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**Improving Compliance in the Three Waters**  
*The Tension between the Rule of Law, Accountability and  
Subsidiarity*

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## *Abstract\**

Levels of compliance, monitoring and enforcement in the three waters – drinking water, wastewater and stormwater – are inadequate. The three waters review is currently investigating options to improve compliance because of the serious adverse effects a lack of compliance has on our health, environment and economy. This paper argues that the current governance arrangements are the reason for the lack of compliance. Local authorities lack the resources to ensure compliance is consistent and effective which undermines equality before the law and congruence. The various actors and forums also dilute accountability. While theoretically subsidiarity and accountability justify the current arrangements, in practice local responsibility for compliance is inefficient and there is weak democratic accountability. This paper analyses the inherent tension between the rule of law, accountability and subsidiarity by assessing the compatibility of these principles with possible changes to the three waters governance arrangements to improve compliance. Despite the difficulty in resolving the tension, this paper argues that changes to the governance arrangements must be made and suggests that a mixture of compliance responsibilities at central and regional governance levels would be most appropriate.

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The text of this paper excluding cover page, abstract, table of contents, footnotes and bibliography comprises 11,978 words.

## *I Introduction*

Poor freshwater quality is New Zealand's greatest environmental issue;<sup>1</sup> our health, economy and environment are affected by the quality of our fresh water.<sup>2</sup> The consequences of inadequate freshwater management are significant. Every year thousands of New Zealanders contract enteric diseases from microbial contaminants in our drinking water and waterways. Stormwater and wastewater discharges pollute our lakes and river.<sup>3</sup> To combat these serious issues, the National Government announced a review in June 2017 into the three water services: drinking water, wastewater and stormwater.<sup>4</sup>

The three waters review is investigating how to improve compliance, monitoring and enforcement (collectively referred to as compliance) within the three waters. Current levels of compliance are inadequate.<sup>5</sup> Lack of compliance is caused by the governance arrangements – the lack of capacity and capabilities at local and regional levels hinders efficacy and impedes the rule of law. The large number of actors and forums dilute accountability. For effective compliance greater allocation of compliance responsibilities at central and regional levels is required. However, the governance arrangements were established for a reason; subsidiarity allows for local democratic control which is important as it may improve accountability. This paper aims to analyse the tension between the rule of law, accountability and subsidiarity by assessing the compatibility of these principles with possible changes to the three waters governance arrangements to improve compliance. I argue that despite the inherent tension, change is essential.

There are five parts to this paper. Part I, this introduction, states the research question and outlines the structure of the paper. Part II articulates the problem. First, this part will outline current levels of three waters compliance. At each level of governance under the current arrangements – national, regional and local – I will summarise the efficacy of compliance and discuss existing explanations and any solutions that have been implemented or proposed. Secondly, this part will describe the

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<sup>1</sup> Kenneth F. D. Hughey, Geoffrey N. Kerr and Ross Cullen *Public Perceptions of New Zealand's Environment: 2016* (EOS Ecology, Christchurch, 2016) at 21.

<sup>2</sup> Cabinet paper "Government review of three waters services" (June 2017); Cabinet paper "Review of three waters infrastructure: key findings and next steps" (April 2018); Ministry for the Environment and Stats NZ *New Zealand's Environmental Reporting Series: Our fresh water 2017* (Ministry for the Environment and Stats NZ, Wellington, 2017).

<sup>3</sup> See generally Jan Wright *Water quality in New Zealand: Understanding the science* (Parliamentary Commissioner for the Environment, Wellington, 2012); Ministry for the Environment and Stats NZ, above n 2, at 11, 18, 31, 41–42, 54–55; Ministry of Health *Guidelines for Drinking-water Quality Management for New Zealand (5<sup>th</sup> ed)* (Ministry of Health, Wellington, 2017) at 4–11.

<sup>4</sup> Cabinet paper (June 2017), above n 2, at 1–7.

<sup>5</sup> Cabinet paper (June 2017), above n 2, at 2–3, 6–7, 11; Cabinet paper (April 2018), above n 2, at 4.

practical implications of low levels of compliance. I will explain the causes and effects of declining freshwater quality before highlighting the Government's focus on improving three waters compliance by noting relevant aspects of the three waters review. Thirdly, this part will explain why the lack of compliance is a rule of law and accountability issue. I will question whether the rule of law is upheld if compliance levels are low and inconsistent. Many resource consents with monitoring conditions are not monitored and some local authorities are not holding themselves accountable for wastewater plant compliance.<sup>6</sup> Lack of compliance undermines equality before the law and congruence. The law as stated is not what is enforced. I will also discuss how the large number of actors and forums under the current arrangements dilute accountability.<sup>7</sup>

Part III explains the governance arrangements. First, this part will discuss the current arrangements beginning with the governance bodies at national, regional and local levels. I will then explain the relevant aspects of the Local Government Act 2002, the Resource Management Act 1991 and the Health Act 1956 and briefly describe the principal policies and regulations under these statutes. These directions are the National Policy Statement for Freshwater Management 2014, the National Environmental Standards for Sources of Human Drinking Water 2007 and the Drinking-water Standards for New Zealand 2005. Next, this part will outline two of the possible justifications for the current arrangements. Subsidiarity – the principle of delegating responsibilities to the lowest form of governance possible – can increase efficiency and better reflect the needs of communities. But there are issues in practice. Local authorities have varied capacity and capabilities and are dependent on ratepayers for funding as all personal and corporate tax goes to central government.<sup>8</sup> Accountability may also be a justification for the current arrangements as democratic accountability is highest at local levels in theory. However, the current accountability of those responsible for the three waters is light; compliance reports are often non-existent or difficult to understand and accountability problems are exacerbated by the fragmented governance arrangements.<sup>9</sup> Therefore, I will question whether subsidiarity and accountability truly justify the current arrangements.

Part IV assesses changes to the governance arrangements to improve compliance. This part will note possible options at national, regional and local levels to improve compliance. Options

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<sup>6</sup> Ministry for the Environment *Compliance, monitoring and enforcement by local authorities under the Resource Management Act 1991: November 2016* (Ministry for the Environment, Wellington, 2016) at 19, 23, 31.

<sup>7</sup> Mark Bovens "Analysing and Assessing Accountability: A conceptual framework" (2007) 13 ELJ 447 at 455–459.

<sup>8</sup> Ministry for the Environment, above n 6, at 5, 18–19, 22–33; Oliver Hartwich *A Global Perspective on Localism* (The New Zealand Initiative and Local Government New Zealand, Wellington, 2013) at 19.

<sup>9</sup> Cabinet paper (April 2018), above n 2, at 4; Lyn Stevens, Karen Poutasi and Anthony Wilson *Report of the Havelock North Drinking Water Inquiry: Stage 2* (Department of Internal Affairs, December 2017) at [231]; Ministry for the Environment, above n 6, at 35.

considered include establishing a dedicated drinking water regulator and creating aggregated regional water suppliers.<sup>10</sup> I will then analyse these options by assessing their compatibility with the rule of law, accountability and subsidiarity. This analysis will highlight the inherent tension between these principles. Finally, Part V will summarise the key points from each part of this paper and conclude on the tension between the rule of law, accountability and subsidiarity.

## *II The problem*

The current governance arrangements for the three waters do not allow for effective compliance. This part will outline the levels of compliance under the current governance arrangements; explain the practical implications from a lack of compliance; and describe conceptions of the rule of law, and the problems of many hands and many eyes, to illustrate why the lack of compliance is a rule of law and accountability issue.

### *A Current levels of compliance*

This sub-part will assess current compliance efficacy at national, regional and local levels and describe explanations for the low level of efficacy and potential solutions. Stormwater and wastewater compliance requires adherence to the Resource Management Act (RMA), local authority plans, bylaws and resource consents.<sup>11</sup> The Minister for the Environment must ensure that the National Policy Statement for Freshwater Management and the RMA are given effect to.<sup>12</sup> Local authorities are responsible for monitoring resource consent compliance and enforcing stormwater and wastewater breaches.<sup>13</sup> For drinking water compliance the Health Act and the Drinking-water Standards for New Zealand (DWSNZ) must be adhered to. Drinking water suppliers and assessors are responsible for monitoring drinking water compliance, medical officers are responsible for enforcing compliance with the DWSNZ and the Minister of Health has emergency powers.<sup>14</sup>

#### *1 National*

The Ministry of Health has failed to discharge many of its responsibilities. No prosecutions have been undertaken and no compliance orders have been issued since the 2007 amendment to the Health Act.<sup>15</sup> The Ministry for the Environment has conducted some monitoring of compliance

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<sup>10</sup> Cabinet paper (April 2018), above n 2, at 6; Stevens, Poutasi and Wilson, above n 9, at [919]–[920].

<sup>11</sup> Ministry for the Environment, above n 6, at 7.

<sup>12</sup> Ministry for the Environment, above n 6, at 8; Resource Management Act 1991, s 24(f).

<sup>13</sup> Ministry for the Environment, above n 6, at 7; Resource Management Act, ss 35, 38.

<sup>14</sup> Health Act 1956, ss 69V–69ZW, 69ZZA–69ZZN.

<sup>15</sup> Stevens, Poutasi and Wilson, above n 9, at [253], [263], [271].

under the RMA and investigated implementation of the National Policy Statement for Freshwater Management.<sup>16</sup>

Compliance is ineffective as the Ministry of Health's drinking water section does not adequately appreciate the risks and is substantially under-resourced.<sup>17</sup> The Ministry of Health's enforcement approach is too soft and lacks quality and accessible guidelines.<sup>18</sup> For RMA monitoring it is difficult for the Ministry for the Environment to assess levels of compliance as data is deficient; the Ministry is largely reliant on surveys and data provided to them by local authorities.<sup>19</sup>

Effectiveness could be increased by simplifying and integrating the governance arrangements and promoting collaboration between the various governance bodies. For example, introducing mandatory joint working groups between local authorities and the Ministry of Health.<sup>20</sup> A dedicated drinking water regulator has also been recommended.<sup>21</sup> The Ministry of Health could increase the number of drinking water assessors. Removing the requirement of being a health protection officer would allow for easier appointment.<sup>22</sup> The Ministry of Health could also implement a firm compliance policy and hold suppliers to account by naming and shaming non-compliance.<sup>23</sup>

## 2 Regional

Local authorities are responsible for stormwater and wastewater compliance – with regional councils having greater responsibility than territorial authorities for water quality<sup>24</sup> – whilst drinking water assessors monitor compliance with the DWSNZ and designated officers and medical officers enforce compliance.<sup>25</sup> Compliance is unsatisfactory. 18 per cent of wastewater plants are operating on expired resource consents and over 50 per cent of three waters providers do not continuously comply with their stormwater and wastewater consent conditions. There is

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<sup>16</sup> Ministry for the Environment, above n 6, at 8–11; Ministry for the Environment *National Policy Statement for Freshwater Management: Implementation Review – National Themes Report* (Ministry for the Environment, Wellington, 2017); Ministry for the Environment *National Policy Statement for Freshwater Management Implementation Review: Otago* (Ministry for the Environment, Wellington, 2017).

<sup>17</sup> Stevens, Poutasi and Wilson, above n 9, at [264], [319(b)], [927].

<sup>18</sup> Stevens, Poutasi and Wilson, above n 9, at [253].

<sup>19</sup> Ministry for the Environment, above n 6, at 8–11.

<sup>20</sup> Local Government New Zealand *Water 2050: Quality – Review of the framework for water quality* (Local Government New Zealand, Wellington, 2018) at 4, 6; Stevens, Poutasi and Wilson, above n 9, at [21], [56], [382], [400], [419].

<sup>21</sup> Stevens, Poutasi and Wilson, above n 9, at [583].

<sup>22</sup> Stevens, Poutasi and Wilson, above n 9, at [319(b)], [522].

<sup>23</sup> Stevens, Poutasi and Wilson, above n 9, at [375], [580].

<sup>24</sup> See Resource Management Act, ss 9, 14–15, 30–31, 35.

