was only the fourth country to establish a parliamentary ombudsman function, *Human Rights Law* (online ed, Thomson Reuters) at [PR1.04 (2)].

[119] Official Information Act 1982 [OIA], s5.

[120] See OIA ss 6, 7, 9, 10, 18. See Allen and Clarke "Release of Official Information Under the Official Information Act 1982" < www.allenandclarke.co.nz >.

[121] See commentary about the role of ombudsmen at Ombudsman "*Your Ability to Request Official Information*" < www.ombudsman.parliament.nz >.

The public service (central government departments, agencies and entities)[122] is committed to the principle of "open government"[123] and "spirit of service to the community"[124] regarding decision-making (policy or operational) in line with the Public Service Act 2020 operating principles.[125]

B Article 5 – Collection and Dissemination of Environmental Information

> … the way in which public authorities make environmental information available to the public is transparent and that environmental information is effectively accessible[126]

Article 5 covers a range of requirements to publish and disseminate information including that found in lists, register or files; reports, texts, policies, plans and programmes, and progress reports on implementation.[127] Parties are also required to "publish and disseminate a national report on the state of the environment, including information on the quality of the environment and information on pressures on the environment".[128]

Taumata Arowai is required to publish a range of reports including:

(a) an annual drinking water regulation report[129]

(b) a drinking water compliance, monitoring, and enforcement strategy;[130]

[122] As defined in the Public Service Act 2020, s10.

[123] Public Service Act 2020, s12.

[124] Public Service Act 2020, s13.

[125] Public Service Act 2020, s13.

[126] Aarhus Convention, above n 3 art 5 (2)(a).

[127] Aarhus Convention, above n 3 art 5 (2)(c), (3) and (5).

[128] Aarhus Convention, above n 3 art 5 (4).

[129] WSA s 137.

[130] WSA s 136.

(c) monitor and report on the environmental performance of networks and network operators;[131]

(d) establish and maintain registers of supplies,[132] wastewater and stormwater networks and make them publicly available.[133]

The responsibility for "state of the environment" reporting in New Zealand lies with MfE and Stats New Zealand. Currently the cycle is three-yearly with the most recent report released in 2019.[134] Additional themed reports are also produced, for example, *Our Freshwater* in 2020.[135] There is every expectation that through the WSA and the role of Taumata Arowai and RMA national directions, monitoring data about freshwater systems will improve (noting the requirement on Taumata Arowai to share information with other regulatory agencies).[136]

In summary, there is no expectation that accessing information or dissemination of information from Taumata Arowai will be an issue under the WSA. Coupled with the complexity of institutional arrangements, it might be difficult for the public or consumers to determine what information is available, who collects and publishes it, how to find it, and who the actual decision-maker might be.

[131] WSA, ss 141, 147.

[132] WSA, s 55.

[133] WSA, s 144

[134] Ministry for the Environment *Environment Aotearoa 2019* (April 2019). See also Ministry for the Environment "Environmental Reporting" < www.environment.govt.nz >.

[135] Our Freshwater 2020 above n 9.

[136] WSA, s204. This section lists the departments and regulatory agencies that "may provide" information to Taumata Arowai (and vice versa) and includes the EPA, Ministry of Health, and local authorities. Oddly, Taumata Arowai can expand the list by prescribing an agency "by notice" (s204 (5)(m). Perhaps this is in anticipation of further institutional change.

C Articles 6, 7 and 8 - Public Participation in Decisions and Plans, Programmes and Policies and Regulations

> The public concerned shall be informed, either by public notice or individually as appropriate, early in an environmental decision-making procedure, and in an adequate, timely and effective manner.[137]
>
> … provide for early public participation, when all options are open and effective public participation can take place.[138]
>
> … give the public concerned access for examination, upon request where so required under national law, free of charge and as soon as it becomes available, to all information relevant to the decision-making… [139]
>
> … allow the public to submit, in writing or, as appropriate, at a public hearing or inquiry with the applicant, any comments, information, analyses or opinions that it considers relevant…[140]
>
> … in the decision due account is taken of the outcome of the public participation.[141]
>
> Time-frames sufficient for effective participation should be fixed; draft rules should be published or otherwise made publicly available; and the public should be given the opportunity to comment, directly or through representative consultative bodies.[142]
>
> … when the decision has been taken by the public authority, the public is promptly informed of the decision…[143]

There are two aspects affecting public participation that are relevant to Taumata

[137] Aarhus Convention, above n 3 art 6 (2).

