

SARA (PIPPA) PLAYER

**ACCOUNTABILITY, POWER AND CONTROL IN NEW
ZEALAND'S LOCAL GOVERNMENT SYSTEM**

**LLM RESEARCH PAPER
LAWS 531: LOCAL DEMOCRACY AND SUB-NATIONAL
GOVERNMENT**

FACULTY OF LAW

TE WHARE WĀNANGA O TE ŪPOKO O TE IKA A MĀUI



JUNE 2022

Abstract

Criticisms of local government range from its not doing its job (a central government-centric perspective), to local democracy is being undermined by paternalistic and excessive intervention (a local government-centric perspective). Taking a closer look at the *effects* of accountability arrangements using Mark Bovens' public accountability framework can help us think differently about the concentrations of *power* and the checks and balances that are used to control such powers. This paper tests Bovens' framework for its value in legislative design by exploring public accountability through the roles of Minister, mayor, governing body and chief executive in the Local Government Act 2002 (LGA). It concludes that it is lazy governance if we are only relying on prescription in statute and legal accountability as the main control mechanism; and by doing so we are placing less importance on mapping progress towards community outcomes collaboratively through the activities of the two spheres of government in New Zealand (central and local).

This paper reflects the author's opinions and suggestions and does not represent Government policy or the views of any government agency or other organisation. All citations and references to electronic sources were accurate at the time of writing.

Word length

The text of this paper (excluding abstract, table of contents, annexes and bibliography) is approximately 7,420 words.

Subjects and Topics

Democracy, governance, management, accountability, decision-making, local government, Local Government Act 2002, judicial review, legislative design.

Contents

I	INTRODUCTION.....	5
II	LOCAL GOVERNMENT ACCOUNTABILITY AND GOVERNANCE	9
	A Accountability, a Vital Public Sector Control Mechanism	9
	B Central Government Accountability is Different to Local Government Accountability	10
	1 Parliament is supreme.....	10
	2 35 years of local government reform has shaped public expectations and driven greater professionalism.....	13
	C The Principled and Prescriptive Approach to Accountability in the LGA	16
	1 Structure of the local government sector.....	17
	2 Principles that guide local government.....	18
	3 Prescription in the governance and leadership of local authorities	20
III	DEFINING, CLASSIFYING AND MAPPING PUBLIC ACCOUNTABILITY.....	29
	A Defining and Classifying Accountability.....	29
	B Mapping Local Government Accountabilities	31
IV	EVALUATING PUBLIC ACCOUNTABILITY IN LOCAL GOVERNMENT	34
	A A Snapshot of Findings.....	34
	B Further Reflections on the LGA framework – Exercising Power and Controlling Power.....	36
	1 Democratic perspective – accountability and popular control.....	36
	2 Constitutional perspective.....	39
	3 Learning perspective	42
V	CONCLUSIONS	44
	ANNEX 1 EXTRACTS FROM THE LOCAL GOVERNMENT ACT 2002.....	47
	ANNEX 2 GAZETTE NOTICE REGARDING MINISTERIAL POWERS OF LOCAL GOVERNMENT ASSISTANCE AND INTERVENTION 28 MARCH 2018.....	51
	BIBLIOGRAPHY.....	54
	A Cases	54
	B Legislation.....	54
	1 New Zealand primary and secondary legislation.....	54
	2 Bills.....	55
	C Treaties, Conventions and Declarations	55

D Texts and Online Commentaries	55
E Journal Articles.....	56
F Parliamentary and Government Materials	57
1 Gazette Notices.....	57
2 Other materials	57
G Reports and Papers.....	58
H Internet materials.....	58
I Unpublished Papers	59

Tables

Table 1 2019-2020 Local Government Sector Revenue and Expenses	15
Table 2 Number of elected members required - Local Electoral Act 2001	22
Table 3 Classification of Accountability and the Range of Accountabilities in Key Roles Under the Local Government Act 2002.....	32
Table 4 Snapshot of Local Government Act 2002 Accountabilities - Summary Findings	35

Figures

Figure 1 Central and Local Government - executive and governing bodies	12
Figure 2 Core functions and services of local authorities in New Zealand	18
Figure 3 Generic local authority governance and management structure.....	21
Figure 4 Bovens' Accountability Model.....	30
Figure 5 Generic Accountabilities of a Local Authority Under the Local Government Act 2002.....	33

I Introduction

There are nearly as many descriptions of accountability as there are legal, political and philosophical authors who have written on the topic.¹

A lack of clarity about what accountability means in practice can “create difficulties when organisations attempt to be accountable in the wrong way or try to be accountable in every way”.² Leading academic, Mark Bovens³ explains this as either: the “problem of many eyes” where an organisation is accountable to lots of different bodies with each applying different criteria and judgment on the organisations actions; and in the opposite, the “problem of many hands” where there are so many parties who have contributed to the conduct of an organisation that it is not clear who is accountable for what.⁴

Focus on accountability in the academic literature regarding local government, has generally been on quality of performance and the behaviours that demonstrate that procedural requirements have been met (assessing the “virtues”).⁵ This is seen in the comprehensive and prescriptive procedural and documentation requirements evident in the Local Government Act 2002 (LGA), the main statute empowering local authorities in New Zealand.

¹ Ellen Rock *Measuring Accountability in Public Governance Regimes* (Cambridge University Press, 2020) at 14.

² Controller and Auditor General *Public Accountability: A Matter of Trust and Confidence* (B29[19e] 2019) at [5.40]. References Koppell, J (2005), “Pathologies of accountability: ICANN and the challenge of ‘multiple accountabilities disorder’”, *Public Administration Review*, Vol 65 No 1, page 95.

³ Prof. Dr. Mark Bovens, Professor of Public Administration at the Utrecht University School of Governance since 1997 <<https://www.uu.nl/staff/MAPBovens/CV>>.

⁴ Mark Bovens *Analysing and Assessing Public Accountability A Conceptual Framework EUROGOV No C-06-01* (European Governance Papers (EUROGOV), 2006) at [3.1-3.2]. [Bovens 2006]. Note the same paper was substantially reproduced in Mark Bovens “Analysing and Assessing Accountability: A Conceptual Framework” (2007) 13 *EURLJ* 447. [Bovens 2007].

⁵ Mark Bovens “Two Concepts of Accountability: Accountability as a Virtue and as a Mechanism” (2010) *West European Politics*, 33:5, 946-967 at 948. Mark Bovens has written many papers relating to accountability. [Bovens 2010].

However, there is another way to look at public accountability. Mark Bovens' assessment tool focuses on understanding the *effects* of accountability "mechanisms" not just the "virtues" of behaviours using three overlapping perspectives: democratic, constitutional and learning.⁶ The central ideas in these are:⁷

- (i) *Democratic accountability* offers controls and legitimises government actions by linking them effectively to the 'democratic chain of delegation' - the degree the accountability arrangement or regime enables democratically elected bodies to monitor and evaluate executive behaviour, and to induce actors to modify their actions.
- (ii) *Constitutional accountability* is essential to withstand the tendency toward power concentration and abuse of powers in the executive branch - the extent an accountability arrangement prevents the abuse of executive power.
- (iii) *Learning accountability* provides incentives for public agencies through feedback mechanisms to increase their effectiveness and efficiency - the degree an accountability arrangement stimulates actors to focus consistently on achieving desired outcomes.⁸

Bovens sees the interplay between the three perspectives is useful because:⁹

⁶ Bovens' evaluation framework draws on a wide body of academic research.

⁷ Adapted from Mark Bovens, Thomas Schillemans and Paul 'T Hart "Does Public Accountability Work? An Assessment Tool" [2008] Public Administration at Tables 1, 2 and 3. et al]. See also the summary in R Thwaites and Dean R Knight "Administrative Law Through a Regulatory Lens: Situating Judicial Adjudication Within a Wider Accountability Framework" in S Frankel and D Ryder (eds) *Recalibrating Behaviour: Smarter Regulation in a Global World* (LexisNexis, 2013) 529 at [14.2.1].

⁸ Bovens, Schillemans and 'T Hart, above n 7, at 232. "It is not about 'keeping the bastards honest' but about 'keeping the bastards smart and sharp'". Rock (above n 1, at 124) makes a similar point, although more pragmatically in her discussion of "deterrence" as a rationale to "increase the likelihood of facilitating positive change" through dialogue, without imposing strong sanctions.

⁹ Bovens 2007, above n 4, at 467. See also discussion on the importance of the three perspectives in controlling public power within a constitutional system in Matthew Palmer and Dean R Knight *The Constitution of New Zealand: A Contextual Analysis* (Bloomsbury Publishing Plc, 2022) at 168.

Too much emphasis on administrative integrity and corruption control, which would be considered beneficial from a constitutional perspective, could lead to a proceduralism that seriously hampers the reflexivity, and hence also the efficiency and effectiveness, of public organisations.

Thwaites and Knight also note the value of systematic analysis using the three perspectives. They surmise that attention to the learning perspective is less understood in public law scholarship,¹⁰ but that it is important to consider as the context for governance changes.¹¹ This can be seen in the increasing complexity of regulatory issues (consider water or resource management reform or the establishment of new government agencies), uncertain impacts of policy interventions (consider the recent climate change response) and rapid rate of change (consider the economic and societal adaptations to the COVID-19 pandemic).¹² Therefore, relying on “judicial interpretation and application of pre-ordained regulatory benchmarks” might not enable system improvements or future change to accountability frameworks at a pace necessary to respond to general trends in societal expectations of public institutions.¹³

The pursuit of accountability by Bovens, Ellen Rock and others echoes Matthew Palmer’s approach to “constitutional realism” in the way that institutional structures, processes, principles and cultural norms can affect the exercise of public power.¹⁴

At a practical level, Bovens’ framework can help us to think differently about the relationships between actors¹⁵ and to test the accountability of a particular actor or how a

¹⁰ Thwaites and Knight, above n 7, at [14.2.1].

¹¹ At [14.4.2].

¹² At [14.4.2].

¹³ At [14.4.2].

¹⁴ Matthew SR Palmer “New Zealand Constitutional Culture” (2007) NZULR 565 at 565. See also discussion of the crucial role of accountability in controlling public power within our constitutional system in Palmer and Knight, above n 9, at 168.

¹⁵ Thwaites and Knight, above n 7, at [14.2.1].

proposal fits into a desired accountability goal.¹⁶ Bovens' approach can reveal potential "accountability deficits" or "accountability excesses"¹⁷ in the various checks and balances on powers of the actors involved in a particular regime. More importantly, the approach could be particularly useful in legislative design.¹⁸

To keep the scope of this paper manageable, the focus is limited to a high-level view of the LGA and the main relationships between the roles of Minister, mayor, governing body and chief executive (CE).¹⁹ The aim is to test Bovens' framework by considering the local government system and provide some direction for further study.

Part II outlines how accountability in local government in New Zealand works, highlighting the differences between central and local governance and providing some historical context to the LGA. It also provides an overview of the LGAs principles and procedural code with reference to the roles of Minister, mayor,²⁰ governing body and CE. Part III identifies and maps the accountability mechanisms of the LGA at a system level, with Part IV covering the last element in Bovens' methodology, the evaluation. Conclusions in Part V draws the threads from the evaluation and points to potential areas for further study.

Annex 1 reproduces some of the key sections in the LGA that are referenced in the paper.