<sup>25</sup> Health Act, ss 69V–69ZW, 69ZZA–69ZZN.

limited compliance, and no formal enforcement, of the DWSNZ.<sup>26</sup> Prosecutions are rare and comprise less than three per cent of formal enforcement action under the RMA.<sup>27</sup> Overall, compliance effectiveness is improving in some councils, but is decreasing in others.<sup>28</sup>

RMA compliance monitoring is generally inadequate. Resource consent conditions receive the most monitoring overall with plan rule monitoring occurring less frequently. However, only 60 per cent of resource consents with monitoring conditions are monitored. Of those, 21 per cent are non-compliant. Monitoring methods also vary. Site visits may be rare, and some councils rely on complaints before action is taken. Complaint response times range from an average of two to three days to backlogs that have not been investigated.<sup>29</sup> Furthermore, information is generally not easily accessible to the public as only some local authorities publish compliance reports.<sup>30</sup>

Compliance is ineffective due to a lack of capability and capacity. There are currently 374 full time equivalent compliance staff across 78 local authorities; 10 local authorities have no full-time equivalent compliance staff and 31 have one or less.<sup>31</sup> Low retention of experienced compliance staff causes skill shortages. Many local authorities also struggle with limited financing and compliance is not always prioritised.<sup>32</sup> In larger local authorities, poor communication between compliance staff and consenting and planning staff is an issue. For effective compliance, resource consent conditions and plan rules must be simple enough to be able to be monitored and enforced.<sup>33</sup>

Enforcement action for non-compliance is inadequate because it is predominantly left to local authorities' discretion. The maximum \$1000 fine for an infringement offence may be insufficient to deter non-compliance and prosecution costs are high. If the charge is defended the legal expenses can rise to six figures. There is no guarantee a fine will be recovered and even if it is it may not cover legal costs.<sup>34</sup> For example, when the Bay of Plenty Regional Council prosecuted

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<sup>26</sup> Allan Prangnell and Richard Ward "Three Waters Review: Slides for discussion" (slides presented for public discussion, Wellington, 13 June 2018) at 22; Land and Water Forum *Better freshwater management: A Land and Water Forum Report to the Minister of Agriculture* (December 2017) at 34–35.

<sup>27</sup> Ministry for the Environment, above n 6, at 27.

<sup>28</sup> Ministry for the Environment, above n 6, at 32–33.

<sup>29</sup> Ministry for the Environment, above n 6, at 5, 9, 19–25, 32; New Zealand Productivity Commission *Towards better local regulation* (New Zealand Productivity Commission, Wellington, 2013) at 62, 79.

<sup>30</sup> Ministry for the Environment, above n 6, at 35.

<sup>31</sup> Prangnell and Ward, above n 26, at 22.

<sup>32</sup> Land and Water Forum, above n 26, at 5; Ministry for the Environment, above n 6, at 5, 17–19, 27, 43.

<sup>33</sup> Marie Brown *Last line of defence: compliance, monitoring and enforcement of New Zealand's environmental law* (Environmental Defence Society, Auckland, 2017) at 38; Ministry for the Environment, above n 6, at 36.

<sup>34</sup> Ministry for the Environment, above n 6, at 13–15, 28, 41; New Zealand Productivity Commission, above n 29, at 171; Resource Management (Infringement Offences) Regulations 1999, sch 1.

Mobil for an oil spill in Tauranga Harbour the fine was around \$60,000 less than the legal costs.<sup>35</sup> Local authorities take different approaches to prosecutions. Some proceed only if they will recover costs. Others take a principled approach and proceed if the prosecution is warranted, regardless of cost recovery.<sup>36</sup>

Political pressure may also be hindering effective compliance as local authorities must balance ratepayer and stakeholder interests when conducting compliance.<sup>37</sup> Councillor influence on compliance staff is a problem in some local authorities.<sup>38</sup> There have also been cases of councillors standing for election to alter compliance and subsequently restricting cold-calling by requiring warnings before inspections. Local authorities have differing policies on cold-calling.<sup>39</sup>

A final explanation is that there is currently no standardised compliance approach and central government guidance was non-existent until 2018.<sup>40</sup> Some flexibility is appropriate as local authorities must reflect the needs of their region, district or city.<sup>41</sup> However, a lack of consistency causes uncertainty and can result in poor environmental outcomes.<sup>42</sup>

Regional councils and unitary authorities share compliance ideas through the Compliance and Enforcement Special Interest Group. The group has developed a framework for compliance in the regional sector which includes risk-based monitoring.<sup>43</sup> A risk-based monitoring approach is useful for prioritising monitoring where there are limited resources. Several regional councils already use risk-based monitoring.<sup>44</sup>

Central government involvement could be increased in several ways. Resourcing could be improved through greater funding and central government appointees who could help increase the expertise of compliance staff. Central government could also amend the relevant legislation to

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<sup>35</sup> *Bay of Plenty Regional Council v Mobil Oil New Zealand Ltd* [2016] NZDC 8903; Ministry for the Environment, above n 6, at 28.

<sup>36</sup> Ministry for the Environment, above n 6, at 28.

<sup>37</sup> Land and Water Forum, above n 26, at 43–44; Local Government New Zealand, above n 20, at 27.

<sup>38</sup> Ministry for the Environment, above n 6, at 30.

<sup>39</sup> Ministry for the Environment, above n 6, at 19, 30.

<sup>40</sup> Ministry for the Environment, above n 6, at 12, 17; see generally Ministry for the Environment *Best Practice Guidelines for Compliance, Monitoring and Enforcement under the Resource Management Act 1991* (Ministry for the Environment, Wellington, 2018).

<sup>41</sup> Local Government Act 2002, s 10.

<sup>42</sup> Ministry for the Environment, above n 6, at 7–8, 25, 43.

<sup>43</sup> Ministry for the Environment, above n 6, at 25; Nick Zaman and others *Regional Sector Strategic Compliance Framework 2016-2018* (Compliance and Enforcement Special Interest Group, Auckland, 2015) at 7, 11.

<sup>44</sup> Land and Water Forum, above n 26, at 46; Local Government New Zealand *Water 2050: Governance – A better framework for drinking water regulation* (Local Government New Zealand, Wellington, 2018) at 18; Ministry for the Environment, above n 6, at 20, 22; Zaman and others, above n 43, at 11.

increase infringement fines and allow for consideration of past compliance transgressions when considering resource consent applications. Finally, a national policy statement or national environmental standard for compliance could be developed. However, it would need to allow flexibility to reflect local circumstances as required under the Local Government Act.<sup>45</sup>

### 3 Local

Territorial authorities conduct less enforcement than regional councils and prefer to use informal methods. For example, regional councils and unitary authorities take almost 80 per cent of formal enforcement action.<sup>46</sup> Less than half of territorial authorities always comply with their wastewater discharge permit conditions.<sup>47</sup> There is also anecdotal concern that territorial authorities are not sufficiently aware of the National Policy Statement for Freshwater Management when providing the three waters.<sup>48</sup>

For drinking water, compliance with the DWSNZ is unacceptably low.<sup>49</sup> Compliance improved by only 3.7 per cent between 2009 and 2016. Most suppliers were compliant with the chemical standards but almost 40 per cent were not compliant with the microbial standards.<sup>50</sup> Compliance also varies depending on the size of the supplier; almost 90 per cent of large suppliers complied with the DWSNZ in 2015-2016 compared to only 25 per cent of small suppliers.<sup>51</sup> Boil water notices, which can be issued if there is non-compliance, affected 15,000 people in 2015-2016. 7,200 of those affected were subject to permanent boil water notices.<sup>52</sup>

Compliance levels are inadequate as many territorial authorities are small which increases the chance that compliance staff will give preferential treatment to people whom they have ties to.<sup>53</sup> Some councils use informal methods as they believe that a good sense of community is more important than effective compliance.<sup>54</sup> Other councils do not understand the importance of effective compliance and allocate insufficient resources.<sup>55</sup> Drinking water compliance is

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<sup>45</sup> Brown, above n 33, at 79, 81, 86; Land and Water Forum, above n 26, at 5, 42; Ministry for the Environment, above n 6, at 39, 44–45.

<sup>46</sup> Ministry for the Environment, above n 6, at 27.

<sup>47</sup> Castalia Strategic Advisors *Exploring the issues facing New Zealand's water, wastewater and stormwater sector* (Local Government New Zealand, Wellington, 2014) at 18.

<sup>48</sup> Land and Water Forum, above n 26, at 35.

<sup>49</sup> Stevens, Poutasi and Wilson, above n 9, at [267].

<sup>50</sup> Stevens, Poutasi and Wilson, above n 9, at [92]–[100].

<sup>51</sup> Ministry of Health *Annual Report on Drinking-water Quality 2015-2016* (Ministry of Health, Wellington, 2017) at 1, 7–15; Stevens, Poutasi and Wilson, above n 9, at [98].

<sup>52</sup> Stevens, Poutasi and Wilson, above n 9, at [108].

<sup>53</sup> Ministry for the Environment, above n 6, at 30.

<sup>54</sup> Ministry for the Environment, above n 6, at 31.

<sup>55</sup> Ministry for the Environment, above n 6, at 31.

inadequate due to insufficient expertise among council staff and a lack of guidance from the Ministry of Health.<sup>56</sup>

Territorial authorities lack a support network to help with compliance.<sup>57</sup> Greater coordination could be achieved through a national network with annual meetings. Alternatively, regional networks could be established between regional councils and territorial authorities in the same regions.<sup>58</sup>

## ***B Practical implications***

Inadequate levels of compliance have serious practical implications. This sub-part will explain the effects of a lack of compliance on health, the environment and the economy before describing relevant aspects of the three waters review.

### *1 Fresh water*

Fresh water is a broad domain with many aspects.<sup>59</sup> It is a source of recreation, contributes to productive urban and agricultural industries and is home to native biota. Safe drinking water is essential for human health.<sup>60</sup> Wastewater and stormwater discharges can make water unsafe for recreation and increase the cost of treating drinking water;<sup>61</sup> and flooding can occur if stormwater infrastructure is inadequate as urban surfaces are largely impervious.<sup>62</sup>

Water quality “relates to the condition of water and includes factors like how well it can support plants and animals, and whether it is fit for us to use”.<sup>63</sup> Freshwater quality can be measured through chemical or biological parameters.<sup>64</sup> The main issues in New Zealand are excessive nutrients, sediment or pathogens.<sup>65</sup> Nitrogen and phosphorous are the most problematic nutrients as they can cause algal blooms which decrease the dissolved oxygen in the water and affect biota health. Both nutrients are present in wastewater and stormwater.<sup>66</sup> Groundwater, a source of

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<sup>56</sup> Stevens, Poutasi and Wilson, above n 9, at [815]–[842].

<sup>57</sup> Ministry for the Environment, above n 6, at 25; compare Zaman and others, above n 43, at 6.

<sup>58</sup> Ministry for the Environment, above n 6, at 25, 38.

<sup>59</sup> Controller and Auditor-General *Introducing our work programme – Water management* (Office of the Auditor-General, Wellington, 2017) at 5, 13.

<sup>60</sup> Ministry for the Environment and Stats NZ, above n 2, at 8–19.

<sup>61</sup> Chris Nokes *A Guide to the Ministry of Health Drinking-water Standards for New Zealand* (Environmental Science and Research, Wellington, 2008) at 2–4.

<sup>62</sup> Controller and Auditor-General, above n 59, at 19, 28–29; Ministry for the Environment and Stats NZ, above n 2, at 31.

<sup>63</sup> Ministry for the Environment and Stats NZ, above n 2, at 9.

<sup>64</sup> NIWA *Analysis of Water Quality in New Zealand Lakes and Rivers* (NIWA, Wellington, 2015) at 11.

<sup>65</sup> Wright, above n 3, at 9.

<sup>66</sup> Wright, above n 3, at 31–36.

drinking water, can be susceptible to nutrient accumulation and high nitrate concentrations are dangerous for bottle-fed infants.<sup>67</sup> Microbial contaminants such as E.coli, giardia and cryptosporidium can cause enteric disease.<sup>68</sup> The Ministry for the Environment released their report on the state of our fresh water in 2017.<sup>69</sup> Nitrogen, phosphorous and E.coli concentrations are highest in urban areas and at least one third of native aquatic species are threatened or at risk of extinction.<sup>70</sup>

There is no one sole cause of poor freshwater quality.<sup>71</sup> Pollution may be point source or diffuse. Point source pollution has an identifiable source; for instance, discharge of wastewater and stormwater from a pipe. Diffuse pollution, such as run-off or pipe seepage, has no identifiable source.<sup>72</sup> Most nitrogen and phosphorous pollution is diffuse. Therefore, effective compliance is difficult as there is no identifiable source. Regulation is also problematic as each catchment has different natural characteristics and vulnerability to human activities.<sup>73</sup>

A 2016 survey found that 40 per cent of people believe that wastewater and stormwater have the worst effect on freshwater quality.<sup>74</sup> Stormwater is not treated and contains nutrients, sediment and other waste from roads and roofs.<sup>75</sup> Wastewater treatment effectiveness varies, and untreated wastewater can enter fresh water diffusely if pipes break due to old age or earthquakes, or the network overflows.<sup>76</sup> Poor freshwater quality causes drinking water to require more treatment.<sup>77</sup>

Stormwater and wastewater influence freshwater quality which in turn affects drinking water. Decreased quality causes significant health and economic effects.<sup>78</sup> Each year there are 18,000-34,000 cases of gastrointestinal disease from waterborne pathogens.<sup>79</sup> Most outbreaks are small but in 1984 around 3,500 people in Queenstown developed gastroenteritis due to a sewer overflow,<sup>80</sup> and in 2017 approximately 5,500 people in Havelock North developed

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<sup>67</sup> Nokes, above n 61, at 7; Wright, above n 3, at 31–32, 41, 47.