[138] Aarhus Convention, above n 3 art 6 (4).

[139] Aarhus Convention, above n 3 art 6 (6).

[140] Aarhus Convention, above n 3 art 6 (7).

[141] Aarhus Convention, above n 3 art 6 (8); art 8.

[142] Aarhus Convention, above n 3 art 8 (a), (b), (c).

[143] Aarhus Convention, above n 3 art 6 (9).

Arowai's new roles relating to general governmental process for policy development and law-making, and the specific requirements of the WSA.

Note that Annex 1 to the Aarhus Convention prescribes a list of activities for which Article 6 applies regarding consenting (or permitting). This list includes a range of industry sectors and activities that, in New Zealand, would require consents under the RMA. It is the RMA that governs the public engagement processes in developing national direction, regional and district plans and how they are implemented in practice through resource consent processes.[144] Therefore, considering alignment of the WSA with Articles 6 and 7 of the Aarhus Convention is about the parliamentary and executive processes in place to develop, set and enforce standards for drinking water and monitor environmental performance of network infrastructure.[145]

1 Parliamentary and executive process – primary and secondary legislation

Public participation in law-making is generally available in two areas through *parliamentary* processes and *executive* processes.[146] The standard parliamentary process for developing legislation includes Select Committee consideration of Bills (including receiving written and oral submissions or inquiries) and scrutiny of secondary legislation

[144] Note Section III explained the scope of environmental standards and enforcement powers that Taumata Arowai can use under the WSA, and the consequential amendments to the RMA.

[145] Note that under the RMA, the precautionary approach of Principle 15 of the Rio Declaration has, to an extent, been incorporated into domestic law by virtue of: the RMA's sustainable management purposes (RMA, pt 2, ss 5-8.); and tested in case law, most notably in *Shirley Primary School v Telecom Mobile Communications Ltd* [1999] NZRMA 66. The precautionary approach has also been explicitly included in HSNO where those exercising powers and duties "shall take into account the need for caution in managing adverse effects where there is scientific and technical uncertainty about those effects" (HSNO, s7).[145]

[146] Guided by the Cabinet Office *Cabinet Manual 2017* <dpmc.govt.nz>; and the Cabinet Office *CabGuide* <dpmc.govt.nz>. There is a requirement that the Cabinet Legislation Committee review and endorse legislative proposals. Guidance is also included in a range of papers and journals, including process steps to enhance the quality of law in Geoffrey Palmer, *Lawmaking in New Zealand: Is there a better way?* (2014) 22 Waikato L Rev VII.

post-enactment.[147] In terms of the *quality* and *appropriateness* of law, parliamentary process and oversight are governed through the Legislation Act 2019, Secondary Legislation Act 2021 and Standing Orders of the House of Representatives 2020 (Standing Orders).[148] Standing Orders also prescribe the role of the Regulations Review Committee (RRC) to review secondary legislation that is required in primary legislation to be presented to Parliament. The RRC also hears complaints and can inquire into issues raised by the public.[149] Parliament also has some oversight of implementation by government agencies through Select Committee review of annual reporting by Crown entities.

Agencies and Ministers can generally develop their own public consultation processes for most secondary legislation proposals (outside formal parliamentary process).[150] Some agencies will have procedural requirements included in their empowering legislation, or in requirements for developing secondary legislation. Guidance on developing legislation (primary and secondary) is available in several forms including the CabGuide,[151] the Cabinet Manual,[152] via the Office of the Parliamentary Counsel and the Legislation Design and Advisory Committee (LDAC).[153]

[147] Refer Office of the Parliamentary Counsel *Turning Policy Into Law: A Step-by-Step Guide for Instructors* <www.policy-to-law.pco.govt.nz>. The Legislation Act 2019, as amended by the Secondary Legislation Act 2021 sets out the requirements for drafting and publishing legislation.