¹⁶ At [14.2.1]. See also the framework to use as a "5-part benchmark" to evaluate accountability in Rock (above n 1) at [8.1, Table 8.1].

¹⁷ Bovens 2006, above n 4, at 24. "accountability deficits: a lack of sufficient accountability arrangements; or of accountability excesses: dysfunctional, negative effects of the accumulation of a range of accountability mechanisms." Also referred to as "deficits" and "overloads" in Bovens, Schillemans and 'T Hart, above n 7, at 226.

¹⁸ Including the adaptations of the approach by Rock, above n 1.

¹⁹ To undertake a definitive evaluation would entail an intensive research programme involving qualitative interviews of a large sample of local and central government officials and elected representatives.

²⁰ The mayor has been chosen, as opposed to regional council chair, as this leadership role is distinct from the role of governing body under the LGA.

II Local Government Accountability and Governance

A Accountability, a Vital Public Sector Control Mechanism

Accountability is an “elusive and illusive” concept²¹ which has been said to be in the same class of abstract concepts as equity, transparency and well-being.²² However, there is reasonable consensus among academics that it is “a relational mechanism that can be analysed within the framework of the questions: *who* is accountable, to *whom*, for *what* and *how*?”²³

Accountability is frequently discussed in the context of organisational management, performance, responsibility, and governance. In the public sector,²⁴ *governance* is not just about how an organisation gets things done, it has a broader meaning.²⁵ The Department of Internal Affairs (DIA) defines governance as:²⁶

... the act, process or power of governing....the means for collective action in society, responding to and guiding change that is beyond the capacity of private action.

²¹ Rock (above n 1) at 16.

²² Jeroen van der Heijden “Regulatory Stewardship the challenge of joining a virtue and a mechanism” (2021) 17 Policy Quarterly at 59.

²³ Bovens 2006, above n 4, at [24]. Bovens and Rock (above n 1) draw on a wide range of models and approaches and provide a thorough history of debate around evaluating accountability.

²⁴ See resources at Public Service Commission “What is the Public Sector?” www.publicservice.govt.nz.

²⁵ The New Zealand Institute of Directors refers to corporate governance as a mechanism “to help the company achieve its fundamental purpose as articulated and subscribed to by its shareholders and stakeholders.” *New Zealand Institute of Directors Four Pillars of Governance Best Practice for New Zealand Directors* (2021) at 0.2.2.

²⁶ Department of Internal Affairs “Glossary - Local Government in New Zealand” <www.localcouncils.govt.nz>. DIA is the central government agency responsible for administering legislation in the local government portfolio. There are over 100 statutes relating to local government in some form.

In the local government sector, governance of a local authority²⁷ is through the election of a “governing body” by the citizens of a district or region.

Checks and balances on the actions of public bodies are important control systems for democracy, for delivery of public services and to meet societal expectations.²⁸ These control systems serve to pick up poor performance (for example, illegality, criminality, or poor process) and to incentivise good performance and desirable conduct.²⁹

Accountability provides such controls through a range of mechanisms (processes, protocols and requirements) and supports governance by ensuring that “the legitimacy of governance remains intact or is increased.”³⁰

B Central Government Accountability is Different to Local Government Accountability

While local government is firmly part of the *public sector* in New Zealand, it has a more arms-length relationship to Parliament than public service departments.³¹ This subsection covers the differences between central and local government in New Zealand and sets some historical context over the last 35 years.

1 Parliament is supreme

In New Zealand’s Westminster-style system, Parliament is the supreme law-maker (the legislature). The executive decides policy, proposes laws (which must be approved by the legislature) and administers the law.³² The executive comprises government,

²⁷ LGA, s 5 “Local authority means a regional council or territorial authority.” In this paper “local authority”, “council” are used interchangeably.

²⁸ Note the reminder to administrative lawyers that “traditional accountability mechanisms are part, but only part, of a bigger picture of multiple accountabilities” in Richard Rawlings and Carol Harlow “Regulatory Design and Accountability” in *Law and Administration (Law in Context)* (4th Edition ed, Cambridge University Press, 2021) 282 at 304.

²⁹ Jonathan Boston, David Bagnall and Anna Barry *Foresight, Insight and Oversight: Enhancing Long-term Governance Through Better Parliamentary Scrutiny* (Victoria University Wellington 2019) at 62.

³⁰ Bovens 2007, above n 4, at 464.

³¹ Departments and ministries. See Public Service Commission, above n 22.

³² Ministry of Justice “New Zealand’s Constitutional System” <www.justice.govt.nz>.

ministers and government departments. Ministers must be members of the House of Representatives (the House), and each member is answerable to the House (comprising all elected members).³³ A Minister will have oversight of the direction and work programmes of government departments, agencies and crown entities and is held to account for their activities by both the government (through Cabinet and Cabinet committees) and Parliament.³⁴ Chief executives of central government entities are appointed by and responsible to the Public Services Commissioner.³⁵

In contrast, Local government in New Zealand has no guaranteed status;³⁶ it is a creature of statute. It draws its “entire existence” (powers, functions and authority) from Parliament.³⁷ In a local authority, elected representatives form the governing body; and the CE is employed by the governing body, who is empowered to employ staff. There is no requirement to seek endorsement of the appointment of the CE or oversight of the role by the Public Service Commission.³⁸

The core differences are that a local authority’s executive is appointed, not elected and each sphere of government (central and local) has separate funding streams (taxpayer and ratepayer). This is illustrated conceptually in Figure 1. In practice, many interactions

³³ Boston, Bagnall and Barry, above n 29, at 63.

³⁴ Through reporting requirements under the Public Finance Act 1989 et statement of intent, annual reports; and responding to inquiries into activities.

³⁵ Refer to the Public Services Act 2020; note that the “public service” includes to government departments, departmental agencies, and Crown agents (s 10) but excludes other forms of crown entities which are subject to the Crown Entities Act 2004. Chief executives of crown entities are appointed by their boards with the written consent of the Public Service Commissioner (refer Crown Entities Act 2004, s 117 (2A)).

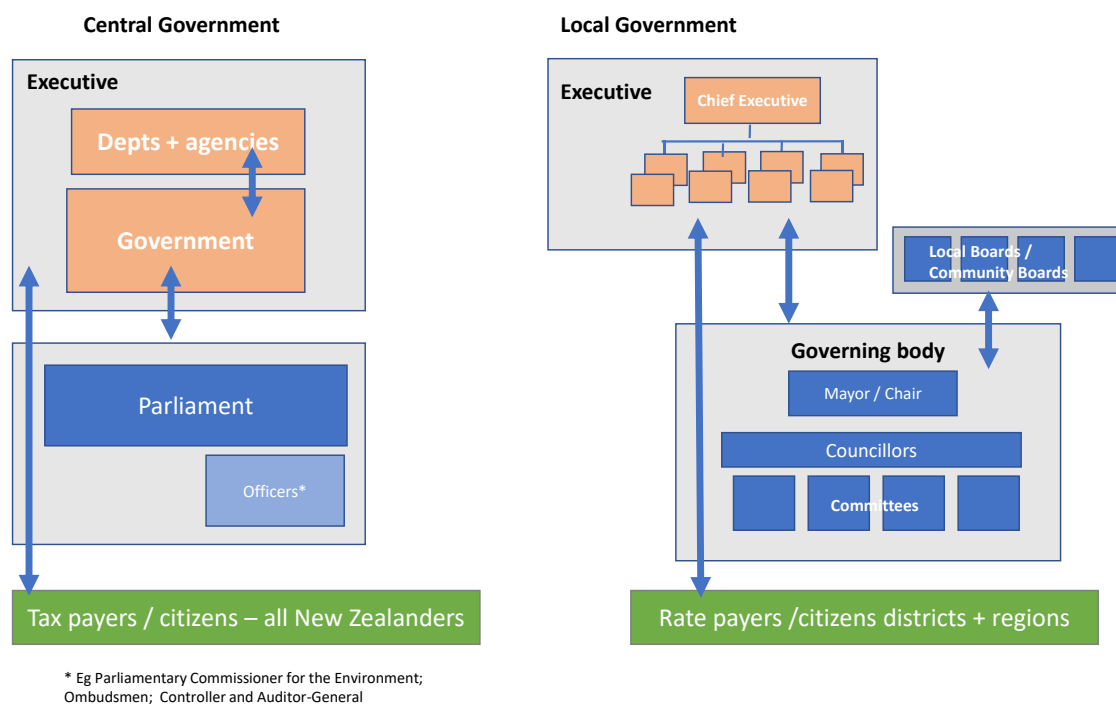
³⁶ Sascha Mueller “Incommensurate Values? Environment Canterbury and Local Democracy” 2017 NZJPL 293 at 298. See also section 3(2) Senior Courts Act 2016 “New Zealand’s continuing commitment to the rule of law and the sovereignty of Parliament”.

³⁷ Mike Reid “Local Government’s Quest for Constitutional Status” in J Drage, J McNeill and Christine Cheyne (eds) *Along A Fault-Line: New Zealand’s Changing Local Government Landscape* (Dunmore Publishing, 2011) at 2. [Reid 2011]

³⁸ The governing body-chief executive relationship in a local authority is more akin to that between a crown entity board or company board and its chief executive.

occur between the spheres in terms of delegation of powers, policy direction, funding, contracting, partnerships and initiatives, reporting and information sharing.³⁹

Figure 1 Central and Local Government - executive and governing bodies



Accountability lines between the two spheres are somewhat distanced or at “arms-length”,⁴⁰ sometimes deliberately so.⁴¹ Inevitably, the frustrations of central government in delivering broader outcomes (for example well-being and environmental outcomes) can appear, at times, in conflict with what is desired by communities and expressed

³⁹ Which also depends on the nature of the power or function granted by Parliament for example, regulatory or non-regulatory.

⁴⁰ Mike Reid *Structures and roles for enabling local authorities to maximise their contributions to community wellbeing and adapt to meet future challenges* (2021) at 23. [Reid 2021] The “propensity to place public services into arms-length corporate bodies” to narrow the scope of interference from democratic politics.

⁴¹ Rawlings and Harlow, above n 28, at 284. “Independence from, or an arm’s-length relationship with, government is said to facilitate the continuity of, and flexibility or responsiveness in, policy formulation and implementation” and helps to “deflect criticism or political responsibility and reduc[e] government overload.”

through a community's long-term plan.⁴² This situation could be characterised as a constitutional conundrum for New Zealand. While not a core topic for this paper, to some extent, constitutional issues are at the heart of current debates relating to legislative reforms in resource management,⁴³ water,⁴⁴ local government,⁴⁵ and giving effect to the Treaty of Waitangi.⁴⁶

2 *35 years of local government reform has shaped public expectations and driven greater professionalism*

The history of the legislative framework for local government in New Zealand since the 1850s is complicated. In the last 35 years there has been significant change.⁴⁷ A major overhaul of local government in 1989 was led by the Local Government Commission (LGC)⁴⁸ which reorganised 822 local government entities into 87 multifunctional city, district and regional councils.⁴⁹ This reform was “driven by an overall desire to address

⁴² Refer LGA, ss 10, 11, 12. The debate over the Three Waters Reform shows this frustration. Central government is not willing to drive greater consistency in management of freshwater, stormwater and waste water through existing tools of the Resource Management Act 1991, the Health Act 1956 and the LGA but has set up a new agency, Taumata Arowai- the Water Services Regulator.