<sup>68</sup> Ministry of Health, above n 3; Wright, above n 3, at 21, 23.

<sup>69</sup> Environmental Reporting Act 2015, ss 10–12, 19; Environmental Reporting (Topics for Environmental Reports) Regulations 2016, reg 7; Ministry for the Environment and Stats NZ, above n 2, at 5.

<sup>70</sup> Ministry for the Environment and Stats NZ, above n 2, at 9–10, 13–14, 25–58, 69–84.

<sup>71</sup> Wright, above n 3, at 5–6, 9–10.

<sup>72</sup> Ministry for the Environment and Stats NZ, above n 2, at 9, 57–58.

<sup>73</sup> Ministry for the Environment and Stats NZ, above n 2, at 7–8, 58; Wright, above n 3, at 39–48.

<sup>74</sup> Hughey, Kerr and Cullen, above n 1, at 15, 17, 36.

<sup>75</sup> Ministry of Health, above n 3, at 139.

<sup>76</sup> Ministry for the Environment and Stats NZ, above n 2, at 31–32; Wright, above n 3, at 22, 49–50.

<sup>77</sup> Land and Water Forum, above n 26, at 34.

<sup>78</sup> Ministry for the Environment and Stats NZ, above n 2, at 18–19.

<sup>79</sup> Ministry of Health, above n 3, at 4.

<sup>80</sup> Wright, above n 3, at 23.

campylobacteriosis due to E.coli in the water supply.<sup>81</sup> Between 2006 and 2016 there were 13 waterborne disease outbreaks.<sup>82</sup> The corresponding economic benefits to preventing waterborne disease outbreaks can be significant;<sup>83</sup> for instance, the Havelock North outbreak was estimated to cost society around \$21 million.<sup>84</sup>

## 2 *The three waters review*

As noted in Part I, the three waters review is currently underway. The review's findings are likely to alter the governance arrangements. The three waters review has three stages.<sup>85</sup> Stage one clarified the problem by reviewing data and evidence and identified seven main issues which were consistent with many of the findings from stage two of the Havelock North Drinking Water Inquiry. Of most relevance to this paper are the findings of low levels of compliance and risks to human and environmental health.<sup>86</sup> Stage one identified four key drivers where change could be considered: information, capability and capacity, finance and funding, and central oversight.<sup>87</sup>

Stage two is underway to develop options with recommendations due to be delivered to ministers in October 2018 as part of stage three. Possible legislative changes may follow.<sup>88</sup> The four drivers from stage one form the basis of four inter-related workstreams.<sup>89</sup> This paper will reflect workstream one which aims to provide new governance arrangement options by determining who should be responsible for policy and regulation and providing ways to improve compliance.<sup>90</sup> Relevant recommendations from the Havelock North Drinking Water Inquiry will also be considered.<sup>91</sup>

## C *Rule of law*

Lack of compliance is a rule of law issue. Resource consent conditions are not being consistently monitored and some councillors are preventing compliance staff from conducting effective enforcement – the law is not being enforced equally, or as written. This sub-part will first outline

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<sup>81</sup> Lyn Stevens, Karen Poutasi and Anthony Wilson *Report of the Havelock North Drinking Water Inquiry: Stage 1* (Department of Internal Affairs, May 2017) at [1]–[42].

<sup>82</sup> Stevens, Poutasi and Wilson, above n 9, at [71].

<sup>83</sup> Stevens, Poutasi and Wilson, above n 9, at [121].

<sup>84</sup> Stevens, Poutasi and Wilson, above n 9, at [72]–[76].

<sup>85</sup> Cabinet paper (June 2017), above n 2, at 16–17.

<sup>86</sup> Cabinet paper “Review of three waters infrastructure services: Initial key findings for discussion with the Minister of Local Government” (10 November 2017) at 7–9.

<sup>87</sup> Cabinet paper, above n 86, at 19.

<sup>88</sup> Prangnell and Ward, above n 26, at 35.

<sup>89</sup> Cabinet paper (April 2018), above n 2, at 6.

<sup>90</sup> Cabinet paper (April 2018), above n 2, at 7.

<sup>91</sup> Cabinet paper (April 2018), above n 2, at 6; Stevens, Poutasi and Wilson, above n 9, at [919]–[920].

relevant conceptions of the rule of law. I will then apply these conceptions to the compliance issues I identified earlier in Part II to illustrate how the lack of compliance is a rule of law issue.

The rule of law is an elusive concept and the range of conceptions is extensive.<sup>92</sup> Some conceptions are narrow and focus on only a few criteria that are commonly accepted; such as equality before the law. Other conceptions are broad and contain various criteria that allow our expectations around different aspects of our lives to be met. Conceptions may focus purely on procedure or may integrate moral principles.<sup>93</sup>

Equality before the law is a key element of many conceptions.<sup>94</sup> For instance, it is one of the three elements in Dicey's conception of the rule of law.<sup>95</sup> According to Dicey those who administer and create the law must be subject to it to the same extent as ordinary citizens.<sup>96</sup> Equality before the law therefore requires that everyone, including the government, is accountable under the law and that laws are applied evenly.<sup>97</sup>

Another conception of the rule of law which is relevant here is Fuller's conception which contains eight factors; seven of which relate to law making processes. Congruence, the eighth factor, concerns enforcement. The laws as written must be what is enforced.<sup>98</sup> Laws will not be understood as law unless they are enforced as they are written.<sup>99</sup> If congruence does not occur citizens will lose faith in those responsible for enforcing compliance.<sup>100</sup>

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<sup>92</sup> Rachel Kleinfeld "Competing Definitions of the Rule of Law" in Thomas Carother (ed) *Promoting the Rule of Law: In Search of Knowledge* (Carnegie Endowment for International Peace, Washington D.C, 2006) 31 at 32.

<sup>93</sup> Brian Z. Tamanaha *On the Rule of Law: History, Politics, Theory* (Cambridge University Press, Cambridge, 2004) at 3; see also Michael J. Trebilock and Ronald J. Daniels *Rule of Law Reform and Development: Charting the Fragile Path of Progress* (Edward Elgar Publishing, Cheltenham, 2008) at 16–24; Philip Joseph "The Rule of Law: Foundational Norm" in Richard Ekins (ed) *Modern Challenges to the Rule of Law* (LexisNexis NZ, Wellington, 2011) 47 at 47, 76–77.

<sup>94</sup> Kleinfeld, above n 92, at 38–39; Trebilock and Daniels, above n 93, at 16–24.

<sup>95</sup> A.V. Dicey *Introduction to the study of the law of the constitution* (8th ed, LibertyClassics, Indianapolis, 1982) at 110–115.

<sup>96</sup> Dicey, above n 95, at 120.

<sup>97</sup> Joseph Raz "The Rule of Law and its Virtue" in *The Authority of Laws, Essays on Law and Morality* (Clarendon Press, Oxford, 1979) 210 at 212; The World Justice Project *Rule of Law Index 2017-2018* (The World Justice Project, Washington D.C., 2018) at 11.

<sup>98</sup> Lon Fuller *The Morality of Law* (revised ed, Yale University Press, New Haven, 1969) at 39.

<sup>99</sup> Wibren van der Burg "The Work of Lon Fuller: A Promising Direction for Jurisprudence in the Twenty-First Century" (2014) 64 U.T.L.J 736 at 746–747.

<sup>100</sup> Colleen Murphy "Lon Fuller and the Moral Value of the Rule of Law" (2005) 24 Law & Phil. 239 at 242, 245.

Regulatory enforcement is closely related to congruence. Heydon argues that the processes for enforcing the law must be effective. Government regulations must be effectively enforced.<sup>101</sup> Similarly, Raz argues that people must understand the law and be able to obey it – if laws are not enforced, people may not understand what the law is.<sup>102</sup> Freedom from political interference is also important. Compliance must be free from improper influence.<sup>103</sup>

As outlined earlier in Part II, the current efficacy of three waters compliance is inadequate. The law is not being applied equally as not all resource consents with monitoring conditions are monitored. The Environmental Defence Society and Waikato-Tainui have questioned the point of conditions if they are not monitored.<sup>104</sup> Lack of adherence to the rule of law, by not applying laws equally, leads to a lack of congruence and causes disillusionment with those responsible for enforcement. Furthermore, not all local authorities hold themselves to the same standard as their constituents; for example, regional councils do not always take enforcement action against non-compliant wastewater plants.<sup>105</sup> Local authorities are responsible for enforcement and by not enforcing their own breaches they create distrust in the law.

Congruence in three waters compliance is poor as each local authority exercises discretion when deciding whether to take enforcement action. While the RMA provides different enforcement options the likelihood that formal enforcement will occur differs between local authorities.<sup>106</sup> Congruence is undermined if there are inconsistent consequences for non-compliance; for instance, if some councils use informal methods whilst others use formal methods for the same type of non-compliance. Inadequate levels of congruence in the three waters also reflects the World Justice Project's finding that effective enforcement is the weakest area in New Zealand's regulatory enforcement.<sup>107</sup> While the lack of compliance is widespread, undue influence is limited to a portion of local authorities. Therefore, the main rule of law issues in three waters compliance are a lack of congruence and equality before the law.

According to Fuller if any of his eight factors are not met the legal system is undermined.<sup>108</sup> Perfect implementation of congruence is difficult. However, if congruence is not substantially adhered to the rule of law will be weakened which is concerning as environmental and human health may not

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<sup>101</sup> JD Heydon "What Do We Mean By the Rule of Law" in Richard Ekins (ed) *Modern Challenges to the Rule of Law* (LexisNexis NZ, Wellington, 2011) 15 at 19–20; The World Justice Project, above n 97, at 11, 16.

<sup>102</sup> Raz, above n 97, at 213.

<sup>103</sup> The World Justice Project, above n 97, at 16.

<sup>104</sup> Ministry for the Environment, above n 6, at 24.

<sup>105</sup> Ministry for the Environment, above n 6, at 31.

<sup>106</sup> Ministry for the Environment, above n 6, at 26–27.

<sup>107</sup> The World Justice Project, above n 97, at 118.

<sup>108</sup> Fuller, above n 98, at 39.

be protected.<sup>109</sup> Lack of compliance in the three waters illustrates disparate congruence and a lack of equality before the law in enforcement. Lack of compliance is a rule of law issue. Under the current governance arrangements, the rule of law is not being upheld.

#### ***D Accountability***

Lack of compliance is also an accountability issue. There are 78 local authorities who, as will be seen in Part III, are responsible for most compliance.<sup>110</sup> This sub-part will describe how the large number of actors and corresponding forums dilute accountability.<sup>111</sup>

The first problem – that of “many hands” – is the difficulty in determining which actor to hold to account.<sup>112</sup> The local authority, as a body corporate, could be held to account.<sup>113</sup> More commonly those at the top of the hierarchy will be publicly held to account;<sup>114</sup> for instance, the councillors by their constituents at the next election or the relevant minister by Parliament. Individual accountability, based on proportionate contribution is the most morally appropriate option.<sup>115</sup> However, the complex governance arrangements make it difficult for the public to know who is responsible for the lack of compliance. Identifying the responsible actor is challenging when regional councils are responsible for some aspects of three waters compliance, and territorial authorities are responsible for other aspects. The difficulty of identification is the crux of the accountability issue.

The second problem – that of “many eyes” – is the difficulty of determining which forum should hold the actor to account.<sup>116</sup> Local authorities are politically accountable to their constituents.<sup>117</sup> However, participation in local government elections has decreased over the last 30 years; in 2016 the voter participation rate was only 42 per cent.<sup>118</sup> Legal accountability through the judiciary is also limited.<sup>119</sup> There is no ability to judicially review a local authority’s failure to monitor resource

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<sup>109</sup> Matthew H. Kramer “On the Moral Status of the Rule of Law” (2004) 63 C.L.J 65 at 65; The World Justice Project, above n 97, at 6, 11.