[148] Standing Orders of the House of Representatives 2020 (21 October 2020).

[149] Parliament also has some oversight of implementation by government agencies through Select Committee review of annual reporting by Crown entities.

[150] The Minister for the Environment developed his own process to develop the NPS FM and NEW DW, refer RMA s 46A.

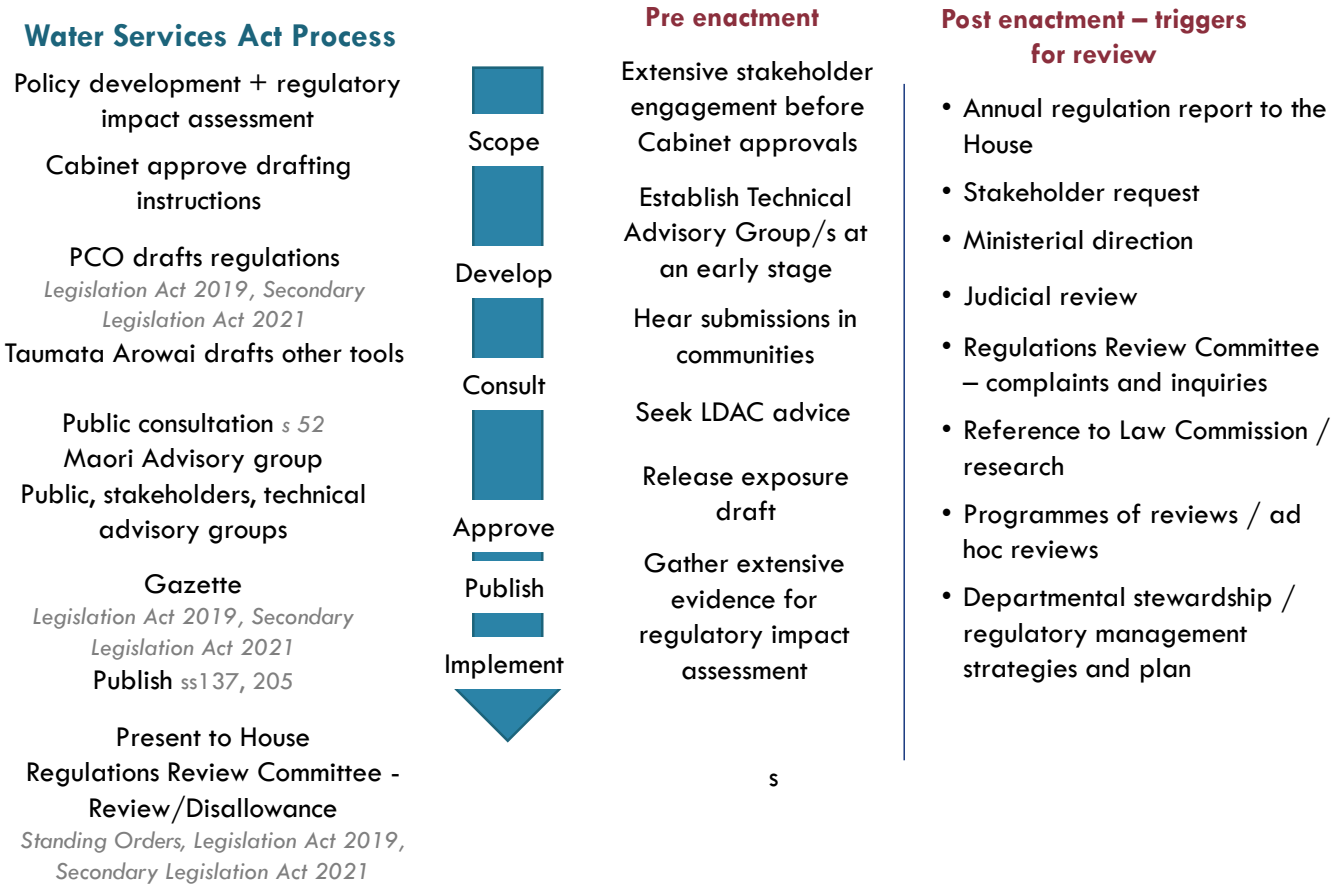
[151] Cabinet Office *CabGuide* <dpmc.govt.nz>.