⁴³ Ministry for the Environment “Overview of the resource management reforms” (21 January 2022) Ministry for the Environment <<https://environment.govt.nz>>.

⁴⁴ See Department of Internal Affairs “Three Waters Reform Programme” <www.dia.govt.nz>.

⁴⁵ See Department of Internal Affairs “Review into the Future for Local Government” Future for Local Government <www.futureforlocalgovernment.govt.nz>. See also Department of Internal Affairs *Arewa ake te Kaupapa, Raising the Platform – The Future of Local Government Review – Interim Report* (October 2021) www.futureforlocalgovernment.govt.nz.

⁴⁶ See for example discussion on co-governance with former Minister for Treaty of Waitangi Negotiations Hon Christopher Finlayson in Sharon Brett Kelly, “Co-governance: Time to get on with it?” (podcast, 5 October 2022) The Detail www.rnz.co.nz. *Co-governance: Time to get on with it?* (podcast, Radio New Zealand, 5 October 2022) <www.rnz.co.nz>.

⁴⁷ Useful context and succinct history of the development of the LGA can be found in Mike Reid *Saving local democracy: An agenda for the new government - a report prepared for the Policy Observatory* (Auckland University of Technology 2018). [Reid 2018]

⁴⁸ New Zealand Parliament *Local Government Amalgamation Parliamentary Research Paper 8* (October 2014) <<https://www.parliament.nz>>.

⁴⁹ Reid 2021, above n 40, at 8.

what was seen as a problem of fragmented local governance”.⁵⁰ The second major reform was the LGA⁵¹ noted as the first comprehensive revision of general law relating to local government since 1974:⁵²

It provides the framework to ensure that local authorities are an effective local component of New Zealand’s system of democratic government.

The LGA introduced a new paradigm for local government, focussing on partnership, democracy and equity as opposed to efficiency.⁵³ Since then, reforms have ping-ponged between left-leaning and right-leaning governments that have considered local government as either “a legitimate form of sub-national government” or “service provider of last resort”.⁵⁴

Reid describes the resultant framework for local government that we have today as a one-size-fits-all approach due to its inability to take into account the varied nature, size and scale of local authorities.⁵⁵ He suggests the extensive corporate-type governance systems in the LGA might work for large metropolitan-based communities like Auckland, Christchurch and Wellington, but are excessive for a council servicing the communities of the predominantly rural Ruapehu District.⁵⁶ Reid concludes this lack of

⁵⁰ At 32.

⁵¹ The Local Government Bill 2001 (191-1) was introduced by the fifth Labour government (1999-2008).

⁵² Local Government Bill 2001 (191-1), explanatory note. See also Department of Internal Affairs “Background to the Local Government Act 2002” <<https://www.dia.govt.nz>>.

⁵³ Reid 2018, above n 47, at 6.

⁵⁴ At 6. Reid notes the 2002 statute was drafted in partnership with local government and “‘repurposed’ councils to be active players in the governance and leadership of their communities.”

⁵⁵ Reid 2021, above n 40, at 32.

⁵⁶ Noting the significant reform relating to Auckland that generated the Local Government (Auckland Council) Act 2009 that reorganised eight local authorities into one entity. This stemmed from 2006 and the Auckland councils’ collective desire to address regional planning and infrastructure issues. A Royal Commission on Auckland Governance was established by the Labour government in 2007 and the subsequent National government drove the response and the legislation. See Department of Internal

differentiation has led to ongoing issues in many parts of New Zealand and further reflects an irony of the LGA being based on a competitive philosophy of the State Services Act 1998, which is now in stark contrast to the “collaborative approach” in the new Public Service Act 2020.⁵⁷ There is a view that the reforms have brought in a more professional approach to governance and management of local authorities and strengthened accountability (enabling communities to hold their elected representatives to account).⁵⁸ This is appropriate if you consider the sector’s collective economic significance in terms of revenue and expenditure for the 2019-20 year shown in Table 1.⁵⁹

Table 1 2019-2020 Local Government Sector Revenue and Expenses

2019 -20 year	Amount
Total revenue (actual)	\$13.9 billion Includes \$6.6 billion in rates
Total operating expenditure (actual)	\$12.481 billion
Capital expenditure - Total infrastructure assets	\$3.154 billion Includes \$1.71 billion of Three Waters infrastructure ⁶⁰

Affairs “Government Decisions in Response to the Royal Commission on Auckland Governance” <<https://www.dia.govt.nz>>; Cabinet Office *Royal Commission on Auckland Governance, Initial Government Reaction* Cabinet Minute (09) 8/10 (9 March 2009).

⁵⁷ Reid 2021, above n 40, at 8. The Public Service Act 2020 does not directly affect local authorities, despite local government being seen as part of the public sector.

⁵⁸ At 8. See Andy Asquith “The Role, Scope and Scale of Local Government in New Zealand: Its Prospective Future” (2012) 71 *Australian Journal of Public Administration* at 78. The 1989 reforms “brought considerable new blood into local government in New Zealand, with generic management skills honed in the private sector.”

⁵⁹ Source: Controller and Auditor General *Insights into local government: 2020 (Report B29[21f])* (Controller and Auditor General 2021), Part 1. Based on audit data from the 78 local authorities in New Zealand.

⁶⁰ Three waters infrastructure refers to networks and services associated with stormwater, freshwater and waste-water systems.

C The Principled and Prescriptive Approach to Accountability in the LGA

The LGA that empowers local authorities is principles-based; it has a purpose statement, outcomes, principles of operation, principles for leadership, financial management and operational management. In theory, a combination of purpose in s 3, power of general competence in s 10 and principles in s 14, gives a local authority considerable choice over what and how it delivers services and outcomes.⁶¹ More specifically, s 3(c) includes the purpose of promoting “the accountability of local authorities to their communities”; and s 14 (1)(a) requires a local authority to “conduct its business in an open, transparent, and democratically accountable manner”.⁶² Therefore, there are expectations of *public accountability* for exercising the range of powers and duties the legislation contains and to meet the goals or outcomes anticipated by the regulation.⁶³

There is also prescriptiveness in the LGA. Detailed procedural requirements form a procedural code that covers matters such as structure and governance;⁶⁴ the appointment of a CE;⁶⁵ strategic planning; financial management and fundraising through rates and development contributions;⁶⁶ reporting and audit; decision-making and consultation;⁶⁷ and requires an operational split between regulatory and non-regulatory activities.⁶⁸ Local government is organised and structured around these purposes, principles and prescriptive code.

⁶¹ See extracts in Annex 1.

⁶² Kenneth Palmer *Local Authorities Law in New Zealand* (Thomson Reuters, Brookers Ltd, 2012) at [1.3.1]. Palmer reflects on the need in a governance system to “strike a balance” between making decisions on behalf of a community (representative democracy) and implementing the wishes of the community through decision-making processes (participatory democracy). This can be seen in practice in the approach to significance and engagement policies under s 76AA of the LGA (see extract in Annex 1).

⁶³ Referred to as the tension between regulation and administrative law in Thwaites and Knight, above n 7, at [14.1].

⁶⁴ LGA, Pts 3, 4.

⁶⁵ LGA, s 42.

⁶⁶ LGA, Pt 6.

⁶⁷ LGA, Pt 6.

⁶⁸ LGA, s 42(3)(a), a chief executive must ensure the management structure of the local authority “reflects and reinforces the separation of regulatory responsibilities and decision-making processes from other responsibilities and decision-making processes”.

1 Structure of the local government sector

There are two types of local authority (or council) in New Zealand: territorial authorities and regional councils.⁶⁹ A local authority that has the responsibilities, powers and duties of both a territorial and a regional council is a unitary authority.⁷⁰

Each council has a geographically defined area (city, district, region).⁷¹ All 78 councils exist to:⁷²

- a) enable democratic local decision-making and action by, and on behalf of, communities; and
- (b) promote the social, economic, environmental, and cultural well-being of communities in the present and for the future.

Councils are funded by their local communities to do a range of activities and functions prescribed/enabled in many statutes. They have, what is termed a general power of competence:⁷³

- (2) For the purposes of performing its role, a local authority has—
 - (a) full capacity to carry on or undertake any activity or business, do any act, or enter into any transaction; and
 - (b) for the purposes of paragraph (a), full rights, powers, and privileges.

Figure 2 demonstrates that differences between the types of council are functional (described as core functions and services).⁷⁴ It is not a “governing” hierarchy, although under some regulatory regimes and funding mechanisms there are policy hierarchies at national, regional and local scales. A simple explanation is that regional councils are

⁶⁹ LGA, s 5 local authority means a regional council or territorial authority.

⁷⁰ LGA, s 5 unitary authority means a territorial authority that has the responsibilities, duties, and powers of a regional council.

⁷¹ LGA, Part 3.

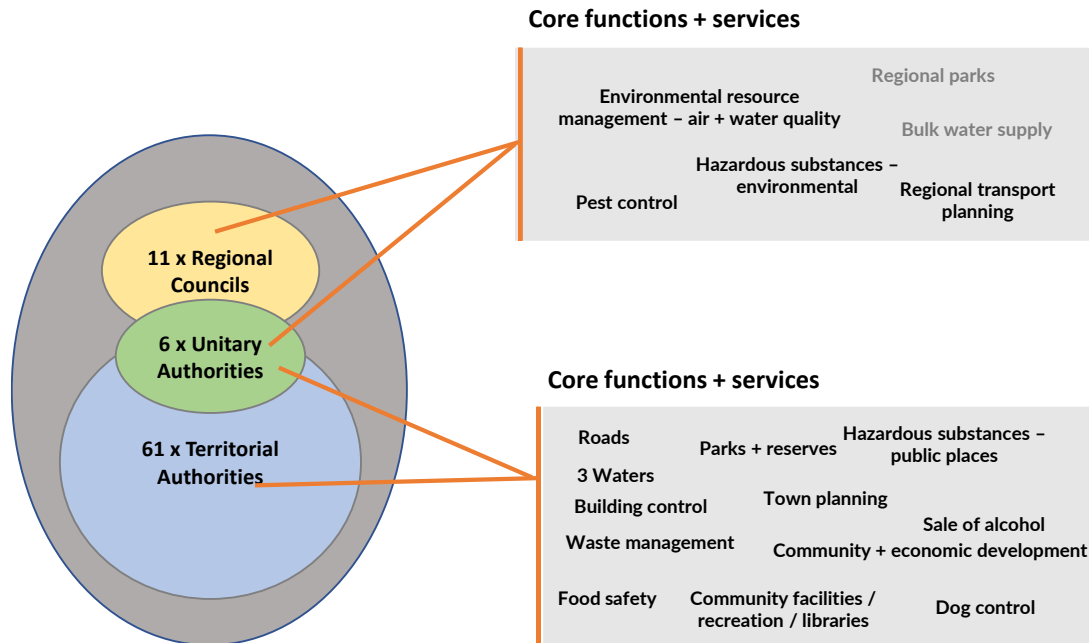
⁷² LGA, s 10 (1), purpose of local government.

⁷³ LGA, s 12.