<sup>110</sup> Local Government Act, s 21(1), sch 2; Local Government New Zealand “Local government in New Zealand” (23 June 2017) <<http://www.lgnz.co.nz/nzs-local-government/>>.

<sup>111</sup> Bovens, above n 7, at 455–459.

<sup>112</sup> Bovens, above n 7, at 457.

<sup>113</sup> Bovens, above n 7, at 458; Local Government Act, s 12(1).

<sup>114</sup> Bovens, above n 7, at 458.

<sup>115</sup> Bovens, above n 7, at 459.

<sup>116</sup> Bovens, above n 7, at 455.

<sup>117</sup> Bovens, above n 7, at 455.

<sup>118</sup> Department of Internal Affairs “Local Authority Election Statistics 2016” (2017)

<[https://www.dia.govt.nz/diawebsite.nsf/wpg\\_URL/Services-Local-Elections-Local-Authority-Election-Statistics-2016?OpenDocument](https://www.dia.govt.nz/diawebsite.nsf/wpg_URL/Services-Local-Elections-Local-Authority-Election-Statistics-2016?OpenDocument)>.

<sup>119</sup> Bovens, above n 7, at 456.

consent conditions or properly comply with the DWSNZ.<sup>120</sup> On the other hand, anyone can apply to the Environment Court for a discretionary enforcement order to ensure a resource consent is complied with.<sup>121</sup> Local authorities may also be held to account administratively through independent audits.<sup>122</sup> For instance, regional councils are trying to conduct audits for their compliance under the RMA generally.<sup>123</sup> Finally, local authorities may be held to account socially if they hold public hearings on compliance and publish reports;<sup>124</sup> but, as noted earlier in Part II, information on compliance is not currently easily accessible. Therefore, even if the actor has been identified it may be difficult to hold them to account as the forums, and their efficacy, differ.

The problems of many hands and many eyes illustrate how the lack of compliance is an accountability issue. Accountability is difficult if you cannot easily identify who the actor is, and which forum should be used to hold them to account.

### *III Governance arrangements*

Part II of this paper highlighted how the current governance arrangements have caused inadequate levels of compliance and detrimental effects on health and the environment. The rule of law and accountability were also identified as part of the problem. This part will outline the basics of the current governance arrangements, and possible justifications for these arrangements, to make it clear why changes are necessary.

#### *A Current arrangements*

This sub-part will detail the most relevant governance bodies, legislation and national directions. Central government establishes the framework through legislation and national directions whilst local authorities are responsible for implementation and most compliance.<sup>125</sup>

##### *1 Governance bodies*

The Ministry for the Environment is responsible for administering the RMA and providing guidance on compliance and any national policy statement or national environmental standard that is issued.<sup>126</sup> The Ministry of Health administers the Health Act, appoints drinking water assessors

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<sup>120</sup> Judicial Review Procedure Act 2016, s 5.

<sup>121</sup> *Brookers Resource Management* (online looseleaf ed, Thomson Reuters) at [A319.01]; Resource Management Act, ss 314(1)(a)–(b), 316(1), 319(1); *Salmon Environmental Law* (online looseleaf ed, Thomson Reuters) at [RM319.01].

<sup>122</sup> Bovens, above n 7, at 456.

<sup>123</sup> Ministry for the Environment, above n 6, at 36–37.

<sup>124</sup> Bovens, above n 7, at 457.

<sup>125</sup> Local Government New Zealand, above n 20, at Appendix 1.

<sup>126</sup> See generally Cabinet paper, above n 86, at 6; Ministry for the Environment, above n 40; Ministry for the Environment above n 16; Resource Management Act, ss 24, 43–55.

and issues the DWSNZ, guidelines and guidance on compliance.<sup>127</sup> Of lesser importance are the Department of Internal Affairs, the Ministry of Civil Defence and Emergency Management, Fire and Emergency New Zealand and the Controller and Auditor-General.<sup>128</sup>

Regional councils and unitary authorities are responsible for issuing and conducting compliance of regional and district plans and resource consents with a primary focus on environmental effects. District health boards employ drinking water assessors who are responsible for assessing supplier compliance with the DWSNZ and water safety plans.<sup>129</sup> At a local level, territorial and unitary authorities are responsible for providing the three waters within their district or city, and carrying out compliance of their drinking water supplies and any resource consents they may issue.<sup>130</sup>

## 2 Legislation

### *Local Government Act 2002*

Local authorities comprise 11 regional councils, six unitary authorities and 61 territorial authorities.<sup>131</sup> Regional councils and territorial authorities have different roles and responsibilities. Unitary authorities have the roles and responsibilities of both.<sup>132</sup> Local authorities must comply with the Local Government Act and any duties imposed by other legislation.<sup>133</sup> They must ensure the present and future needs of their communities – their city, district or region – are met by providing effective public services and infrastructure and fulfilling their regulatory functions.<sup>134</sup> Local authorities must act in a transparent and democratically accountability way, actively cooperate with other local authorities and ensure sustainable development maintains or enhances environmental quality.<sup>135</sup>

Territorial authorities are responsible for providing the three waters within their district or city.<sup>136</sup> They must periodically assess their provision to determine the level of compliance with the DWSNZ and any actual or possible effects of wastewater and stormwater discharges.<sup>137</sup> Territorial

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<sup>127</sup> See generally Cabinet paper, above n 86, at 6; Health Act, ss 69O, 69ZK; Ministry of Health, above n 3.

<sup>128</sup> See generally Cabinet paper, above n 86, at 6; Civil Defence Emergency Management Act 2002, sch 1; Local Government Act, s 99.

<sup>129</sup> Cabinet paper, above n 86, at 6.

<sup>130</sup> Cabinet paper, above n 86, at 6.

<sup>131</sup> Local Government Act, s 21(1), sch 2; Local Government New Zealand “Local government in New Zealand” (23 June 2017) <<http://www.lgnz.co.nz/nzs-local-government/>>.

<sup>132</sup> Local Government Act, s 5(1).

<sup>133</sup> Section 11.

<sup>134</sup> Sections 3, 10, 12, 14.

<sup>135</sup> Section 14.

<sup>136</sup> Sections 11A, 124–126, 197(2).

<sup>137</sup> Sections 125–126.

authorities can contract water supply and wastewater services to an organisation subject to conditions and time limits.<sup>138</sup> If the provider is a council-controlled organisation local authorities have additional monitoring obligations.<sup>139</sup>

Local authorities are given the powers necessary to provide the three waters.<sup>140</sup> They may make bylaws to protect and maintain public health and safety, or the three waters,<sup>141</sup> and water supply may be restricted if the relevant bylaws are breached.<sup>142</sup> Wastewater can be discharged into a sewerage drain if done in accordance with the relevant bylaws.<sup>143</sup> However, local authorities may be liable if the discharge contravenes the RMA.<sup>144</sup>

### *Resource Management Act 1991*

Natural and physical resources, such as water, must be sustainably managed.<sup>145</sup> Sustainable management includes protecting water quality and ensuring adverse environmental effects from activities are avoided, remedied or mitigated.<sup>146</sup> Decision makers must recognise and provide for flood risk management,<sup>147</sup> and must have particular regard to improving or maintaining environmental quality.<sup>148</sup> Sections 9, 14 and 15 restrict the use of land, water takes and the discharge of contaminants to water respectively.

Regional councils are responsible for managing water quality by controlling water takes and discharges through regional plan rules and resource consents.<sup>149</sup> Territorial authorities are responsible for protecting natural and physical resources in their district and controlling activities which have, or may have, effects on surface water.<sup>150</sup> Local authorities must conduct monitoring to ensure they meet their obligations under the RMA and may appoint enforcement officers to carry out functions under the RMA.<sup>151</sup>

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<sup>138</sup> Section 136.

<sup>139</sup> Section 65(1).

<sup>140</sup> Section 143(d).

<sup>141</sup> Local Government Act, ss 143–149; see generally Auckland Council *Stormwater Bylaw 2015* (GB/2015/78, 30 July 2015); Auckland Council *Water Supply and Wastewater Network Bylaw 2015* (GB/2005/62, 25 June 2015).

<sup>142</sup> Local Government Act, s 193.

<sup>143</sup> Sections 195–196.

<sup>144</sup> Section 195(2).

<sup>145</sup> Resource Management Act, ss 2(1), 5(1).

<sup>146</sup> Section 5(2).

<sup>147</sup> Section 6(h).

<sup>148</sup> Section 7(f).

<sup>149</sup> Section 30.

<sup>150</sup> Section 31.

<sup>151</sup> Sections 35, 38.

The Minister for the Environment may issue national policy statements and national environmental standards and must monitor the implementation of any national policy statement.<sup>152</sup> National policy statements concern nationally significant matters and state policies and objectives.<sup>153</sup> National environmental standards can detail requirements, standards and methods for ss 9, 14 and 15.<sup>154</sup> Local authorities are required to enforce a national environmental standard.<sup>155</sup>

Regional councils must establish regional policy statements and regional plans.<sup>156</sup> Regional plans must be prepared in accordance with any national policy statement and regulations and may include regional rules.<sup>157</sup> Territorial authorities must establish district plans in accordance with any national policy statement and regulations and may include district rules.<sup>158</sup> Local authorities may also specify conditions for certain activities.<sup>159</sup> Local authorities must adhere to their own plans.<sup>160</sup>

Resource consents may be granted for restricted activities in ss 9, 14 and 15. The corresponding resource consents are land use consents, water permits and discharge permits.<sup>161</sup> A local authority must have regard to the environmental effects the activity has, or may possibly have, and any relevant national environmental standard, national policy statement, regulation or plan.<sup>162</sup>

Breaches of ss 9, 14 or 15, resource consents, a regional or district plan or a national environmental standard are common forms of non-compliance.<sup>163</sup> Enforcement may be punitive or directive and statutory or non-statutory.<sup>164</sup> Non-statutory methods include written or verbal notification of a breach or a formal warning letter. Statutory methods include abatement and infringement notices, enforcement orders and prosecution. Non-compliance with ss 9, 14 or 15, an abatement notice, or an enforcement order is an offence.<sup>165</sup>

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<sup>152</sup> Section 24.

<sup>153</sup> Sections 45–45A.

<sup>154</sup> Sections 43–43A.

<sup>155</sup> Section 44A(8).

<sup>156</sup> Sections 59–70.

<sup>157</sup> Sections 66, 68–70.

<sup>158</sup> Sections 72–76.

<sup>159</sup> Sections 77A–77D.

<sup>160</sup> Section 84.

<sup>161</sup> Section 87.

<sup>162</sup> Section 104(1).

<sup>163</sup> Ministry for the Environment, above n 40, at 72–73; Resource Management Act, ss 9, 14–15, 87, 314, 322, 338.

<sup>164</sup> Ministry for the Environment, above n 40, at 11, 69–83.

<sup>165</sup> See generally Ministry for the Environment, above n 40, at 84–106; Resource Management Act, ss 309, 314–321, 322–325B, 338, 343A–343D; Resource Management (Infringement Offences) Regulations, sch 1.

### *Health Act 1956*

The Minister of Health can issue, revoke or amend drinking water standards.<sup>166</sup> Drinking water suppliers must take all practicable steps to ensure there is an adequate supply and that the DWSNZ are complied with.<sup>167</sup> Drinking water suppliers must take reasonable steps to protect sources and raw water from contamination<sup>168</sup> and implement water safety plans.<sup>169</sup> They have a monitoring duty to determine compliance with the DWSNZ and evaluate general public health risks.<sup>170</sup> They must investigate complaints, take remedial action if the DWSNZ are breached, and provide reasonable assistance to drinking water assessors.<sup>171</sup> All drinking water suppliers and carriers must be registered with the Director-General of Health.<sup>172</sup> There are strict liability offences if drinking water suppliers breach their duties.<sup>173</sup> Initial fines of up to \$200,000 and further fines not exceeding \$10,000 per day the offence continues may be issued.<sup>174</sup>

Drinking water assessors are appointed by the Director-General of Health and assess drinking water supplier compliance with the DWSNZ, their water safety plan and the Health Act.<sup>175</sup> Drinking water suppliers must keep sufficient records of treatment and monitoring to enable drinking water assessors to assess compliance.<sup>176</sup> There are currently 39 drinking water assessors employed by 12 district health boards.<sup>177</sup> Designated officers ensure that compliance orders and requirements imposed by drinking water assessors are complied with.<sup>178</sup> Compliance testing must be done by recognised laboratories.<sup>179</sup> The Minister of Health may declare a drinking water emergency if there are reasonable grounds that there is a serious health risk. Designated officers have emergency powers including stopping any supplier from supplying.<sup>180</sup> Medical officers can issue compliance orders requiring drinking water suppliers to cease or take certain actions to comply with the Act and prevent a public health risk.<sup>181</sup>

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<sup>166</sup> Health Act, s 69O.