[152] Cabinet Office *Cabinet Manual 2017* <dpmc.govt.nz>. Note that it is a requirement that the Cabinet Legislation Committee review and endorse legislative proposals.

[153] Legislation Design and Advisory Committee *Legislation Guidelines: 2018 Edition* (March 2018) <ldac.org.nz> [Legislation Guidelines]. The Legislation Design and Advisory Committee is an advisory body to the Executive and to Select Committees of Parliament.

A model for the development of secondary legislation (for example, regulations, directives, compliance rules, standards) is shown in Figure 6 with annotations for the relevant sections in the WSA. It reflects 'best practice', drawing on the process steps recommended by the Rt Hon Sir Geoffrey Palmer and highlights a range of triggers for review of instruments.[154]

Figure 6 Executive Process - Model for Secondary Legislation



[154] Geoffrey Palmer *Lawmaking in New Zealand: Is there a better way?* (2014) 22 Waikato L Rev VII. Figure 6 was also developed from the framework in Sara Player "Perceptions and Reality – Scrutiny of Subordinate Instruments Under the Cadastral Survey Act 2002" (LLM research paper, Victoria University Wellington, 2016) at 37.

2 Processes of Taumata Arowai

The WSA requires Taumata Arowai to consult on a range of matters.[155] The general public consultation provisions require "adequate" notice of a proposal, a "reasonable opportunity" for submissions to be made, and to give "appropriate" consideration to submissions.[156] It also leaves it up to Taumata Arowai when it is consulting on environmental performance measures to determine who it consults "any other person it considers appropriate".[157]

No mention is made in the WSA of the right to be heard in support of submissions. It is left to Taumata Arowai to develop its own approach and process requirements (potentially through regulations).[158] It is unclear from the drafting whether the regulator will differentiate between approaches for matters of significant public interest (for example an independent expert or lay panel), or the circumstances in which submitters could be heard in support of their submissions, or that an expert or lay panel should be appointed to consider submissions.

Concerns were also raised during Select Committee consideration about the significance of the compliance rules Taumata Arowai can make, rather than through usual Order in Council processes. It is the responsible Minister (in this case the Minister of Internal Affairs, as opposed to Parliament or an independent body) that would recommend regulatory requirements in secondary legislation. The Clerk of the House noted that it would reduce parliamentary oversight.[159]

Regulatory, administrative and operational proposals will need close scrutiny to ensure

[155] WSA s 55.

[156] WSA s 53. Note the Health Committee had recommended 'adequate' be struck out before 'public consultation' in cl 52(1) and cl 52(2), WSB 314-2 (2020) cl 52(2).

[157] WSA s 138.

[158] WSA s 200.

[159] Office of the Clerk of the House of Representatives *Legislative Scrutiny Briefing Memorandum, Water Services Bill* (March 2021) at [10.2].

they are aligned with the public participation principles of the Aarhus Convention[160] and in line with key cases such as *Wellington International Airport Ltd v Air NZ* (WIAL).[161]

In WIAL, Mackay J described what a proper process of "consultation" would comprise. Where the decision-maker holds meetings with those required to consult with *prior* to making a decision and provides relevant information, retains an "open mind", takes note of what is said, and "waits until they have had their say". It therefore remains to be seen how subjective the assessment of 'adequacy' of public consultation will be through Taumata Arowai.