⁷⁴ The figure shows examples of the core functions and services.

primarily concerned with environmental resource management and territorial authorities are responsible for a wider range of services.⁷⁵

Figure 2 Core functions and services of local authorities in New Zealand



Councils can undertake a wide range of functions and activities. Therefore, there is considerable variation in the governance and management arrangements they put in place to respond to community needs and aspirations. Responsibilities/functions and services can also be transferred between councils,⁷⁶ for example, to combine services for managing resource consent processing or building consents, or to manage shared infrastructure (water supply) or community facilities. Councils can also enter into contractual arrangements with other public sector entities and private sector entities.

2 Principles that guide local government

The principles in s 14 of the LGA, coupled with the purposes of local government in ss 3 and 10, encompass many concepts applying to activities and decision-making including

⁷⁵ Note not all regional councils choose to provide regional parks or bulk water supply services (refer grey text in the list of functions and services in Figure 2).

⁷⁶ LGA, s 17.

democracy, transparency, efficiency and effectiveness, diversity, considering current and future generations, Māori involvement, sustainable development and stewardship.⁷⁷

Some values are not explicit in the LGA and will be influenced by societal norms as they adapt and change over time. In a general sense, working in parallel to the s 14 principles are the administrative law, doctrine and principles guiding judicial consideration of local government actions.⁷⁸

A further concept (principle), that is highly valued within the local government sector internationally is *subsidiarity*, based on the premise that:⁷⁹

[U]nless there are good reasons for not doing so, public services should be delivered by the level of government that is closest to the citizens that it affects.

While it is not a formally recognised principle in New Zealand law (constitutionally or in regulatory tools), subsidiarity has been embedded in international approaches to sustainability over the past 30 years (particularly in European law).⁸⁰ The values-based

⁷⁷ See Annex 1.

⁷⁸ For example, administrative law principles relating to procedural fairness, equity, reasonableness, discretion, public participation and natural justice

⁷⁹ Local Government New Zealand *The 2020 Local Government Manifesto: Getting the democratic balance right in New Zealand* (Local Government New Zealand 2020) at 6. Noting that the subsidiarity principle does not imply public services should necessarily be *designed* at the level of government closest to the citizens affected.

⁸⁰ Note there is considerable history of the subsidiarity principle and its incorporation into international treaties. For example the concept was incorporated into the Treaty on European Union 92/C 191/01 (signed at Maastricht on 7 February 1992, entered into force 1 November 1993) (the Maastricht Treaty); and later into Principle 10 *Rio Declaration on Environment and Development* A/Conf.151/26 (1992).

approach to sustainability in the purposes and principles of the LGA are consistent with the sustainable development goals of the United Nations.^{81 82}

The principles in the LGA are values-based that reflect broad societal expectations on local government. It is not just about specifying legal powers, it is also about taking into account values and beliefs – and helping to align local government activities within wider societal norms of behaviour and conduct of public institutions.⁸³

3 Prescription in the governance and leadership of local authorities

Parliament has prescribed, through the LGA, a comprehensive range of requirements for governance and management;⁸⁴ planning, decision-making, administration, consultation;⁸⁵ and conduct, meeting protocols and voting systems.⁸⁶ Generally, these types of requirements and obligations are imposed as methods to support the delivery of outcomes desired (or expected) by the regulation – and comprise legal requirements that are enforceable by courts.

The extent of the prescription can be seen in four key roles under the LGA: the

⁸¹ See United Nations Agenda 2030 sustainable development goals (SDGs) agreed in *Transforming our world: the 2030 Agenda for Sustainable Development A/RES/70/1* (25 September 2015). Alignment of the New Zealand Living Standards Framework with the SDGs is included in *New Zealand Government He Waka Eke Noa Towards a Better Future, Together New Zealand's Progress Towards the SDGs* (2019) www.mfat.govt.nz.

⁸² See discussion of international thinking on the constitutional recognition of local government in Dean Knight *Constitutional practice in local government: growing constitutional culture when acting locally* Plenary address to SOLGM (Society of Local Government Managers), Marlborough Colloquium (Blenheim, New Zealand; January 2019) at 1.

⁸³ Palmer, above n 14, at 565.

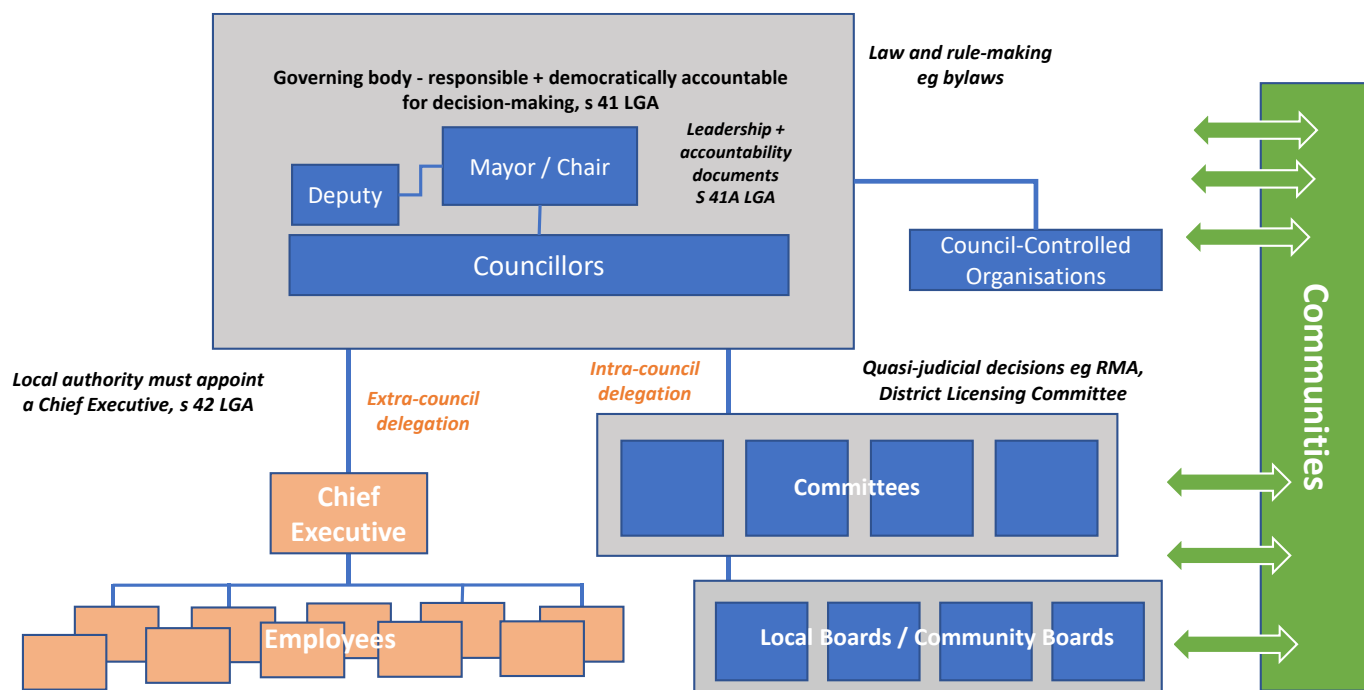
⁸⁴ LGA, Pt 4 and Sch 7.

⁸⁵ LGA, Pt 6.

⁸⁶ LGA, Sch 7.

governing body,⁸⁷ the mayor,⁸⁸ the CE⁸⁹ and the Minister.⁹⁰ Local authority roles are shown schematically in Figure 3 within the overall governance structure within a local authority.

Figure 3 Generic local authority governance and management structure



(a) The governing body

Local body elections are held every three years. The voting system is designed to be fair and effective, based on a plan endorsed by the local authority (“reorganisation plan”).⁹¹ The Local Electoral Act 2001 (LEA) prescribes the methods and processes that must be

⁸⁷ LGA, s 41.

⁸⁸ LGA, s 5(1); mayor of a territorial authority elected under the Local Electoral Act 2001. LGA, s 41(1)(b) “a chairperson elected by members of the regional council in accordance with clause 25 of Schedule 7”.

⁸⁹ Appointed pursuant to s 42 of the LGA.

⁹⁰ LGA, s 5.

⁹¹ LGA, Sch 3; LEA, ss 19Q, 19R. a “reorganisation plan” which considers representation of communities by elected members.

used in elections⁹² and the minimum and maximum numbers of elected members (refer Table 2). Electoral areas are based on subsets of parliamentary electorates, and defined as wards, communities, constituencies or subdivisions.⁹³

Table 2 Number of elected members required - Local Electoral Act 2001

Body and electoral area	Number of elected members	
Territorial authorities <i>Wards, Māori wards, communities</i>	6-30	Includes the mayor, who is elected by residents and ratepayers of the district as a whole and at the same time as councillors.
Regional councils <i>Constituencies, Māori constituencies</i>	6-14	Constituency representatives/councillors.
Local boards <i>Subdivisions</i>	5-12	At least 5 elected from wards or constituencies, others can be appointed if approved through a reorganisation plan.
Community boards <i>Subdivisions</i>	4-12	At least 4 elected from the community identified in a reorganisation plan; others can be appointed if approved through a reorganisation plan.

Local authorities must review their reorganisation plans at least once every six years and confirm by resolution the representation arrangements for subsequent elections.⁹⁴ If there is an appeal or objection, the local authority must forward it to the LGC who must consider and make a determination on the reorganisation plan.⁹⁵

The governing body is “responsible and democratically accountable for the decision-making of the local authority.”⁹⁶ In practice:⁹⁷

⁹² LEA, Pt 1. First-past-the-post (FPP) or single transferable vote (STV) must be used.

⁹³ LEA, ss 5 19A, 19D, 19EA, 19F; LGA ss 5, 19, 49, Sch 6.

⁹⁴ LEA, s19H (2).

⁹⁵ Local Electoral Act 2001, ss 19Q, 19R.

⁹⁶ LGA, s 41(3).

⁹⁷ Controller and Auditor General, above n 59, at [4.2]

Elected members are responsible for what their council does and how it does it. They are obliged to make decisions on behalf of their communities in a robust and transparent way.

The overarching governance principles are contained in s 39 of the LGA (emphasis added):

- (a) a local authority should ensure that the *role of democratic governance* of the community, and the expected conduct of elected members, is *clear and understood* by elected members and the community; and
- (b) a local authority should ensure that the *governance* structures and processes are *effective, open, and transparent*; and
- (c) a local authority should ensure that, so far as is practicable, responsibility and processes for decision-making in relation to *regulatory responsibilities is separated from responsibility and processes for decision-making for non-regulatory responsibilities*; and
- (d) a local authority should be a *good employer*; and
- (e) a local authority should ensure that the *relationship between elected members and management* of the local authority is *effective* and understood.

An example of the prescriptiveness in the legislation is in ss 76-79 which requires for *every* decision identify and assess the benefits and costs of all “reasonably practicable options”.⁹⁸

Perhaps the most important task of the governing body is to appoint a CE.⁹⁹ The relationship between governing body and CE is pivotal in ensuring the performance of a local authority against the governance principles in s 39 (see above, particularly s 39(d) and (e)).

⁹⁸ This mirrors ‘practice’ of the central government executive in terms of regulatory impact statements for regulatory proposals. However, in the case of central government, this is not prescribed in legislation.

⁹⁹ LGA, s 42, Sch 7 cls 33-34.

In appointing a CE, the LGA even suggests the characteristics of the person that the governing body *must* have regard to, that is, a person who will:¹⁰⁰

- (a) discharge the specific responsibilities placed on the appointee; and
- (b) imbue the employees of the local authority with a spirit of service to the community; and
- (c) promote efficiency in the local authority; and
- (d) be a responsible manager; and
- (e) maintain appropriate standards of integrity and conduct among the employees of the local authority; and
- (f) ensure that the local authority is a good employer; and
- (g) promote equal employment opportunities.