<sup>167</sup> Sections 69H, 69S, 69V.

<sup>168</sup> Section 69U.

<sup>169</sup> Sections 69Z, 69ZB, 69ZC.

<sup>170</sup> Section 69Y.

<sup>171</sup> Sections 69ZE–69ZG.

<sup>172</sup> Health Act, ss 69J, 69ZZQ; see generally Ministry of Health *Register of Drinking Water Suppliers for New Zealand* (Ministry of Health, Wellington, 2018).

<sup>173</sup> Health Act, ss 69ZZR, 69ZZS.

<sup>174</sup> Section 69ZZV.

<sup>175</sup> Sections 69ZK, 69ZL.

<sup>176</sup> Section 69ZD.

<sup>177</sup> Ministry of Health “Drinking-water legislation” (28 June 2018) <<https://www.health.govt.nz/our-work/environmental-health/drinking-water/drinking-water-legislation>>.

<sup>178</sup> Health Act, ss 69ZN–69ZV.

<sup>179</sup> Sections 69ZY–69ZZ.

<sup>180</sup> Sections 69ZZA–69ZZG.

<sup>181</sup> Sections 69ZZH–69ZZN.

### 3 National directions

#### *National Policy Statement for Freshwater Management 2014 (as amended 2017)*

The National Policy Statement for Freshwater Management sets limits that reflect national and local values.<sup>182</sup> Contaminant discharges and land development must be sustainably managed to protect water quality.<sup>183</sup> Monitoring of progress towards the freshwater objectives is mandatory.<sup>184</sup> Each regional council must develop a monitoring plan that includes: methods for monitoring ecological health and human health risks, identifies monitoring sites and recognises the importance of long term monitoring.<sup>185</sup>

Ecosystem health and human health for recreation are the only compulsory national values. Ensuring safe drinking water supply is a discretionary national value.<sup>186</sup> Minimum standards for variables that affect water quality are outlined in the attribute table – attributes include total nitrogen and phosphorous, dissolved oxygen, E. coli and periphyton.<sup>187</sup>

#### *National Environmental Standards for Sources of Human Drinking Water 2007*

The National Environmental Standards for Sources of Human Drinking Water sets minimum standards. Regional councils can add resource consent conditions or make or amend rules in regional plans that are more stringent.<sup>188</sup> If a registered drinking water supplier provides at least 501 people with drinking water for at least 60 days per annum, a regional council faces further restrictions when granting water or discharge permits under the RMA.<sup>189</sup> Regional councils also face restrictions if adding or amending rules to permit an activity under ss 9, 14 or 15 upstream of an abstraction point.<sup>190</sup> If a registered drinking water supplier provides at least 25 people with drinking water for at least 60 days per annum, regional councils must impose an additional condition on resource consents that may affect the supplier. The condition must require the

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<sup>182</sup> Ministry for the Environment *National Policy Statement for Freshwater Management 2014 (as amended 2017)* (as published in the New Zealand Gazette on 10 August 2017).

<sup>183</sup> Ministry for the Environment, above n 182, objective A1.

<sup>184</sup> Ministry for the Environment, above n 182, objective CB1.

<sup>185</sup> Ministry for the Environment, above n 182, policy CB1.

<sup>186</sup> Ministry for the Environment, above n 182, appendix 1.

<sup>187</sup> Ministry for the Environment, above n 182, appendix 2.

<sup>188</sup> Resource Management (National Environmental Standards for Sources of Human Drinking Water) Regulations 2007, reg 13.

<sup>189</sup> Regulations 6–8.

<sup>190</sup> Regulations 9–10.

resource consent holder to notify the registered drinking water supplier and the consent authority if certain events occur that could affect water quality.<sup>191</sup>

*Drinking-water Standards for New Zealand 2005 (Revised 2008)*

The DWSNZ sets minimum standards and provides compliance criteria for monitoring and sampling.<sup>192</sup> The DWSNZ are supported by extensive guidelines published by the Ministry of Health.<sup>193</sup> Section 2 details the water quality standards by setting maximum acceptable values.<sup>194</sup> Maximum acceptable values for chemical determinants are the maximum concentrations that would constitute no significant health risk over an average person's life. Maximum acceptable values for microbial determinants are the maximum concentrations before a significant risk of waterborne illness arises. Potable water must not contain any determinant over the maximum acceptable values.<sup>195</sup> Guidelines for aesthetic determinants are also provided.<sup>196</sup>

Section 3 outlines compliance and transgressions, including the six requirements to achieve compliance.<sup>197</sup> Different priority classes for public health are detailed. Microbial determinants (E.coli, cryptosporidium, and giardia) are classed as priority one. Determinants within each distribution zone that exceed 50 per cent of the maximum acceptable values are classed as priority two. Water suppliers must monitor priority one and two determinants but have discretion to monitor priority three and four determinants.<sup>198</sup> Suppliers must follow the relevant sampling, testing and monitoring procedures to comply with the DWSNZ. Compliance criteria are described in detail for microbial,<sup>199</sup> chemical,<sup>200</sup> and radiological determinants.<sup>201</sup> Compliance is also explained in detail for small water suppliers, tankered drinking water, and rural and agricultural drinking water suppliers.<sup>202</sup>

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<sup>191</sup> Regulations 11–12.

<sup>192</sup> Ministry of Health *Drinking-water Standards for New Zealand 2005 (Revised 2008)* (Ministry of Health, Wellington, 2008).

<sup>193</sup> See generally Ministry of Health, above n 3.

<sup>194</sup> Ministry of Health, above n 192, tables 2.1–2.4.

<sup>195</sup> Ministry of Health, above n 192, section 2.

<sup>196</sup> Ministry of Health, above n 192, table 2.5.

<sup>197</sup> Ministry of Health, above n 192, section 3.

<sup>198</sup> Nokes, above n 61, at 10–11; Ministry of Health, above n 192, section 3.

<sup>199</sup> Ministry of Health, above n 192, sections 4–7.

<sup>200</sup> Ministry of Health, above n 192, section 8.

<sup>201</sup> Ministry of Health, above n 192, section 9.

<sup>202</sup> Ministry of Health, above n 192, sections 10–12.

4 Summary

The Health Act, Local Government Act, National Environmental Standards for Sources of Human Drinking Water and DWSNZ are relevant for drinking water regulation. Suppliers must have water safety plans and comply with the DWSNZ and regional councils must implement the National Environmental Standards for Sources of Human Drinking Water. Compliance is monitored by suppliers themselves and verified by drinking water assessors and designated officers. Enforcement occurs through medical officers and compliance orders. Wastewater and stormwater are regulated primarily under the RMA and Local Government Act through plans, resource consents and bylaws. Local authorities have primary responsibility for compliance. Figure one below summarises the governance arrangements.<sup>203</sup>

<b>Figure one: The three waters governance arrangements</b>		
	<b>Governance bodies</b>	<b>Legislation, policy and regulations</b>
<b>National</b>	MfE MoH DIA	RMA 1991 LGA 2002 Health Act 1956
	Fire & Emergency Civil Defence	NPS-FM NES-DW DWSNZ
	Controller & Auditor-General	NPS-FM guidelines (MfE) Drinking water guidelines (MoH)
<b>Regional</b>	11 regional councils & 6 unitary authorities (LGA/RMA)	Regional plans (RMA) Regional policy statements (RMA)
	39 drinking water assessors (Health Act)	Resource consents (RMA) Bylaws (LGA)
<b>Local</b>	61 territorial authorities & 6 unitary authorities (LGA/RMA)	District plans (RMA) Bylaws (LGA) Resource consents (RMA)
<b>Legend</b>		
Environment Wastewater/stormwater	Public health Drinking water	Other role/combination All three waters

<sup>203</sup> Cabinet paper, above n 86, at 6; Local Government New Zealand, above n 20, at 10; Prangnell and Ward, above n 26, at 31.

## ***B Justifications for the current arrangements***

This sub-part will discuss subsidiarity and accountability – some of the possible justifications for the current arrangements.

### *1 Subsidiarity*

The current governance arrangements are an example of subsidiarity in action. I outlined earlier in Part III the significant delegation from central government to local authorities that occurs within the three waters. Delegated functions include monitoring and enforcing resource consent compliance and conducting monitoring of drinking water supplies.<sup>204</sup> However, it is important to bear in mind that Part II highlighted that the lack of compliance is a rule of law and accountability issue. To determine whether subsidiarity holds up to the problems identified in Part II, I will define subsidiarity and identify how it might justify the current arrangements before discussing the appropriateness of its application to the three waters.

Hartwich defines subsidiarity as requiring responsibilities to “always be delegated to the lowest possible tiers of government in order to promote a more efficient provision of services”.<sup>205</sup> Choosing the appropriate governance level requires considering how the actor will be held to account. Therefore, subsidiarity relates strongly to the principle of accountability.<sup>206</sup> Central government has dual and opposing responsibilities under subsidiarity. Central government must support local government when they cannot conduct the functions they have been delegated; but they must ensure they do not interfere with local government’s autonomy.<sup>207</sup>

Subsidiarity is not devolution. There is a political aspect as the decisions must reflect the needs of communities and be representative.<sup>208</sup> Subsidiarity is beneficial for democracy as it makes those responsible for actions, such as compliance in the three waters, accountable to those directly affected by those actions.<sup>209</sup> The principal justifications for the current three waters governance arrangements under subsidiarity were likely local democratic control and consideration of community’s needs. Theoretically there should also be better efficiency. Local control may create competition between local authorities which may improve the services provided.<sup>210</sup> The efficacy

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<sup>204</sup> Health Act, s 69Y; Resource Management Act, ss 35, 108, 309, 314–321, 322–325B, 338, 343A–343D; Resource Management (Infringement Offences) Regulations, sch 1.

<sup>205</sup> Hartwich, above n 8, at 10.

<sup>206</sup> Kevin Guerin *Subsidiarity: Implications for New Zealand* (New Zealand Treasury, Wellington, 2002) at 4–5.

<sup>207</sup> Benjamin Gussen “Subsidiarity as a constitutional principle in New Zealand” (2014) 12 NZJPIIL 123 at 124, 129.

<sup>208</sup> Gussen, above n 207, at 125; Mike Reid “The Central-Local Government Relationship: The Need for a Framework?” (1999) 50 Political Science 164 at 178–179.

<sup>209</sup> Hartwich, above n 8, at 11–12; Paul Jacques Michel “Subsidiarity in New Zealand Local Government: A Principle, A Value, A Culture” (LLB (Hons) Research Paper, Victoria University of Wellington, 2010) at 16.

<sup>210</sup> Hartwich, above n 8, at 14–15.

of accountability at each level of governance should be also considered to determine if subsidiarity is appropriate.<sup>211</sup> Local responsibility for compliance was likely thought to be appropriate for the three waters as it would allow for more direct accountability than central government control.

Subsidiarity is appropriate if local expertise is required,<sup>212</sup> and arguably knowledge of a catchment's climate and geology is necessary to conduct accurate monitoring of the three waters.<sup>213</sup> But local responsibility is not appropriate if there are national directions.<sup>214</sup> The National Policy Statement for Freshwater Management, DWSNZ and National Environmental Standards for Sources of Human Drinking Water indicate that the all New Zealanders should be entitled to the health and environmental benefits of strong compliance. As illustrated in Part II, these directions are not consistently complied with which undermines congruence and equality before the law. Resourcing is a contributing factor to the inadequate levels of compliance as the different sized ratepayer bases cause disparities in local authorities' capacity and capabilities. Sub-central government spending in New Zealand is less than half the average among OECD countries. Across the OECD almost a third of personal income tax goes to local government; whereas in New Zealand all personal income tax goes to central government.<sup>215</sup> Subsidiarity has been misapplied.<sup>216</sup> Central government has the necessary funding to ensure the national directions are consistently complied with. The national directions must be met. Greater central government responsibility for compliance would ensure that all New Zealanders have access to safe drinking water and healthy waterways. Local responsibility is not appropriate.

## 2 Accountability

Accountability is part of the problem because, as outlined in Part II, the problems of many hands and many eyes create difficulties in determining who the actor is, and which forum should be used to hold them to account. On the other hand, accountability may be used to justify the current arrangements. Compliance responsibilities at local and regional levels theoretically enable more direct accountability than would be possible under a centralised regime; accountability is tied to subsidiarity. In practice, however, the accountability benefits of the current arrangements are not clear. The problem of many hands is exacerbated by the overlapping governance arrangements which create room for blame to be passed. To determine if accountability justifies the current

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<sup>211</sup> Guerin, above n 206, at 4.