D Article 9 - Access to Justice

The objective of Article 9 is to give the public (general public and NGOs) "wide access to justice and has a range of provisions including [emphasis added]:

> …ensure that any person … has access to a review procedure before a court of law or another *independent and impartial* body established by law.[162]
>
> … ensure that *members of the public* ….. have access to a review procedure before a court of law and / or another independent and impartial body established by law, *to challenge the substantive and procedural legality of any decision, act or omission*…[163]
>
> …..ensure that ….*members of the public have access to administrative or judicial procedures to challenge acts and omissions by private persons and public authorities* which contravene provisions of its national law relating to the

[160] Aarhus Convention above n 3, art 6.

[161] *Wellington International Airport Ltd v Air NZ* [1993] 1 NZLR 671 (CA) [WIAL], per McKay J at 683 notes to the effect that a proper process of "consultation" is where the decision-maker holds meetings with those required to consult with prior to making a decision and: provides relevant information, retains an "open mind", takes note of what is said, and "waits for them to have their say" befing "due notice" of what is said

[162] Aarhus Convention above n 3, art 9 (1).

[163] Aarhus Convention above n 3, art 9 (2).

> environment.[164]
>
> the procedures …. shall provide *adequate and effective remedies*, including injunctive relief as appropriate, and be *fair, equitable, timely and not prohibitively expensive*.[165]

Article 9 has been subject to substantial challenge since 2008 when ClientEarth, an NGO, led a challenge to the Compliance Committee of the European Union. ClientEarth alleged failure of the EU to comply with Articles 9, specifically that EU regulations[166] limit *who* can challenge and *what* can be challenged in contravention of the Aarhus Convention.[167] The Compliance Committee found[168] that the interpretation of the European Court of Justice that a complainant must have direct and individual concern to have 'standing' is "too strict to meet the criteria of the [Aarhus] Convention".[169] Amendments to European Union regulations were subsequently recommended and passed in October 2021.[170]

[164] Aarhus Convention above n 3, art 9 (3).

[165] Aarhus Convention above n 3, art 9 (4).

[166] Regulation 1367/2006 on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community institutions and bodies [2006] OJ L264/13.

[167] Aarhus Convention Compliance Committee *Findings and Recommendations of the Compliance Committee with Regard to Communication ACCC/C/2008/32 (Part II) Concerning Compliance by the European Union Adopted by the Compliance Committee on 17 March 2017* at [I] [EU CC Findings]. See also Decision 2018/881 requesting the Commission to submit a study on the Union's options for addressing the findings of the Aarhus Convention Compliance Committee in case ACCC/C/2008/32 and, if appropriate in view of the outcomes of the study, a proposal for a Regulation of the European Parliament and of the Council amending Regulation (EC) No 1367/2006 [2018] OJ L155/6.

[168] EU CC Findings above n 167, consider a range of ECJ cases including: Case C-404/12 P and C-405/12 P *European Council and Commission v Stichting Natuur en Milieu and Pesticide Action Network Europe* ECLI:EU:C:2015:5; and Case 25-62 *Plaumann & Co. v Commission of the European Economic Community* ECLI:EU:C:1963:17.

[169] EU CC findings above n 167 at [43.]

[170] See also media release Council of the European Union "Aarhus Regulation - Council Adopts its Position at First Reading (6 October 2021) <www.consilium.europa.eu >.

In New Zealand, avenues for complaints and disputes vary depending on regulatory regimes / statutory provisions, but most do not preclude judicial review— this along with a right to natural justice are protected by s 27 of the Bill of Rights.

A range of interrelated processes and systems provide checks and balances on the powers exercised by each branch in New Zealand's constitutional system.[171] One such check during the development of Cabinet papers,[172] is an assessment of compliance with the Bill of Rights.

The Ministry of Justice advised that the WSB "appears" to be consistent with Bill of Rights.[173] This might be considered sufficient scrutiny, but there might still be cause for concern. The processes for decision-making for the range of secondary tools under the WSA are not yet known – and have been left to Taumata Arowai to develop.