(b) The mayor

The mayor, is elected ‘at large’ by the electors¹⁰¹ and has two main roles. Firstly to provide leadership to the elected members and the people in the district.¹⁰² A mayor can appoint the deputy mayor and establish a committee structure which supports decision-making and administration (for example quasi-judicial decision-making, and decision-making on activities and services provided).¹⁰³ The mayor sits on all committees and “must preside” at meetings of the governing body.¹⁰⁴ Secondly, the mayor leads development of key accountability documents that set the council’s direction and approach to promoting the social, economic, environmental and cultural well-being of

¹⁰⁰ LGA, Sch 7 cl 33.

¹⁰¹ LGA, Sch 7, cl 25. In contrast, a regional council chair is appointed by the elected councillors using an internal voting system, LGA, Sch 7, cl 25.

¹⁰² LGA, s 41A, see Annex 1.

¹⁰³ Note if the mayor declines to do this, then the roles are elected by one of the voting systems in cl 25 Sch 7 LGA. The mayor also sits on every committee.

¹⁰⁴ LGA, Sch 7, cl 26.

communities in the district.¹⁰⁵ This includes the long-term plan, annual plan, policies and budgets that are considered by the governing body.¹⁰⁶

(c) The CE

A CE is critical to successful governance and management within a district or region. Along with the pre-requisites in the ‘person specification’,¹⁰⁷ a CE needs the acumen to lead and manage a multi-million-dollar business.¹⁰⁸

The requirements in s 42 cover duties to implement decisions of the governing body; advise; ensure compliance with law; ensure efficient and effective management; maintain systems; and employ staff, and provide leadership to staff.¹⁰⁹ In addition, the CE must facilitate and foster “substantial elector participation” in elections and polls held under the LEA.¹¹⁰

(d) Minister

Usually, it is the Minister of Local Government¹¹¹ that is delegated responsibility for the local government portfolio, within which lies responsibility for administration of the LGA in the government executive. The administering government department for the LGA is DIA. The main functions of the Minister, through DIA, the LGC and the Auditor-General (AG) relate to monitoring and oversight. The LGC has a similar power of general competence that a local authority has¹¹² but its core roles are to: provide information about local government, promote good practice;¹¹³ and oversee and manage

¹⁰⁵ LGA, s 10.

¹⁰⁶ LGA, s41A(2).

¹⁰⁷ LGA, Sch 7 cl 33, noted above.

¹⁰⁸ See Table 1, at 16.

¹⁰⁹ LGA, s 42, see Annex 1.

¹¹⁰ LGA, s 42(da); inserted through s 15 of the Local Government Regulatory Systems Amendment Act 2019.

¹¹¹ LGA, s 5 “Minister means the Minister of the Crown who, under the authority of any warrant or with the authority of the Prime Minister, is for the time being responsible for the administration of this Act.”

¹¹² Compare LGA, s 29 with s 12 (refer Annex 1).

¹¹³ LGA, s 30.

local government representation and council reorganisation initiatives.¹¹⁴

Under Pt 10, the Minister also has significant powers to intervene in local governance where there is “a problem”, which means:¹¹⁵

- (a) (i) a matter or circumstance relating to the management or governance of the local authority that detracts from, or is likely to detract from, its ability to give effect to the purpose of local government within its district or region; or
- (ii) a significant or persistent failure by the local authority to perform 1 or more of its functions or duties under any enactment; or
- (iii) the consequences of a state of emergency (within the meaning of section 4 of the Civil Defence Emergency Management Act 2002) affecting, or recently affecting, the local authority’s district or region; and
- (b) includes—
 - (i) a failure by the local authority to demonstrate prudent management of its revenues, expenses, assets, liabilities, investments, or general financial dealings; and
 - (ii) a potential problem within the meaning of paragraph (a)(i) or (ii); and
 - (iii) to avoid doubt, 2 or more problems within the meaning of paragraph (a) or subparagraph (i) or (ii) of this paragraph.

The Minister must also have regard to a list of matters relevant to determining what action, if any, to take, which must be published in the Gazette.¹¹⁶ It must contain the principles, matters likely to detract from the ability of local authorities to give effect to the purpose of local government and the types and sources of information the Minister is likely to consider.¹¹⁷ A copy of the list published by the Hon Nanaia Mahuta, Minister of

¹¹⁴ LGA, Sch 3.

¹¹⁵ LGA, s 256.

¹¹⁶ LGA, s 258O. Pt 10, sub-pt 1.

¹¹⁷ LGA, s 258O (2).

Local Government in March 2018 is included in Annex 2.¹¹⁸

The Minister's list includes guiding principles that recognise "local authorities accountabilities are to their ratepayers and residents" and "elections are the primary mechanism for communities to express satisfaction or dissatisfaction with elected Representatives". It notes that intervention should be proportionate to the problem in terms of the nature, scale, potential consequences and duration. In addition, the list highlights financial mis-management, significant failure in service delivery and or "dysfunctional governance"¹¹⁹ as matters that are likely to detract from the purpose of local government.

The trigger for use of such powers appears broad. It could be via a query or request from the LGC, the AG or DIA; or a member of the public or a request by the local authority concerned or another local authority. It could also be at the request of other local authorities as was the case that eventually resulted in the passing of the Environment Canterbury (Temporary Commissioners and Improved Water Management) Act 2010; and suspension of elections of regional councillors in Canterbury for nine years.¹²⁰

The Minister can request information¹²¹ or appoint Crown Review Team, a Crown Observer, a Crown Manager, or a Commission to investigate, report, provide oversight, guide or take over the governance and management of a local authority.¹²² Part 10 provides procedural steps for appointment of observers, managers or commissions who report direct to the Minister. The most drastic option is to replace

¹¹⁸ "Notice Regarding Ministerial Powers of Local Government Assistance and Intervention" (4 April 2018) *New Zealand Gazette* No 2018-go1558. See Annex 2.

¹¹⁹ *New Zealand Gazette* No 2018-go1558 above n 110. "Dysfunctional governance, which includes: failure or breakdown of key relationships; and/or serious capability deficiencies of elected members of the chief executive of the local authority."

¹²⁰ See full history in Mueller, above n 36.

¹²¹ LGA, Part 10, s 257.

¹²² LGA, Part 10, ss 258-258G.

the governing body with a commission and suspend elections.¹²³

The process steps commence such interventions under Pt 10 with the Minister issuing notice to the council,¹²⁴ giving a specified time limit for the local authority to respond.¹²⁵ However, it is not a ‘consultation’. The minister “may but is not obliged to” consult anyone¹²⁶ before issuing a gazette notice putting the chosen intervention option in place. While the Minister must have regard to the published list of matters guiding the decision to use intervention powers,¹²⁷ they may act as is seen fit and are not restricted to problems featured in the list.¹²⁸ The test is whether “the Minister believes, on *reasonable* grounds, that a *significant* problem” exists.¹²⁹ The interventions in Pt 10 are extremely powerful controls.

¹²³ In February 2021 the Minister of Local Government, Hon Nanaia Mahuta appointed four commissioners to act as governing body for Tauranga District Council. In April 2022, the commissioners were appointed for a further term until July 2024. Refer <https://www.tauranga.govt.nz/council/about-your-council/commissioners>; and “Appointment of Commission to Tauranga City Council” (5 February 2021) *New Zealand Gazette* No 2021-go384; and “Termination of the Current Commission and Appointment of a Further Commission to the Tauranga City Council” (4 April 2022) *New Zealand Gazette* No 2022-go1531.

¹²⁴ LGA, s 257.

¹²⁵ LGA, s 257(4) and (5).

¹²⁶ LGA, s 258N.

¹²⁷ LGA, s 258P(1).

¹²⁸ LGA, s 258P(2).

¹²⁹ LGA, ss 258-258M [emphasis added].

III Defining, Classifying and Mapping Public Accountability

The overarching accountability design of the LGA is based on a set of principles and values that apply to behaviours and conduct, and a prescriptive procedural code.

Sanctions or (consequences for actions taken) can be imposed on local government democratically through the election of mayors and governing bodies; by the courts in terms of review of decisions, appeals on regulatory decisions, redress for illegality or criminality; and by the Minister in terms of powers of intervention.

This part looks more closely at the accountabilities in the LGA using Bovens' assessment framework that was introduced in Part I. It considers the local government system by mapping the accountability relationships and identifying the types of accountability present. The benefit of this approach is that it can help to generate an evaluative criteria to test the accountability of a particular actor or if a proposal fits into a desired accountability goal.¹³⁰

A Defining and Classifying Accountability

For the purposes of this paper Bovens' definition of accountability has been adopted:¹³¹

A relationship between an actor and a forum, in which the actor has an obligation to explain and to justify his or her conduct, the forum can pose questions and pass judgement, and the actor may face consequences.

For there to be a *true* accountability relationship,¹³² all the features in the definition need to be present as shown in Bovens' model, shown in Figure 4.¹³³ Further, for there to be

¹³⁰ Thwaites and Knight, above n 7, at [14.2.1]. See also the framework to use as a "5-part benchmark" to evaluate accountability in Rock (above n 1) at [8.1, Table 8.1].

¹³¹ Bovens 2006, above n 4, at [24]. Bovens and Rock (above n 1) draw on a wide range of models and approaches and provide a thorough history of debate around evaluating accountability.

¹³² At [3.5]. Bovens refers to "full" accountability relationships.

¹³³ At Figure 1. Adapted.

public accountability, Bovens suggests the account-giving should be publicly accessible (the informing and debate where the actor explains and justifies conduct, and responds to questions).¹³⁴

Figure 4 Bovens' Accountability Model

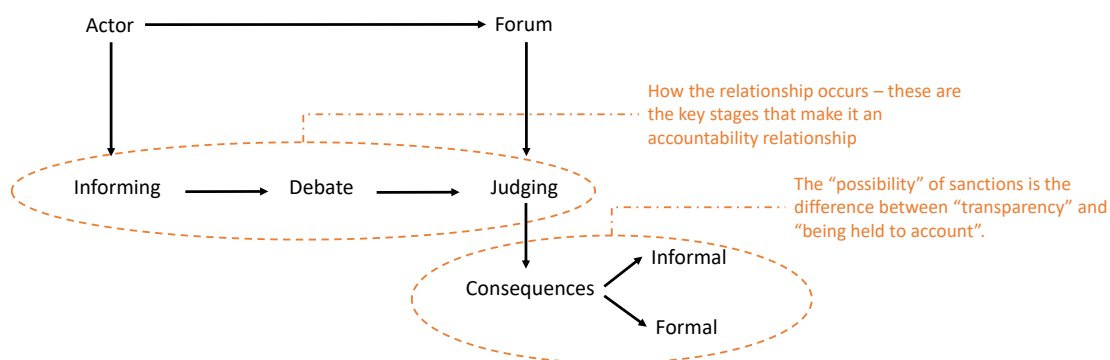


Table 3 summarises, at a system level, the types of accountability within Bovens' framework (refer to the first three columns on the left). Accountability mechanisms for forums are grouped into five types: political, legal, administrative, professional and social. For example, the Minister and a governing body, mayor and CE of a local authority would all have "legal" (to courts) and "administrative" (to auditors) accountabilities under the LGA. As actors, they would also be part of the chains of political accountability in some form – either through accountability or delegation.¹³⁵ Bovens sees these accountabilities typically relate to the "problem of many eyes".¹³⁶

Bovens identifies four strategies typically adopted by the public sector to manage the "problem of many hands": corporate, hierarchical, collective and individual.¹³⁷ For example, in the development of a Council policy, there would be many stages of development with different people and forums considering the policy before it is adopted and approved by a resolution of the governing body (which might include

¹³⁴ At [2.6].