<sup>212</sup> Reid, above n 208, at 179.

<sup>213</sup> See Ministry for the Environment and Stats NZ, above n 2, at 7–8; Wright, above n 3, at 39–48.

<sup>214</sup> Reid, above n 208, at 179.

<sup>215</sup> Hartwich, above n 8, at 18–19.

<sup>216</sup> See Jason Krupp *The Local Manifesto: Restoring Local Government Accountability* (The New Zealand Initiative, Wellington, 2016) at 18.

arrangements, I will outline accountability conceptions, apply elements of Bovens' conception to the three waters and discuss the strength of current accountability.

Wright states that accountability “involves a relationship between an account-holder and an account-giver, so that the latter has to provide explanations to the former, with the possibility of consequences”.<sup>217</sup> Wright's definition echoes other conceptions in encapsulating accountability as a relationship that requires explanation and has possible repercussions.<sup>218</sup> However, there are many different accountability definitions.<sup>219</sup> Accountability may include other concepts such as democracy, responsibility and transparency.<sup>220</sup>

Accountability is important when delegation occurs, as in the current governance arrangements for the three waters. Central and local government are democratically elected as agents of their principals, the voters, but accountability is indirect as both levels of government delegate decision-making powers and responsibilities.<sup>221</sup> Central government delegates policy making to its ministries. In the context of the three waters the Ministry for the Environment is responsible for the National Policy Statement for Freshwater Management, National Environmental Standards for Sources of Human Drinking Water and compliance and implementation guidelines. The Ministry of Health must provide the DWSNZ and compliance guidelines. Local authorities delegate compliance responsibilities to staff.

Accountability can be applied to the three waters by using elements of Bovens' conception. For there to be an accountability relationship the actor must be required to explain their actions to a forum that can inquire into the actor's conduct and decide whether there should be repercussions.<sup>222</sup> The actors at national level are the Ministry for the Environment and the Ministry of Health. Regionally they are the regional councils, unitary authorities and the drinking water assessors. Territorial authorities and unitary authorities are the actors at local level.<sup>223</sup> The accountability forums also differ. Nationally the forums are Parliament and the Ministers for the Environment, Local Government and Health; whilst at regional and local levels, the forums are the constituents of that region, district or city.<sup>224</sup> The obligations at a national level are formal as

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<sup>217</sup> Tony Wright “The Politics of Accountability” in Mark Elliot and David Feldman (eds) *The Cambridge Companion to Public Law* (Cambridge University Press, Cambridge (England), 2015) 96 at 96.

<sup>218</sup> Kaare Strøm “Delegation and accountability in parliamentary democracies” (2000) 37 *Eur.J.Pol.Res* 261 at 267; Richard Mulgan “Accountability: An ever expanding concept?” (2000) 78 *Pub.Adm* 555 at 555.

<sup>219</sup> Bovens, above n 7, at 448.

<sup>220</sup> Bovens, above n 7, at 449.

<sup>221</sup> Strøm, above n 218, at 284.

<sup>222</sup> Bovens, above n 7, at 450.

<sup>223</sup> Bovens, above n 7, at 450.

<sup>224</sup> Bovens, above n 7, at 450.

the Ministry for the Environment and the Ministry of Health must account to their Ministers. The Ministers are then accountable to Parliament.<sup>225</sup> For local authorities the obligations are formal and informal.<sup>226</sup> Formally there is an obligation to release information if requested under the Local Government Official Information and Meetings Act 1987. The Act is a legal form of accountability. Any information held by a local authority can be requested by any person with a presumption that it will be made available unless there is good reason to not release the information.<sup>227</sup> Informally there may sometimes be published compliance reports and, in the case of regional councils, voluntary audits.<sup>228</sup>

There are three elements to the accountability relationship between the actor and the forum.<sup>229</sup> First, there must be adequate monitoring or reporting by the actor to inform the forum. As shown in Part II monitoring and reporting are inadequate. Secondly, the forum must have a chance to question the actor. A chance to question the actor is difficult if information on compliance is not easily accessible. Thirdly, the forum must be able to impose consequences on the actor. Currently, the most likely consequence is democratic accountability at the next election.

According to Bovens there are three perspectives for why accountability is important.<sup>230</sup> First is the democratic perspective which focuses on the principal-agent relationship. Voters, the principals, can hold the different levels of government to account and legitimise their actions through democratic elections.<sup>231</sup> A problem with the democratic perspective is that there is a low voter participation rate in local government elections.<sup>232</sup> However, Palmer and Palmer argue that “the democratic procedures of elections, not the law, are the most important element of local government accountability”.<sup>233</sup> Secondly, the constitutional perspective uses the checks and balances of the different branches of government to prevent excessive use of executive power.<sup>234</sup> Thirdly, the learning perspective argues that governments should learn from their mistakes.<sup>235</sup> This paper will focus on the democratic and learning perspectives as the constitutional perspective is not suited to the three waters governance arrangements.

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<sup>225</sup> Cabinet Office *Cabinet Manual 2017* at [2.2].

<sup>226</sup> Bovens, above n 7, at 451.

<sup>227</sup> Local Government Official Information and Meetings Act 1987, ss 2, 4–5, 10.

<sup>228</sup> Ministry for the Environment, above n 6, at 35–37.

<sup>229</sup> Bovens, above n 7, at 451–452.

<sup>230</sup> Bovens, above n 7, at 462.

<sup>231</sup> Bovens, above n 7, at 463, 465.

<sup>232</sup> Krupp, above n 216, at 19.

<sup>233</sup> Geoffrey Palmer and Matthew Palmer *Bridled power: New Zealand's constitution and government* (4th ed, Oxford University Press, Auckland, 2004) at 256.

<sup>234</sup> Bovens, above n 7, at 463, 466.

<sup>235</sup> Bovens, above n 7, at 463–464, 466.

The current governance arrangements give a close connection in proximity between the principals and agents. However, it is not clear under the current arrangements that there is strong accountability – the three waters have light accountability compared to other core infrastructure sectors such as gas and electricity.<sup>236</sup> Accountability problems are caused by the fragmented governance arrangements.<sup>237</sup> Stage one of the three waters review identified that the public are not provided with “meaningful information on the delivery and performance of three waters services in a way that appropriately promotes transparency, accountability and performance improvement over time”.<sup>238</sup>

Accountability may also be undermined under the current arrangements by the possibility of actors passing the blame. Local authorities must carry out functions that central government assigns them – such as compliance of the three waters – but they are democratically accountable to their constituents.<sup>239</sup> Communities must pay for tasks delegated by central government. When these tasks are performed poorly local authorities can blame central government for their lack of capacity and capability. Conversely, local authorities may be critiqued for the implementation of standards they have no control over. For example, the DWSNZ and National Policy Statement for Freshwater Management are imposed on local authorities by central government.<sup>240</sup> Krupp argues that local government accountability can be restored by “setting clear roles for each tier of government, with limits on the ability of either party to act beyond these limits”.<sup>241</sup> The need for clear lines of accountability to ensure compliance will be explored further in Part IV.

#### *IV Improving compliance*

Part III discussed why it is not clear that subsidiarity or accountability justify the current governance arrangements. Theoretically, the importance of local democratic control to hold actors to account, and the consideration of local circumstances, justify local responsibility for compliance. But in practice subsidiarity is not a strong justification and the ability of forums of

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<sup>236</sup> Cabinet paper (April 2018), above n 2, at 4.

<sup>237</sup> See Stevens, Poutasi and Wilson, above n 9, at [288], [325], [385], [398]; Stevens, Poutasi and Wilson, above n 81, at Appendix 4.

<sup>238</sup> Cabinet paper (April 2018), above n 2, at 4.

<sup>239</sup> See Krupp, above n 216, at 5, 10, 17, 49; Local Government Act, ss 10–11.

<sup>240</sup> Krupp, above n 216, at 13–19.

<sup>241</sup> Krupp, above n 216, at 5.

hold actors to account is weak – compliance is inefficient at local levels due to a lack of resources and voter participation in elections is low. Change is needed.

This part will outline possible changes to the governance arrangements at national, regional and local levels to improve compliance. I will then apply the key principles discussed earlier – the rule of law, accountability and subsidiarity – to each option and assess their compatibility. Local authorities have primary responsibility for compliance under the current arrangements. As the status quo has resulted in a lack of compliance, most analysis will occur at a national level as centralisation is likely required to some extent if compliance is to improve.

### *A National*

Any alteration to the governance arrangements should start at a national level. Compliance must be integrated and coordinated to be effective.<sup>242</sup> This sub-part will analyse four possible changes.

Fuller argues that a lack of congruence is often caused by inadequate legislation.<sup>243</sup> The Labour Government has noted that legislative reform is required to improve drinking water compliance.<sup>244</sup> The Havelock North Drinking Water Inquiry recommended making protection of drinking water sources explicit in the RMA to improve first barrier protection. Sections 6 and 30 should be amended to make source protection a matter of national importance and a clear function of regional councils.<sup>245</sup> The Resource Management (Infringement Offences) Regulations 1999 should also be amended to increase the current \$1000 maximum infringement fine; an increase would ensure that infringement fines act as a deterrence and encourage future compliance.<sup>246</sup> To improve drinking water compliance the Inquiry recommended removing “all practicable steps” from s 69V of the Health Act to make compliance with the DWSNZ compulsory.<sup>247</sup> However, Cabinet has signalled that it is likely s 69V will be altered to limit the defence rather than removing it entirely.<sup>248</sup>

A second option would constitute a significant change. The Havelock North Drinking Water Inquiry recommended establishing a dedicated drinking water regulator.<sup>249</sup> Cabinet has indicated that part of the Labour Government’s plan to establish a new regulatory regime for drinking water in 2019 may be a drinking water regulator; its form and functions are yet to be confirmed.<sup>250</sup> Ideally

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<sup>242</sup> Land and Water Forum, above n 26, at 36–37.

<sup>243</sup> Fuller, above n 98, at 84.

<sup>244</sup> Cabinet paper “Government Response to Havelock North Drinking-Water Inquiry” (April 2018) at 3, 9–12, 18.

<sup>245</sup> Stevens, Poutasi and Wilson, above n 9, at [612]–[623], [919].

<sup>246</sup> Ministry for the Environment, above n 6, at 41.

<sup>247</sup> Stevens, Poutasi and Wilson, above n 9, at [920].

<sup>248</sup> Cabinet paper, above n 244, at 3, 9–12, 18.

<sup>249</sup> Stevens, Poutasi and Wilson, above n 9, at [919].

<sup>250</sup> Cabinet paper, above n 244, at 1, 6–7, 18.

a new regulator would be a three waters regulator as incorporating compliance for stormwater and wastewater into its functions would ensure consistency and coherence between environmental and human health.<sup>251</sup> The regulator should be independent from the Ministry for the Environment and the Ministry of Health so there is no conflict between policy and compliance. Independence would prevent political interference.<sup>252</sup> The regulator could be responsible for monitoring wastewater and stormwater discharge permit conditions and enforcing compliance. However, daily sampling of water supplies could be left to local authorities, or new aggregated regional water suppliers, who would be required to send their records to the regulator. There is support for a regulator from the United Kingdom where the Drinking Water Inspectorate undertakes enforcement work and the Environment Agency monitors discharge permits.<sup>253</sup> The Minister for Local Government, the Hon Nanaia Mahuta, has also recently signalled that it is likely a dedicated water regulator will be established.<sup>254</sup> Of the four options at national level I will analyse, a dedicated regulator is most likely to be chosen by the Government.

A third, less drastic option, would be a national support unit instead of a regulator. The support unit could be comprised as a joint body run by the Ministry for the Environment and the Ministry of Health. It would support national consistency of compliance that would still be conducted at regional and local levels. The support unit would be available for local authorities to contact to receive advice on compliance. Furthermore, it could provide a form of administrative accountability by conducting audits of three waters compliance by local authorities.<sup>255</sup> The likelihood of a support unit for the three waters being established is unclear. However, the Labour Government plans to improve consistency of compliance under the RMA generally by establishing an RMA oversight unit.<sup>256</sup>

A final option would be to amend the Local Government Act to alter the formation of local government.<sup>257</sup> True constitutional power in New Zealand lies with central government.<sup>258</sup> Local authorities are body corporates established by the Local Government Act and therefore are a

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<sup>251</sup> Land and Water Forum *Advice on improving water quality: preventing degradation and addressing sediment and nitrogen* (May 2018) at 35; Cabinet paper, above n 244, at 1, 6–7, 18.