1 Potential issues for review of decisions

There is much commentary in the legal profession about 'ouster' or 'privative' clauses which should be "very carefully considered" as they can "interfere with the courts'

[171] These have been described by Sir Robin Cooke as two operating principles "independent courts" and a "democratic legislature" in "Fundamentals" [1988] NZLJ 158, as referenced in Sian Elias "Fundamentals: A Constitutional Conversation" (2011) 19 Waikato L Rev 1" at 7. This was also covered in a discussion of the constitutional system in Sara (Pippa) Player "Legislative Responses to Natural Disasters – A System Design View of Constitutional Balance" (LLM research paper, Victoria University Wellington, 2021) at 12-13. See also Matthew SR Palmer "What is New Zealand's constitution and who interprets it? Constitutional realism and the importance of public office holders" (2006) 17 PLR 133.

[172] Cabinet Office CabGuide <dpmc.govt.nz>.

[173] Ministry of Justice, Advice to the Attorney General *Consistency with the New Zealand Bill of Rights Act 1990: Water Services Bill* <www.justice.govt.nz >. Note that the Ministry of Justice also provided advice at an early stage in the development of the TAWSRA regarding freedom from discrimination regarding the establishment of a Māori advisory group, Ministry of Justice, Advice to the Attorney General *Consistency with the New Zealand Bill of Rights Act 1990: Water Services Regulator Bill* <www.justice.govt.nz >.

constitutional role as interpreters of the law and so undermine the rule of law". [174] The Judiciary is bound to consider necessity, reasonableness, fairness and practical effect of such clauses as they apply to an individual case.[175]

While there is no specific ouster clause in the WSA, it could be deemed that because of the construction of ss 89 and 93,[176] the rights to judicial review for some decisions are "channelled"[177] in terms of:

(a) limiting the decisions that can be challenged in an internal review to: directions; temporary drinking water supply conditions; grant of or exemptions to water suppliers; and decisions made regarding authorisations made under regulations (s 89(2)(a) to (d));

(b) limiting timeframes for making a challenge (20 working days) with discretion of Taumata Arowai to extend this period (ss 89(1), 93(2));

(c) limiting review or appeal effectively to "affected" water consumers and water

[174] These types of clause "…remove or limit (either substantively or through procedural limits) the ability of the courts to judicially review the decision." Legislation Guidelines above n 153 at [28.1]. They also note ouster clauses might not be effective even if used - see discussion of judicial review as an "essential safety net" in Sian Elias "Judicial Review and Constitutional Balance" (2019) 17 NZJPIL; and discussion of judicial willingness to intervene where challenge is to process or to an alleged abuse of power in Sara (Pippa) Player "Legislative Responses to Natural Disasters – A System Design View of Constitutional Balance" (LLM research paper, Victoria University Wellington, 2021) which references a range of analysis and commentary including from: Josh Pemberton "The Judicial Approach to Privative Provisions in New Zealand" (2015) NZ L Rev 617.

[175] Relevant cases would include *Anisminic Ltd v Foreign Compensation Commission* [1969] 2 AC 147 (HL), [1969] 1 All ER 208 [*Anisminic*]; *Bulk Gas Users Group v Attorney-General* [1983] NZLR 129 (CA); *Tannadyce Investments Limited v Commissioner of Inland Revenue* [2011] NZSC 158, [2012] 2 NZLR 153 [Tannadyce]; and *H (SC 52/2018) v Refugee and Protection Officer* [2019] NZSC 13.

[176] The text of ss 89 and 92 is included in Annex 1.

[177] Refer Hanna Wilberg "Privative Clauses in NZ: Some Limits of Permissible Channelling" (10 March 2020) Administrative Law Blog <adminlawblog.org>.

suppliers directly involved in a decision (ss 89(1)-(2), 93(1)).

For example, it might be construed that internal review and appeal is not available for a member of the public or an NGO, who might have an interest in a decision or a compliance order (as opposed to being directly "affected" by the decision). They would therefore only have the option of taking a judicial review proceeding, which would only restart the process, not provide a definitive independent ruling on the merits of the issues raised or the decision itself. On the development of secondary tools such as compliance rules, environmental performance standards,[178] once promulgated, a complaint could be made to the Regulations Review Committee (which could consider disallowance under Standing Orders on secondary legislation).[179]

With increasing institutional complexity, it might be difficult for the average New Zealander to work out who has made a decision, the process used, how they be involved, and where to find information.