¹³⁵ At 16. Bovens notes the importance of political accountability and that this mechanism "operates in the opposite direction to that of delegation".

¹³⁶ Noted in Part I above.

¹³⁷ Bovens 2006, above n 4, at 18. Bovens notes the difficulties in understanding who has done what, and who and to what degree an actor can be held to account for actions.

public engagement,¹³⁸ and input from an oversight agency like the AG).¹³⁹

The last two categories in Table 3 show the matters an actor has to explain in terms of financial, procedural or product/output (the nature of the conduct) and the degree an actor is *obliged* to justify their actions (nature of the obligation). Bovens notes that most political accountability arrangements based on delegations are mandatory (ie vertical). In the local government system all three forms (vertical, diagonal and horizontal) are evident. Examples of diagonal accountabilities would be the obligation to provide information to the LGC during an inquiry¹⁴⁰ or forward reports and information to the AG. Note the AG has no power to impose consequences on a local authority in light of the information given. The direct legal and administrative accountability is to the Minister (not Parliament or governing body or local community).

B Mapping Local Government Accountabilities

Figure 5 shows conceptually the accountability relationships (orange lines) and delegations (blue lines) between elected representatives to Parliament (on the left), to a local authority (in the middle) through to local communities (voters in local body elections). Surprisingly, under the LGA, there are no direct lines of accountability from a governing body to Parliament or the Minister responsible for the LGA.¹⁴¹

¹³⁸ For example, in line with a significance and engagement policy adopted by the Council under s 76AA of the LGA.

¹³⁹ For example, a long-term plan, annual plan, annual report (LGA, Pt 6, ss 93, 95, 98). Noting that Pt 6 also requires a range of strategies and policies, for example, financial strategy (s 101 A), infrastructure strategy (s 101B), funding and finance policies (s 102), revenue and financing policy (s 103), rates policies (ss 110, 111), and investment policy (s 105).

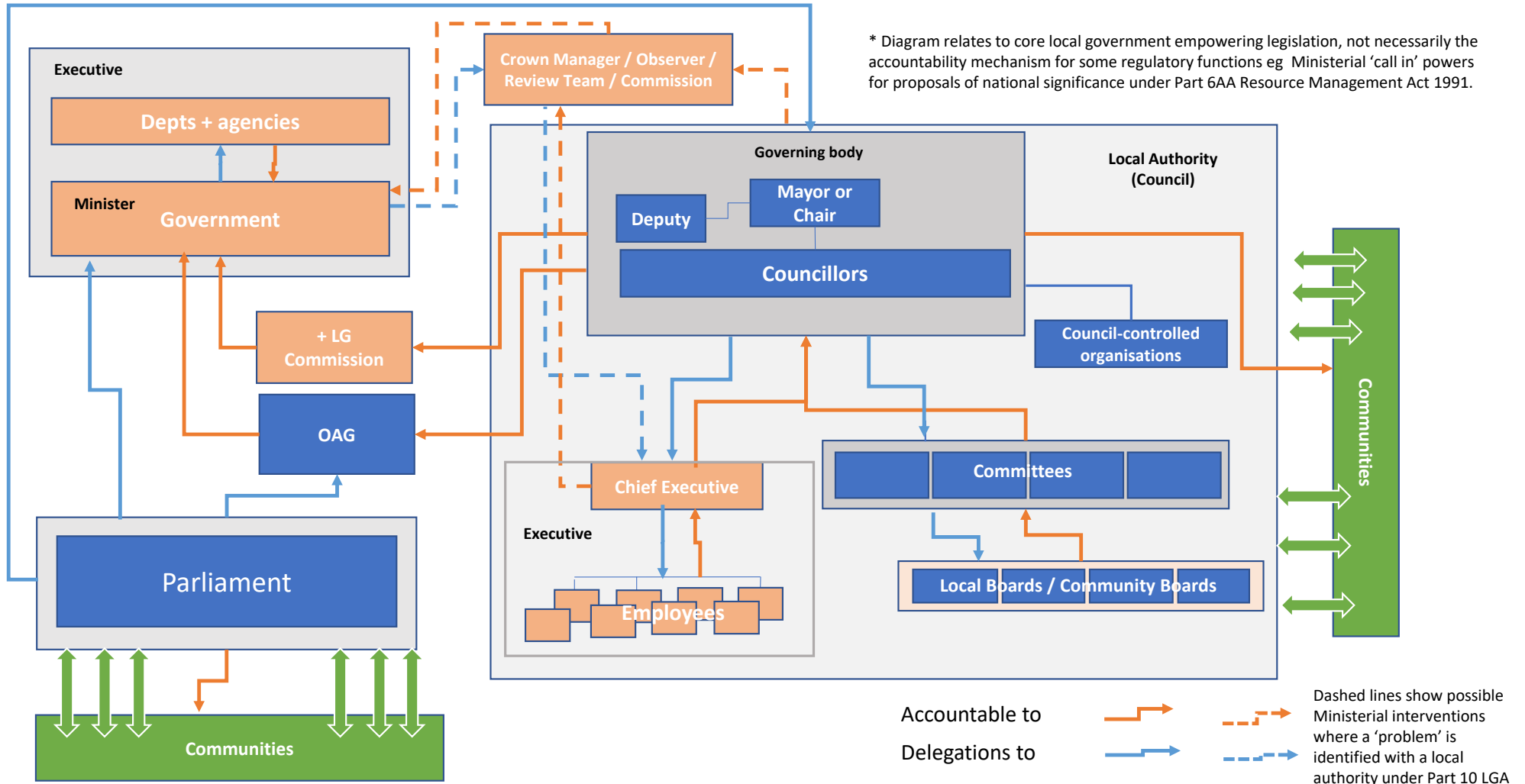
¹⁴⁰ LGA, s34; Inquiries Act 2013, Pt 3.

¹⁴¹ Note that under regulatory regimes there can be specific accountabilities to a Minister or Parliament, such as under Part 6AA of the Resource Management Act 1991, that relates to Ministerial “call-in” powers for nationally significant proposals for resource consents and changes to resource management policies and plans.

Table 3 Classification of Accountability and the Range of Accountabilities in Key Roles Under the Local Government Act 2002

Accountability			Predominant accountability relationships for actors evident under the Local Government Act 1991			
Based on	Types	Examples	Minister	Governing Body	Mayor	Chief Executive
Nature of the forum – to whom are they accountable	Political	Elected representatives, political parties, voters, media – includes within institutions (intra-political) or between government institutions (inter)	Political (inter- + intra) Legal Administrative	Political Legal Administrative Social	Political Legal Administrative Social	Intra-political Legal Administrative
	Legal	Courts				
	Administrative	Auditors, inspectors, controllers (financial, procedural, output/product)				
	Professional	Professional peers				
	Social	Interest groups, charities, other stakeholders				
Nature of the actor - who is accountable?	Corporate	The organisation as actor who can be held accountable	Hierarchical Individual	Hierarchical Corporate Collective	Hierarchical Individual	Hierarchical Corporate Individual
	Hierarchical	One for all – strict chains of command from the top				
	Collective	All for one – every member can be held accountable				
	Individual	Each for him/herself – proportionate accountability				
Nature of the conduct – for what?	Financial	Financial management	Procedural Product	Financial Procedural Product	Financial Procedural Product	Financial Procedural Product
	Procedural	Managing process and administration				
	Product	Delivering products or outputs				
Nature of the obligation – how do they account?	Vertical	Mandatory - forum compels actor to give account	Vertical Diagonal Horizontal	Vertical Diagonal Horizontal	Vertical Horizontal	Vertical Diagonal Horizontal
	Diagonal	Intermediary supervises conduct and reports to elected representatives				
	Horizontal	Voluntary or moral obligation to give account – not based on legal requirements				

Figure 5 Generic Accountabilities of a Local Authority Under the Local Government Act 2002



IV Evaluating Public Accountability in Local Government

The discussion and mapping of accountabilities developed in Parts II and III show there is a strong focus on administrative and legal accountability in the LGA. In contrast, there are less obvious, or perhaps more convoluted, chains of political accountability.

This part discusses the last element in Bovens' framework – an evaluation against three perspectives (democratic, constitutional and learning) as outlined in Part 1.¹⁴² In light of the time and word limit, this part serves only as a *snapshot* to highlight the inter-relationships between Minister, mayor, governing body and CE under the LGA.¹⁴³

A A Snapshot of Findings

Based on the discussion and mapping of accountabilities developed in Parts II and III, a *snapshot* of examples is shown in Table 4. The examples show the extent of information provision, debate and consequences within the accountability relationships under the LGA as either weak, moderate, strong, or very strong.¹⁴⁴

Further reflections on the summary findings in Table 4 are provided in sub-section B.

¹⁴² Bovens, Schillemans and 'T Hart, above n 6, at 231–232; refer Tables 1, 2 and 3. The methodology describes the central evaluation criteria and provides a series of “concrete” evaluation questions.

¹⁴³ In the timeframe and word limit, it was not possible to conduct an in-depth study based on qualitative data, suitably gathered through interviews with a statistically significant sample of central and local government officials and representatives.

¹⁴⁴ This is not an in-depth or precise analysis, it is illustrative of how the framework can be used.