<sup>252</sup> Local Government New Zealand, above n 44, at 7–8, 18–21.

<sup>253</sup> Office of Water Services *The Development of the Water Industry in England and Wales* (Office of Water Services, Birmingham, 2006) at 47, 49–51, 54–55.

<sup>254</sup> Nanaia Mahuta “Three waters and the Case for Change” (speech to Water NZ Conference, Hamilton, 19 September 2018).

<sup>255</sup> Ministry for the Environment, above n 6, at 25, 36–41.

<sup>256</sup> David Parker “Resource Management Act oversight unit to be established” (press release, 17 May 2018).

<sup>257</sup> Hadleigh Pedler “What Does the “Government” in “Local Government” Mean Anyway? The Constitutional Position of Local Government in New Zealand and Central Government Intervention in Environment Canterbury” (LLB (Hons) Research Paper, Victoria University of Wellington, 2010) at 36.

<sup>258</sup> Guerin, above n 206, at 12; Michel, above n 209, at 14.

creature of statute.<sup>259</sup> Central government could theoretically appoint regional bodies that would have the sole function of providing, and conducting compliance of, the three waters. Mandatory consultation could ensure that the views of local communities are still considered.

### *1 Rule of law*

Equality before the law requires the same standard of compliance across New Zealand. Centralising compliance responsibilities would be beneficial as a sole body would have a greater ability than multiple bodies to ensure the same standards are met. A regulator would be able to enforce non-compliance as national monitoring could identify where non-compliance was occurring. Local authorities would still have primary responsibility for sampling due to subsidiarity as it would not be efficient for a regulator to conduct sampling at all water supplies.<sup>260</sup>

A three waters regulator would solve the problem of misalignment between human and environmental health by acknowledging that freshwater quality influences drinking water. The two aspects should be considered together.<sup>261</sup> Alignment is important as rules must be clear and coherent. Currently the system is fragmented. A regulator would not necessarily fix the underlying statutes and regulations; but it would enable them to be addressed from the same body. A combined approach is preferable to the current arrangements where regional councils are responsible for environmental protection and drinking water assessors and territorial authorities are responsible for health protection. Fuller argues that breaches of congruence are often caused by misinterpretation of the law.<sup>262</sup> A regulator would be able to ensure congruence as there would be only one interpretation of the relevant laws.

To follow the law, it must be clear what the law is. The current Ministry for the Environment guidelines on RMA compliance are not sufficient. The guidelines provide some national guidance and direction but there is still discretion – enforcement approaches differ between local authorities. Having a centralised regulator would ensure that the law as written is enforced and that it applies to everyone. Any further Ministry for the Environment involvement through a national policy statement would be unlikely to significantly improve enforcement if local authorities retained discretion. A regulator would remove the discretionary element from enforcing compliance and ensure that the same standards are applied across the country. Fuller argues that breaches of the rule of law become cumulative.<sup>263</sup> Centralisation would remove the cumulative effect of breaches of congruence that result from discretion to enforce compliance at regional and local levels.

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<sup>259</sup> Local Government Act, s 12.

<sup>260</sup> Local Government New Zealand, above n 44, at 24–25.

<sup>261</sup> Local Government New Zealand, above n 20, at 15.

<sup>262</sup> Fuller, above n 98, at 81.

<sup>263</sup> Fuller, above n 98, at 92.

For consistent compliance central government should assume responsibility as they have greater capacity and capabilities than local authorities.<sup>264</sup> A regulatory body must have the resources to fund enough full-time staff to conduct the required monitoring and enforcement. To ensure congruence there must be a body with sufficient finances to ensure consistency in prosecutions, which currently does not occur.<sup>265</sup> A regulator would likely be funded from personal income tax and would be able to ensure that people have the same standard of drinking water regardless of where they live.<sup>266</sup> Comparatively, it is less clear how regional compliance bodies would receive funding. If funding was based on existing regional councils' ratepayer bases disparities may continue due to the different sizes of the ratepayer bases; therefore, regional compliance bodies are less preferable than a regulator. Potential funding issues could decrease efficacy in compliance and prevent equality before the law and congruence. However, central government's resources are not unlimited, and a regulator may end up with inefficiency problems like local authorities.

One problem is that a regulator may be less adaptable to local circumstances compared to the current arrangements.<sup>267</sup> Under subsidiarity inflexibility supports devolution to local levels. However, the relevant legislation and national directions are meaningless if they are not enforced and compliance is unlikely to improve through voluntary change.<sup>268</sup> A national support unit may improve coherence and consistency of compliance to a certain extent, but only in a reactive way through audits and advice. A support unit would also be dependent on local authorities seeking advice. If some local authorities sought advice and others did not, disparities in compliance would continue to persist impeding congruence and equality before the law. Therefore, the proactive approach a regulator or regional compliance bodies could take is preferable. A regulator would also help remove the current political interference with compliance by creating greater separation between the enforcer and the resource consent holder.<sup>269</sup>

## 2 Accountability

Central government should be ultimately accountable for compliance since water is nationally important to New Zealand.<sup>270</sup> Duplication of accountability must be avoided.<sup>271</sup> Accountability is

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<sup>264</sup> Local Government New Zealand, above n 44, at 24–26.

<sup>265</sup> Ministry for the Environment, above n 6, at 39–40.

<sup>266</sup> Ministry of Health, above n 192, at 1; Ministry of Health, above n 3, at 13; New Zealand Productivity Commission, above n 29, at 112.

<sup>267</sup> Ministry for the Environment, above n 6, at 39–41.

<sup>268</sup> Cabinet paper (April 2018), above n 2, at 5.

<sup>269</sup> New Zealand Productivity Commission *Local government regulatory performance: Issues Paper July 2012* (New Zealand Productivity Commission, Wellington, 2012) at 41, 47.

<sup>270</sup> See Local Government New Zealand, above n 44, at 25; Resource Management Act, ss 5–7.

<sup>271</sup> Local Government New Zealand, above n 44, at 15, 27; New Zealand Productivity Commission, above n 29, at 16, 21, 68, 86, 89–92, 113, 121, 172, 211, 218.

an issue as responsibilities have been delegated to local authorities without the capacity and capabilities to conduct effective compliance – local authorities can pass the blame to central government.<sup>272</sup> For true accountability there must be no ability for central government or local government to pass the blame.<sup>273</sup> A regulator is preferable to regional compliance bodies or a national support unit as it would be clear where the accountability would fall. Regional compliance bodies may have different levels of resources which could allow them to shift the blame and a national support unit would have no proactive ability to improve compliance.

Identifying who is accountable, however, is only one part of accountability. The forum must be able to hold the actor to account. A regulator would be accountable to the public indirectly as Parliament would delegate responsibility to the regulator. Indirect accountability could be problematic as it may be difficult to question the conduct of the regulator and to impose any consequences. The question is whether having one clear body to hold to account is preferable to the problem of many hands and the potential to pass the blame. For regional compliance bodies it would be unclear if they are accountable to central government who established them, or to their source of funding, which could be either central government or regions. If the regional compliance bodies did not align with existing regions there would be limited democratic accountability. Accountability would also be weak if central government appointed the staff on the regional bodies, as opposed to them being elected by their constituents.<sup>274</sup> A national support unit would be accountable to the Ministry for the Environment, the Ministry of Health and the relevant ministers. Like the regulator, the indirect accountability from the forum could pose difficulties. There would be little opportunity for citizens to challenge the unit's performance and few direct consequences. Citizens would not be able to directly elect new agents if they were dissatisfied with their performance; whereas citizens can elect new councillors under the current arrangements if they are dissatisfied.

Overall, centralising compliance by establishing a sole regulator may improve accountability by making identification of the responsible actor easier.<sup>275</sup> The problem of many hands would be removed. Conversely, accountability may be decreased by central government involvement. A regulator would be devolved from the agent, Parliament, which the principals elected. Furthermore, because central government has more extensive responsibilities than local

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<sup>272</sup> Cabinet paper, above n 86, at 15; Cabinet paper (April 2018), above n 2, at 4, 13–14, 19–20.

<sup>273</sup> Krupp, above n 216, at 33–41; Land and Water Forum, above n 26, at 43–44.

<sup>274</sup> See generally Environment Canterbury (Temporary Commissioners and Improved Water Management) Act 2010; Pedler, above n 257, at 43–58.

<sup>275</sup> Land and Water Forum, above n 26, at 19.

government, democratic accountability would be further devolved.<sup>276</sup> Therefore, while it may be clearer who is responsible under a regulator it could be more difficult to hold the actor to account.

### 3 *Subsidiarity*

As shown by current compliance levels it is not efficient to delegate responsibility for three waters compliance to the lowest level possible. Local control is not the most appropriate governance arrangement as drinking water networks would benefit from economies of scale.<sup>277</sup> Furthermore, as the current standards are imposed and set by central government they are best able to ensure they are met consistently;<sup>278</sup> central government is likely to have better resources in funding and expertise than local authorities.<sup>279</sup> However, a three waters regulator, national support unit or regional compliance bodies would be further removed from the people affected by their actions. Democratic representation may be worse than under the current arrangements.<sup>280</sup>

Concerns that greater centralisation may not reflect local conditions are legitimate.<sup>281</sup> Each catchment is unique and the Local Government Act aims to ensure decisions reflect each community's needs.<sup>282</sup> Furthermore, if a three waters regulator is worse at compliance than the current arrangements the whole country will be affected, rather than only specific communities.<sup>283</sup> However, standards of compliance should not be left to communities to decide as ensuring equality before the law would be difficult with different standards. As the health and environmental effects from a lack of compliance are significant – as illustrated in Part II – everyone should be entitled to the same level of three waters compliance to the same standards.

Finally, meeting the costs of complying with the existing law is best borne by central government as capital costs will differ across regions.<sup>284</sup> However, while central government has a bigger tax base than local authorities it also has more responsibilities. It may be difficult for a regulator to receive the funding required to be effective.<sup>285</sup>

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<sup>276</sup> Pedler, above n 257, at 36.

<sup>277</sup> Krupp, above n 216, at 18.

<sup>278</sup> Local Government New Zealand, above n 44, at 24–26.

<sup>279</sup> New Zealand Productivity Commission, above n 269, at 28–35.

<sup>280</sup> New Zealand Productivity Commission, above n 269, at 33, 36.

<sup>281</sup> Ministry for the Environment, above n 6, at 39–40.

<sup>282</sup> Land and Water Forum, above n 26, at 5; Local Government Act, ss 3, 10.

<sup>283</sup> Krupp, above n 216, at 29.

<sup>284</sup> BECA *Cost Estimates for Upgrading Water Treatment Plants to Meet Potential Changes to the New Zealand Drinking Water Standards* (Department of Internal Affairs, 15 March 2018) at 22, 24, 31.

<sup>285</sup> See Trevor Daya-Winterbottom “Resource management reform, subsidiarity and the anthropocene” (2017) 12 BRMB 57 at 2.

## ***B Regional***

For subsidiarity to be accounted for there should be some allocation of compliance responsibilities at regional or local level. This sub-part will analyse two options.

An alternative to centralisation would be regional regulators who would assume responsibility for compliance. Regional regulators make sense from an environmental perspective as the regional council boundaries are based on catchment boundaries.<sup>286</sup> Regional regulators could be subject to audits by the Ministry for the Environment and the Ministry of Health which would be a form of administrative accountability; and publication of results would allow for democratic accountability if compliance is poor. To ensure consistency each body could have a centrally appointed official to aid with expertise and funding.<sup>287</sup> Monthly or annual compliance meetings between the regions could further aid consistency.<sup>288</sup>

Water supply should also be provided through aggregated regional drinking water suppliers. The Havelock North Drinking Water Inquiry recommended that the government should decide whether to establish dedicated aggregated suppliers.<sup>289</sup> The three waters review is exploring this option as it would improve capacity and capabilities.<sup>290</sup> Cabinet has also noted that aggregation may improve compliance and accountability.<sup>291</sup>

### *1 Rule of law*

The main issue with regional governance is the rule of law. There may still be inconsistent compliance between regions due to different capabilities and the need to balance costs and stakeholder interests. For monitoring to be effective staff must be trained to similar levels which could be difficult across multiple bodies. The introduction of central government appointed officials may help with consistency, but appointees are unlikely to be as effective at ensuring consistent compliance as a centralised regulator. Furthermore, while less so than at local level, there is a chance of political interference by staff with links to the community.