Given the range of administrative and legislative decisions regarding freshwater management Taumata Arowai is empowered to make, there is a potential risk of contravening not only the Bill of Rights, but also the UDHR[180] and international environmental law as embodied in Article 9 (3) of the Aarhus Convention. It would be an unacceptable outcome if it was found that, participatory rights are diminished through a regulator being able to: develop secondary tools with limited scrutiny of parliament; define its own processes; and rule on its own internal process and decisions; and weaken the "safety net"[181] that is judicial review.

[178] These tools will be secondary legislation and subject to the Legislation Act 2019 and Secondary Legislation Act 2021.

[179] Standing Orders above n 148.

[180] UDHR above n 25, art 10.

[181] See discussion of judicial review as a weak but essential safety net in Sian Elias "Judicial Review and Constitutional Balance" (2019) 17 NZJPIL at 3.

V Conclusions

Overall, the WSA has all the right bits for a sound regulatory scheme, but the devil might be in the detail. The overall design appears to honour international law principles relating to: the Three Pillars, the universal right to a sustainable and healthy environment and to water and sanitation.

However, the WSA enables Taumata Arowai to create new tools in secondary legislation that can prescribe a range of administrative and operational processes "necessary for its administration, or necessary for giving it full effect".[182] These tools and the institutional design that is emerging in the wider government reforms may create more bureaucracy and increase barriers to participatory engagement; and may not honour 'best practice' as embodied in the Aarhus Convention.

As new regimes are implemented, we need to be mindful of firstly over complicating institutional and governance arrangements; secondly, balancing executive powers with oversight by Parliament and the Judiciary; and thirdly that our domestic law, particularly our secondary legislation, adheres to sound participatory and procedural principles – as expected by the international community and New Zealanders.

Let us hope that the reforms to the regulation of freshwater result in a real improvement to the management of such a precious resource – and that there is no "devil in the detail".[183]

[182] WSA, s200 (1)(j), noting that this is a relatively common regulation-making provision for a regulatory regime.

[183] An idiom suggesting that "whatever one does should be done thoroughly" - details are important, see Wikipedia "The Devil is in the Detail" <www.wikipedia.org >.

Annex 1 Water Services Act 2021 Selected Sections

89 Application for internal review

(1) A person affected by a decision to which this section applies (the reviewable decision) or the person's representative may apply to Taumata Arowai for a review (an internal review) of the decision within—

(a) 20 working days after the day on which the decision first came to the affected person's notice; or

(b) any longer period that Taumata Arowai allows.

(2) This section applies to the following decisions:

(c) any directions issued by Taumata Arowai or a compliance officer:

(d) any conditions issued by Taumata Arowai under section 33 that apply to a temporary drinking water supply:

(e) any decision by the chief executive to grant or refuse to grant an exemption under section 57 or 58:

(f) any decision to refuse to authorise, or to amend, suspend, or revoke, an authorisation under regulations made under section 200.

(3) The application must be made in the manner and form required by Taumata Arowai.

93 Appeal

(1) A person may appeal to the District Court against any of the following on the grounds that it is unreasonable:

(a) a decision or determination specified in section 64(5):

(b) Taumata Arowai's decision under section 90 on an internal review:

(c) the whole or any part of a compliance order issued under section 120.

(2) The appeal must be lodged within 20 working days after the day on which the decision or determination first came to the person's notice or the compliance order was served on the person.

(3) On an appeal under subsection (1), the court must inquire into the decision, determination, or compliance order and may—

(a) confirm or vary the decision, determination, or compliance order; or

(b) set aside the decision or determination, or cancel the compliance order; or

(c) set aside the decision or determination and substitute another decision or determination that the court considers appropriate; or

(d) cancel the compliance order and substitute another compliance order that the court considers appropriate; or

(e) refer the decision, determination, or compliance order back to the decision maker with the court's opinion, together with any directions as to how the matter should be dealt with.

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