Table 4 Snapshot of Local Government Act 2002 Accountabilities - Summary Findings

	Democratic	Constitutional	Learning
Information provision	<p><i>Democratic chain of delegation is informed about the conduct and consequences of executive actors.</i></p> <p>Strong – the CE produces significant information for the governing body.</p> <p>Strong – local authorities produce significant information for the Minister via regular reporting to the CAG and on request by the LGC or Minister.</p> <p>Weak – Minister generates limited information about local government performance directly to Parliament.</p>	<p><i>Forum gains insight into whether agent's behaviour is in accordance with laws, regulations and norms.</i></p> <p>Strong – the obligations and requirements in the LGA are prescriptive; responsibility lies with the CE to implement. Mayors lead processes for key accountability documents which must be endorsed by the CAG. CAG provides range of regular monitoring reports for the Minister and the public.</p>	<p><i>Information gathering and provision routines yield an accurate, timely and clear diagnosis of important performance dimensions.</i></p> <p>Strong – assumed each local authority has sound grasp of performance in processes to develop key accountability documents – even though they are voluminous and difficult to understand</p> <p>Moderate – monitoring role of CAG provides a range of consolidated reports on sector performance against prescriptive requirements in the LGA for financial management and efficiency of service delivery (trust and confidence); less so in terms of assessment of performance against desired outcomes.</p>
Debate	<p><i>Interaction concentrates on conformity of action with principal's preferences.</i></p> <p>Strong – governing body and CE eg via council meetings, at performance review</p> <p>Weak – governing body and local communities have limited opportunity to debate merits of Ministerial interventions.</p>	<p><i>Interaction concentrates on conformity of actions with laws and norms.</i></p> <p>Strong – obligations in LGA on CE to demonstrate compliance through approval of key accountability documents, regular financial and management reporting cycles.</p>	<p><i>Ongoing, substantial dialogue with clients and other stakeholders about performance feedback.</i></p> <p>Strong – LGA requires significant consultation and opportunities to debate significant issues eg through long-term plans, annual plans and reports; but also on decisions (strategies, policies or activities) affecting communities. Mayor leads process on key accountability documents and governance structures to support decision-making of the governing body; CE enables governance structures, processes and opportunities for public and stakeholders to provide input.</p>
Consequences	<p><i>Ability of democratic chain of delegation to modify the actor's policies and/or incentive structures.</i></p> <p>Strong – with ratepayers/local residents through triennial elections of the governing body.</p> <p>Very strong – ministerial interventions can include replacing governing body and suspending elections.</p>	<p><i>Forum should be able to exercise credible 'deterrence' vis à vis the actor.</i></p> <p>Very strong – ministerial interventions can replace a CE and governing body, and suspend elections for an indefinite time.</p> <p>Moderate – judicial review can be time consuming and require policy and consultative processes to be revisited.</p>	<p><i>Sufficiently strong outside actors to make accountors anticipate, yet sufficiently 'safe' culture of sanctioning to minimise defensive routines.</i></p> <p>Weak – there are strong outside actors (CAG, LGC) who can influence performance, but do not have powers of sanction. Ministerial sanctions imposed have been blunt and have led to criticism of their use and lack of collaboration in finding solutions.</p> <p>Strong – judicial review appears important in terms of driving decision-making and consultation practices; a CE plays a pivotal role in ensuring legal and ethical norms are complied with.</p>
Cumulative effect	<p><i>Actor acceptance of principal's right to control its policies and performance.</i></p> <p>Moderate – sector acceptance that ministerial intervention might be necessary; but wary of politically motivated use of powers.</p>	<p><i>Actor awareness that powerful watchdog(s) observe its integrity and check its powers.</i></p> <p>Very strong – for all actors; reputational, administrative and legal risk for individual organisations and on a sector scale. Poor performance can lead to significant intervention by the Minister, but also risk law change imposed through Parliament that has negative impact on local authority roles and responsibilities.</p>	<p><i>Actor commitment to continuous improvement by dialogue-induced focus on outcome achievement.</i></p> <p>Strong – incentive for CE to demonstrate continuous improvement approach; and for governing body to ensure community outcomes are identified, agreed and performance is made towards them.</p>

B Further Reflections on the LGA framework – Exercising Power and Controlling Power

1 Democratic perspective – accountability and popular control

(a) Unfettered ministerial control?

The overall democratic control is through elections of the governing body (including the mayor) and the Minister:

Direct responsibility to the electorate is the exemplar of the democratic perspective. The forum is a public one, where electors assess the performance of their delegates over the preceding term against the electors' preference, both in terms of policies they supported and bureaucratic culture and behaviour they exhibited.¹⁴⁵

The Minister acts at a national level and is not directly accountable in the same way a mayor or councillors are to the local community that elects them.

There is very limited information provided formally to Parliament about the performance of a local authority. There are no regular reports required to be tabled in the House and neither is there a forum to debate such information.¹⁴⁶ In addition, the LGC can, in effect, report to the Minister on anything considered “appropriate”.¹⁴⁷

A governing body is not regularly required to interact with the Minister.¹⁴⁸ Only where a Minister has chosen to investigate a “problem”¹⁴⁹ is there “information provision”, but

¹⁴⁵ Thwaites and Knight, above n 7, at [14.3.3].

¹⁴⁶ Noting there are reports provided to the Minister by the Local Government Commission and the AG. As an officer of Parliament, the AG is accountable to Parliament as an agency, and the Local Government Commission is accountable to Parliament via the Minister of Local Government. See also Public Finance Act 1989.

¹⁴⁷ LGA, s 31.

¹⁴⁸ There are of course practical considerations in how should or could a Minister (and or department) effectively have direct relationships with 78 local authorities.

¹⁴⁹ LGA, Pt 10 covers the powers of the Minister; s 256 defines “problem”.

there is limited “debate”. In the extreme, the Minister can suspend elections and replace the CE (“consequences”). However, there is a gap in the chain of accountability—there is no *obligation* on the Minister to consult or invite debate with a local authority or a local community regarding use of intervention powers in Pt 10 of the LGA.¹⁵⁰

A useful reminder of the supremacy of Parliament is the example of intervention in the Canterbury region that resulted in the Environment Canterbury (Temporary Commissioners and Improved Water Management) Act 2010 (ECan Act).¹⁵¹ The grounds under the LGA at the time related to whether a local authority was *wilfully* refusing or *substantially* refusing to perform and exercise its duties and power under the LGA or any other enactment; and that it is impairing good local government or likely to endanger public health or safety.¹⁵² It was a high profile situation, showing national and local frustration with the conflicting measures and decision-making regarding water rights, irrigation and land use planning to enable economic development. Despite this, Ministers did not rely on LGA (or powers under the Resource Management Act 1991). Instead, the government following commissioning a review¹⁵³ pushed through separate legislation, the ECan Act, which led to suspending local body elections for regional councillors in the Canterbury region for the following nine years.¹⁵⁴ Suffice to say this outraged many commentators and legal scholars, including Philip Joseph who declared the approach taken “disproportionate and excessive”.¹⁵⁵

¹⁵⁰ LGA, s 258N expressly notes “The Minister may, but is not obliged to, consult any person, organisation, or group”. However, the benefits in terms of improving cooperation and reputational risk, a Minister would likely ensure some form of dialogue takes place with the local authority and the local community before making a decision to intervene.

¹⁵¹ Mueller, above n 36. Mueller provides history and commentary on this example.

¹⁵² Noting that s 256 was replaced by s 31 of the Local Government Act 2002 Amendment Act 2012.

¹⁵³ The assessment of performance of Environment Canterbury in discharging its responsibilities under the Resource Management Act 1991 and the LGA was led by Wyatt Creech for the Minister for the Environment and the Minister of Local Government in 2009.

¹⁵⁴ Wyatt Creech *Investigation of the Performance of Environment Canterbury under the Resource Management Act & Local Government Act* (Ministry for the Environment 2010) at 1.

¹⁵⁵ Philip Joseph “Environment Canterbury legislation” (2010) NZLJ 193 at 196.

There is no “full” accountability relationship between a local authority and the Minister or to Parliament under the LGA. As Laura Hardcastle notes, the intent of the provisions in Pt 10 are to prevent harm to a community, but it affords ministers too much discretion; a poorly executed or politically motivated intervention will potentially harm local democracy by not taking local conditions into account and risks a concentration of power with the Minister.¹⁵⁶

There are significant incentives for the local authority to strive to perform well in light of the powers of intervention by the Minister, the reporting requirements to the public, the AG and the LGC, or the transparency of the reporting regimes. No CE would ordinarily want the Minister to take over management of the local authority from them, and few elected members would wish to be ousted in favour of a Ministerially-appointed commission.

(b) Mayor and governing body - setting direction

The main opportunity for a governing body to set direction for a district or region is through key accountability documents such as the long-term plan (overarching outcomes, priorities and budgets) the annual plan and other strategies and policies. The *process* is led by the mayor. The governing body must consider these key documents and the implications as presented/developed by the CE and test it through consultation processes. The LGA prescribes much of the content for these documents. The CE controls much of what, how and when information is presented to the governing body and the public. However, it is the governing body that passes resolutions to adopt such documents – which are, in some cases (like the long-term plan) difficult for an ordinary person to engage with (for example, in consultation and perhaps in oversight by elected

¹⁵⁶ Laura Hardcastle “For the People, by the Minister: Ministerial Interventions in Subnational Elected Bodies and a Principled Approach to Their Future Use” (2015) 13 New Zealand Journal of Public and International Law 297 at 298. For a full account of the imposition of Commissioners under Pt 10 LGA see also Mueller, above n 36.

members).¹⁵⁷ With such levels of prescription, there is potential “capture” of the governing body by the executive.¹⁵⁸

The governing body *can* hold the CE to account because of the processes set out in the LGA. The governing body must hear public comments, reflect on them and the impacts on the people within the district or region they represent, and then make a decision. It is only through elections every three years that the mayor and councillors are held to account. While there is opportunity for a newly formed council to change the direction of a long-term plan, in practice, the complexity and requirements make it difficult for a governing body to shape it considerably to a policy platform within one three-year term.

2 *Constitutional perspective*

(a) Constitutional tension – principles and prescription

The principles in the LGA provide empowerment, but expectations of legal accountability are to seek more precision. Here lies a constitutional conundrum for ministerial oversight: a local authority is a creature of statute, but it is also a body corporate with perpetual succession;¹⁵⁹ is empowered to collect taxes (but limited to a property-based tax);¹⁶⁰ it has the power of general competence, that is “full capacity to carry on or undertake any activity or business, do any act or enter into any transaction”;¹⁶¹ and its statutory role in its district or region is:¹⁶²

- a) to enable democratic local decision-making and action by, and on behalf of, communities; and

¹⁵⁷ Controller and Auditor General *Long-term plans* (Office of the Auditor-General, Wellington, 2018) at [3.28]. Note that capability and capacity of elected officials to engage with such material is a common theme in commentary. For example see Asquith, above n 58, at 79.

¹⁵⁸ Asquith, above n 58, at 79.

¹⁵⁹ LGA, s 12(1).

¹⁶⁰ Local Government (Rating) Act 2002.

¹⁶¹ LGA, s 12(2).

¹⁶² LGA, s 10 (1).

- (b) to promote the social, economic, environmental, and cultural well-being of communities in the present and for the future.

In addition, s 12 of the LGA requires a territorial authority to exercise its powers “wholly or principally for the benefit of its district” and a regional council for the benefit “of all or a significant part of its region, and *not for the benefit of a single district*”¹⁶³ (emphasis added). However, a local authority is ultimately, as Mike Reid puts it, at the “whim” of parliament¹⁶⁴ – in terms of the prescription in statute, rather than the principles that establish and enable a local authority to govern and administer. This *whim* characterises the relationship between the two spheres of government.

At a system level, the assessment reveals a dilemma between principles and prescription in the LGA. This has also been shown in the courts’ views of the role of local government and its decision-making, particularly regarding rating. For example in *Mackenzie District Council v Electricity Corporation of New Zealand*, local government was seen as having:¹⁶⁵

... only a subordinate role in our system of government. It is a statutory creation exercising the local and special purpose functions reposed in territorial authorities by Parliament. It is not to be viewed in high policy terms as the alter ego of central Government.

And yet, a more pragmatic stance was taken in *Wellington City Council v Woolworths New Zealand Ltd.*¹⁶⁶ The political decisions a governing body can or needs to make in a principles-based framework were acknowledged.¹⁶⁷

¹⁶³ LGA ss 12 (4) and (5).

¹⁶⁴ Reid 2011, above n 37, at 2.

¹⁶⁵ *Mackenzie District Council v Electricity Corporation of New Zealand* [1992] 2 NZLR 41 (CA) per Richardson J at 3.

¹⁶⁶ *Wellington City Council v Woolworths New Zealand Limited (No 2)* [1996] 2 NZLR 537 [*Woolworths*].