Dedicated suppliers could ensure that the quality of water each region receives is similar. Scale plays an important role in improving quality and compliance.<sup>292</sup> However, funding would likely

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<sup>286</sup> Local Government Act, sch 3, cl 17(a).

<sup>287</sup> Land and Water Forum, above n 26, at 42.

<sup>288</sup> Ministry for the Environment, above n 6, at 38.

<sup>289</sup> Stevens, Poutasi and Wilson, above n 9, at [920].

<sup>290</sup> Cabinet paper (April 2018), above n 2, at 4; Nanaia Mahuta “Leading Together to Prepare for the Future” (speech to LGNZ Annual Conference, Christchurch, 17 July 2018).

<sup>291</sup> Cabinet paper, above n 244, at 4, 14–15, 20.

<sup>292</sup> Cabinet paper, above n 244, at 14.

determine the level of consistency. If central government provides funding, consistency may improve; whereas if funding is provided from existing ratepayer bases disparities may continue. More importantly, regardless of the infrastructure there must still be an independent body, or bodies, to conduct compliance.

## 2 *Accountability*

A principal must know how effectively their agent is conducting compliance if they are to hold the agent to account. Accountability could be improved if regional regulators were required to make compliance reports publicly available.<sup>293</sup> Published reports would enable all constituents to view the information rather than the information only being available to a person who makes a request under the Local Government Official Information and Meetings Act. Requiring compliance reports to be published would therefore help constituents to hold their agent democratically accountable if they do not conduct effective compliance.<sup>294</sup>

A disadvantage of regional networks would be the possibility of blame being apportioned since compliance ideas would be shared. One region may blame another region if their methods of compliance are not effective. It may be difficult to determine who to hold to account. On the other hand, regional networks could be a form of learning accountability. Regions could learn from regions with strong compliance levels.

A further problem may be determining the consequences the actor should face for a lack of compliance. Monetary sanctions would only exacerbate compliance problems as there are already funding issues. Democratic accountability could be difficult if the suppliers are aggregated in ways that do not match existing regional boundaries. Conversely, if the suppliers and regulating bodies are based on the existing regional council boundaries, and staff are democratically elected, accountability would be more direct than a centralised regulator.

## 3 *Subsidiarity*

Delegation to regional government makes sense environmentally as the quality of drinking water sources, and the types of pollution that affect those sources, are likely to be region specific.<sup>295</sup> Each catchment has different characteristics.<sup>296</sup> Allowing regional level compliance would ensure that

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<sup>293</sup> Zaman and others, above n 43, at 7, 9–10, 15, 18.

<sup>294</sup> Ministry for the Environment, above n 6, at 43.

<sup>295</sup> Pedler, above n 257, at 57.

<sup>296</sup> Stevens, Poutasi and Wilson, above n 9, at [624].

local circumstances are considered. Furthermore, local democratic control would be higher at a regional level compared to a centralised regulator.<sup>297</sup>

### *C Local*

Local responsibility for compliance is not viable. If compliance is to improve, most compliance responsibilities should be allocated to central or regional government. Due to the lack of compliance at local levels, and the absence of realistic improvements, this sub-part will not discuss the rule of law, accountability and subsidiarity in separate sections. Instead I will briefly mention minor changes that could be made and discuss the compatibility of these principles with the current arrangements to reinforce why local responsibility for compliance is not viable.

Local authorities could make information about three waters compliance publicly available. If the public is informed they can better hold the council to account.<sup>298</sup> Consistency of compliance could also be improved through a compliance framework for territorial authorities.<sup>299</sup> The necessity of a framework would depend on whether further guidance was provided nationally; the compliance guidelines provided by the Ministry for the Environment on the RMA are unlikely to be sufficient. Councils retain discretion and the guidelines are not specific to three waters compliance.<sup>300</sup> Joint guidelines on three waters compliance, established by the Ministry for the Environment and the Ministry of Health, may be more likely to improve consistency.

The different levels of compliance between local authorities – due to capacity and capability constraints – undermines equality before the law and congruence,<sup>301</sup> and political interference is most likely to occur in territorial authorities. The rule of law is not being upheld. Conversely, at a local level the forum is closest to the actor who is conducting compliance. Public meetings are accessible as people do not have to travel large distances and the forum experiences first-hand the results of a lack of compliance. The proximity between the actor and the forum creates strong democratic accountability in theory. However, voting levels are lower than central government elections.<sup>302</sup>

As a common resource, water can be considered under Harden's tragedy of the commons in which the only ways to resolve degradation of the resource are to privatise or require central government

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<sup>297</sup> Controller and Auditor-General, above n 59, at 6, 11.

<sup>298</sup> Land and Water Forum, above n 26, at 5.

<sup>299</sup> See generally Zaman and others, above n 43, at 6.

<sup>300</sup> Ministry for the Environment, above n 40, at 9.

<sup>301</sup> Cabinet paper, above n 86, at 7–9; Cabinet paper (April 2018), above n 2, at 4.

<sup>302</sup> Department of Internal Affairs, above n 118; Electoral Commission "Voter Turnout Statistics"  
<[www.elections.org.nz/events/2017-general-election/2017-general-election-results/voter-turnout-statistics](http://www.elections.org.nz/events/2017-general-election/2017-general-election-results/voter-turnout-statistics)>.

involvement. Centralisation may be necessary. However, Harden's view has been critiqued as community ownership is another possibility.<sup>303</sup> Local communities could increase the efficacy of compliance by submitting Local Government Official Information and Meetings Act requests and using democratic accountability to remove ineffective councillors.

Local Government New Zealand has recently called for an increase in devolution and decentralisation; the principal argument is that subsidiarity leads to better accountability for performance.<sup>304</sup> Krupp argues that accountability problems can be fixed by giving local authorities full responsibility to ensure there is no duplication of roles.<sup>305</sup> Logically, it makes sense for the party who must pay, the ratepayers, to set the standards they want.<sup>306</sup> However, ensuring consistent compliance across New Zealand would be difficult if there were different standards. A further problem with full local responsibility is that compliance outcomes are unlikely to be equal, even if the required standards were the same – larger territorial authorities would likely achieve higher compliance than smaller territorial authorities due to better resourcing. The three waters have nationwide effects on health and the environment. For equal and consistent compliance, central government should accept responsibility.

#### ***D Resolving the tension***

The previous sub-parts have examined possible new governance arrangements to improve three waters compliance. A common thread throughout this analysis was the tension between the rule of law, accountability and subsidiarity. This sub-part will suggest possible conclusions that can be drawn on the best options to improve compliance, and the inherent tension between these principles.

To ensure the rule of law is upheld any changes should allow for consistent compliance to provide equality before the law and congruence. Creating clear lines of accountability would stop the blame from being passed and reducing the number of actors would minimise the problem of many hands. Easier identification of the responsible actor would prevent accountability from forming part of the problem. Equally, some form of local democratic accountability should be retained as it is likely the strongest form of accountability. However, as subsidiarity also requires that the level of governance chosen enables efficient compliance, local governance is unlikely to be appropriate as current compliance is not efficient.

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<sup>303</sup> Ezekiel Hudspith "Freshwater Management in New Zealand: A Challenge for Ecology, Equity, and Economic Efficiency" (2012) 16 N.Z. J. Env'tl. L. 277 at 286–287, 316.

<sup>304</sup> Local Government New Zealand *Local government position statement on localism* (Local Government New Zealand, Wellington, 2018) at 2.

<sup>305</sup> Krupp, above n 216, at 33–41.

<sup>306</sup> Krupp, above n 216, at 26.

At a national level, statutory changes should be straightforward as they do not directly engage with the rule of law, accountability and subsidiarity. A three waters regulator would be most likely to ensure congruence and equality before the law and would remove the problem of many hands. However, the lack of consideration of local circumstances would clash with subsidiarity. A national support unit would be less effective at ensuring consistency and would not remove the problem of many hands; but it would ensure subsidiarity occurs as local government would retain primary responsibility for compliance. Regional compliance bodies would ensure more congruence and equality before the law than the current arrangements and would allow local circumstances to be considered. However, the bodies may not remove the accountability problems.

The rule of law is weaker at a regional level as inconsistent compliance is more likely. However, subsidiarity is stronger in terms of local democratic control. There would be less of a problem of many hands but still potential for blame to be passed which may reduce accountability. Regional regulators would therefore be most appropriate if there was central oversight to ensure consistency; for instance, through administrative accountability.

Finally, of the three levels of government, subsidiarity is strongest at a local level as there is high democratic accountability in theory, if not in practice. However, voter participation is low which reduces democratic accountability; the problem of many hands would continue to hinder accountability; and the rule of law would be weakest due to discretion over enforcement and varying capacity and capabilities. The chance of political influence would also be highest.

Local Government New Zealand has recently acknowledged that subsidiarity may not be appropriate if there are reasons why regional or central control are necessary.<sup>307</sup> If New Zealand wants to improve freshwater quality and prevent future waterborne disease outbreaks the status quo cannot continue. It seems likely that some centralisation will be required. Consistent compliance is necessary to ensure there is equality before the law and congruence; however, regional involvement will be necessary to maintain some local democratic control as centralisation would result in more indirect accountability. The difficult challenge for the three waters review will be striking an appropriate balance between the rule of law, accountability and subsidiarity.

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<sup>307</sup> Local Government New Zealand, above n 304, at 2.

## *V Conclusion*

The lack of compliance in the three waters, as illustrated in Part II, is a result of the governance arrangements. Inadequate levels of compliance are concerning. The resulting detrimental effects on human and environmental health are serious and will continue unless changes are made to improve compliance. Lack of compliance is also a rule of law and accountability issue. Inconsistent compliance undermines equality before the law and breaches congruence as the laws as written are not enforced; whilst accountability is diluted by the various actors and forums. The three waters review's focus on investigating changes to the governance arrangements to improve compliance highlights the significance of the problem. A solution must be found.

To reinforce why change is essential, Part III outlined the current governance arrangements and questioned whether they could be justified by subsidiarity and accountability. Theoretically, there is strong local democratic control and direct accountability when compliance is conducted primarily at local levels. The reality is different. Local democratic control is weak due to low voter participation in local government elections; the complex arrangements allow the blame to be passed and make it difficult to identify which actor should be held to account; and compliance is not efficient. Subsidiarity and accountability do not adequately justify the current governance arrangements.

It is clear changes to the governance arrangements are necessary. To determine the best option, Part IV analysed possible changes by assessing the compatibility of the rule of law, accountability and subsidiarity with each option. The application of these principles established that the rule of law is most likely to be upheld with increased centralisation; whereas the natural variability of catchments and the local democratic accountability associated with subsidiarity support some regional governance. The tension between the rule of law, accountability and subsidiarity makes it challenging to determine exactly how the governance arrangements should be altered. There is no easy answer. However, as the Minister for the Environment, the Hon David Parker has noted; “enforcement of the rule of law will always be essential to encourage broader compliance”.<sup>308</sup> If compliance is to improve, changes must ensure the rule of law is complied with.

This paper has analysed the inherent tension between the rule of law, accountability and subsidiarity by examining ways in which the three waters governance arrangements could be altered to improve compliance. Local accountability creates problems with enforcement consistency as there are too many actors and forums. Conversely, centralisation conflicts with

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<sup>308</sup> Ministry for the Environment, above n 40, at 7.

subsidiarity by reducing local democratic control. Although changes may appear pointless because of the difficulty in resolving the tension, the current arrangements create issues with the rule of law and accountability, and do not make a strong case for subsidiarity. The status quo cannot continue. The tension is inherent, but for compliance to improve changes must be made.

The three waters affect all New Zealanders. A system wide change is required to ensure consistency in outcomes across the country; the three waters issues cannot be solved by local or central government alone.<sup>309</sup> If three waters compliance is to improve, the governance arrangements must change. As the analysis of potential options in Part IV showed, the most appropriate structure would likely be a mixture of compliance responsibilities at central and regional levels.<sup>310</sup> The three waters review is unlikely to conclusively resolve the inherent tension between the rule of law, accountability and subsidiarity. However, they must draw a line between these principles. A balance must be struck. As Mr Clark and Ms Mahuta stated; “the broader public good, the health of our communities, and the health of our environment are at stake”.<sup>311</sup>

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<sup>309</sup> Mahuta, above n 290.

<sup>310</sup> See also Mahuta, above n 254, where the Minister signals that a dedicated water regulator and some regional involvement, possibly through aggregation of the provision of the three waters, are the likely options the Government will choose.

<sup>311</sup> Cabinet paper, above n 244, at 14.

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