¹⁶⁷ *Woolworths* per Richardson P above n 166 at 26 and 27-28. Contrast with the successful challenges to the reasonableness of rating decisions in *Rogan v Kaipara District Council* [2018] NZCA 478 and *CP Group Limited & Ors v Auckland Council* [2020] NZHC 89.

...for decisions to be invalidated as "unreasonable", to repeat expressions used in the cases, they must be so "perverse", "absurd" or "outrageous in [their] defiance of logic" that Parliament could not have contemplated such decisions being made by an elected Council.

... The Legislature has chosen not to specify the substantive criteria but rather to leave the overall judgment to be made in the round by the elected representatives.

(b) Decision-making – the pivotal role of the CE

Every decision a governing body takes (a *council* decision) is a conscious decision whether to accept the advice and/or a recommendation put to it by/through the CE. The governing body is not obliged to endorse a recommendation, proposal, policy or plan, or to take a particular course of action. It is clear from the courts' interpretation a *council* decision is made by the governing body, not the CE.¹⁶⁸

In practice, the consequences or sanctions the governing body can impose on the CE are as varied as the decisions put before it to endorse. Perhaps the top three examples of *mechanisms* a mayor and governing body can use to hold the CE to account are through regular council meetings,¹⁶⁹ at performance review¹⁷⁰ and the result of performance

¹⁶⁸ For example, see *Cain v Canterbury Regional Council* [1998] EMC Christchurch CC36/98 at 5. The Court considered the difference between governance by the elected members (to establish policy, set the annual plan and budget) and day-to-day management of the chief executive (ensure that Acts and regulations are complied with, employ staff, and operations, activities and planning of the Council were managed effectively, efficiently and economically).

¹⁶⁹ For example, requesting and receiving reports/information from a CE; seeking further information about a matter presented to a meeting; hearing the account; making a judgment about whether to accept or not a recommendation.

¹⁷⁰ The LGA provides a clear framework from the qualities the governing body should look for in its employee and the obligations of the role (s 42, Sch 7, cl 33 LGA), the process to appoint them, and how their performance is reviewed. The governing body, in line with a performance agreement with the chief executive must consider the "the mix of skills and attributes possessed by the chief executive, and the degree to which they are consistent with the skills and attributes that the local authority considers necessary for the future."

audits by external organisations.¹⁷¹

3 *Learning perspective*

There is a strong interplay between the constitutional and learning perspectives in Bovens' perspectives. The LGA includes a myriad of procedural requirements that require a local authority to consult, inform or seek endorsement of statutorily required documents from the AG.¹⁷² While the process for these documents is led by the mayor, it is enabled by the CE. The AG provides an intensive monitoring and influencing role (but with no formal forum for debate or powers of sanction). The AG's focus is to improve sector performance through financial management and efficiency of service delivery as a means to build public trust and confidence in the sector. There appears less emphasis on performance against desired outcomes – at a national or local scale.

The incentives in the LGA framework can be said to encourage a continuous learning approach.¹⁷³ This is, no doubt related to the strong emphasis on quality performance in the legislative design.

Perhaps the ultimate *encouragement* from the legal accountability side is that of the role of judicial review, particularly regarding the role of common law principles and the meeting point between the common sense, principled approaches in administrative law and the interpretation of regulatory accountability.¹⁷⁴ The courts' acknowledgement of *context* along with a reluctance to engage in what would amount to a merits review in

¹⁷¹ The chief executive is responsible for securing the CAG's endorsement of key accountability documents; and ensuring appropriate information is available for any inquiry or action of the LGC or the Minister.

¹⁷² LGA, s 94. See also LGA, Pt 6 which includes requirements on local authorities to have a long-term plan (s 93) and a range of policies such as an infrastructure strategy (s 101B) and a finance and funding policy (s 102).

¹⁷³ Rock above n 1 at [8.1] Note the suggestion that transparency is a "fundamental prerequisite to accountability" to discover and respond to "maladministration" and forms a strong deterrent.

¹⁷⁴ Thwaites and Knight, above n 7, at [14.1].

complex disputes of fact¹⁷⁵ could indicate a broader respect for the democratic role of local government.¹⁷⁶ However, among legal scholars, the deterrence effect that judicial review doctrine forms is debatable in that it can be seen to be more about *consequences* of non-compliance as opposed to *learning*.¹⁷⁷ However, from a public sector management perspective, the risk of judicial review is taken seriously in practice.¹⁷⁸

¹⁷⁵ At [14.3.2]. Refers to analysis of *Lab Tests Auckland Ltd v Auckland District Health Board* [2008] NZCA 385, [2009] 1 NZLR 776.

¹⁷⁶ See Graham Taylor “Judicial Review and Rating: a Brief History” 27 May 2022 Capital Letter. Suggests since *Woolworths* above n 161, the prospects of challenging council decisions have significantly declined and requires an “objective failure” of local government to succeed. References: *Mackenzie District Council v Electricity Corporation of New Zealand* [1992] 2 NZLR 41; *Mangawhai Ratepayers and Residents Inc v Kaipara District Council* [2016] NZSC 48; *Rogan v Kaipara District Council* [2018] NZCA 478; *Kidd v Southland District Council* [2019] NZHC 1947; *CP Group Limited & Ors v Auckland Council* [2020] NZHC 89; *New Zealand Forest Owners Association Inc v Wairoa District Council* [2022] NZHC 761.

¹⁷⁷ Thwaites and Knight, above n 7, at [14.3.1]. Thwaites and Knight note more empirical evidence is needed.

¹⁷⁸ For example, see Crown Law *Te Pouārahi, The Judge Over Your Shoulder, A Guide to Good Decision-making and the Law in New Zealand* (2019).

V Conclusions

There is no accountable governance without accountability arrangements.

Accountability mechanisms keep public actors on the virtuous path and prevent them from going astray.¹⁷⁹

As discussed throughout this paper, accountability is “a relational mechanism that can be analysed within the framework of the questions: *who* is accountable, to *whom*, for *what* and *how*?”¹⁸⁰

Public accountability is not necessarily the “solution to all problems” in the public sector.¹⁸¹ In Bovens’ terms, the legislative framework of the LGA provides more for “preventing the development of concentrations of power” in the local authority executive rather than acting as a democratic means to “monitor and control” wider government conduct.¹⁸²

The mapping and evaluation process allude to the LGA being weak democratically, but strong constitutionally. The weakness is particularly shown in the intervention powers of the Minister under Part 10 of the LGA and the concentration of power in the Minister – with limited oversight of Parliament. This points to the need to consider the merits of further controls over the exercise of ministerial powers, perhaps in terms of participation of the affected local authority and affected communities prior to ministerial decision-making, and reinforcing natural justice provisions.

From a constitutional perspective, a strength of the LGA framework is the extensive range of checks and balances. These are predominantly in prescriptive requirements but

¹⁷⁹ Bovens 2010, above n 5 at 963.

¹⁸⁰ Rock, above n 1, at 13.

¹⁸¹ Controller and Auditor General, above n 2, at [5.40].

¹⁸² Bovens 2006, above n 4, at 25. References P Aucoin and R Heintzman “The dialectics of accountability for performance in public management reform” 2000 *International Review of Administrative Sciences* 45.

serve the important function of tempering executive power, particularly over the activities of the CE.

The assessment reveals the *power* lies with the CE. A CE is empowered to act; incentivised to ensure proper conduct of the local authority as a body corporate through the roles of monitoring entities, the governing body and the courts; and in practice *controls* all activities the local authority is involved in. The CE controls the flows of information and advice that the governing body (and wider public) rely on for decision-making.

At a system level, the assessment also reveals the dilemma between principles and prescription in the LGA. It is relatively straight-forward for the government of the day to “overload” a statute with prescriptive requirements if it lacks confidence (or distrusts) in the ability of local government to achieve the outcomes expected in the statute. It is much harder to use principles to influence or incentivise local government, especially if there is a discrepancy in the interpretation of community needs and expectations between central and local government. Addressing this would require strong collaboration and partnership between central and local government. An “overload” in prescription therefore indicates a level of immaturity in the relationship between central and local government.

Re-balancing the LGA between empowering local authorities through principles and providing appropriate checks and balances might involve introducing:

- (i) Mechanisms of accountability direct to Parliament eg when considering law affecting local government¹⁸³ or making the LGC an office of Parliament with a formal system monitoring function.¹⁸⁴

¹⁸³ Reid 2018, above n 47, at 18.

¹⁸⁴ As opposed to a commission reporting through the Minister or system monitoring by DIA; and retaining the audit role of the CAG. Note Taiuarā Local Government Professionals Aotearoa has

- (ii) A more principled approach to ministerial intervention, taking greater account of democratic accountability and subsidiarity.¹⁸⁵
- (iii) A constitutional recognition of local government and the subsidiarity principle.¹⁸⁶

Bovens' framework¹⁸⁷ provides some clear insights that can be used to improve future legislative design if we consider the accountability mechanisms and look to the underlying rationale of democratic, constitutional and learning formed by the questions: *who* is accountable, *to whom*, *for what* and *how*?

Perhaps it is lazy governance if we rely only on prescription in statute and legal accountability as the main mechanisms of control; and by doing so place less importance on mapping progress towards community outcomes *collaboratively* through the activities of all spheres of government.

developed a range of initiatives and tools to support local authorities, including the “Well-beings Project” which uses a common set of indicators to support councils monitoring outcomes. However, this is not linked to the legislative framework.

¹⁸⁵ Hardcastle, above n 156, at 344. Notes a principled approach “might inform use of intervention powers beforehand, or allow retrospective analysis, through judicial review or otherwise. Alternatively, they may clarify legislation through inclusion as mandatory considerations for decisionmakers.”

¹⁸⁶ Geoffrey Palmer and Andrew Butler *A Constitution for Aotearoa* (Victoria University Press 2016) at 73. See the discussion of safeguards at 175 and rationale for constitutional protection for local government.

¹⁸⁷ And adaptations of the framework by Rock, above n 1, at 13–14. Includes adopting a more nuanced series of underlying rationales to ask the questions *who should* be accountable, *to whom*, *for what* and *how*?

Annex 1 Extracts from the Local Government Act 2002

3 Purpose

The purpose of this Act is to provide for democratic and effective local government that recognises the diversity of New Zealand communities; and, to that end, this Act—

- (a) states the purpose of local government; and
- (b) provides a framework and powers for local authorities to decide which activities they undertake and the manner in which they will undertake them; and
- (c) promotes the accountability of local authorities to their communities; and
- (d) provides for local authorities to play a broad role in promoting the social, economic, environmental, and cultural well-being of their communities, taking a sustainable development approach.

10 Purpose of local government

- (1) The purpose of local government is—
 - (a) to enable democratic local decision-making and action by, and on behalf of, communities; and
 - (b) to promote the social, economic, environmental, and cultural well-being of communities in the present and for the future.

12 Status and powers

- (1) A local authority is a body corporate with perpetual succession.
- (2) For the purposes of performing its role, a local authority has—
 - (a) full capacity to carry on or undertake any activity or business, do any act, or enter into any transaction; and
 - (b) for the purposes of paragraph (a), full rights, powers, and privileges.
- (3) Subsection (2) is subject to this Act, any other enactment, and the general law.
- (4) A territorial authority must exercise its powers under this section wholly or principally for the benefit of its district.
- (5) A regional council must exercise its powers under this section wholly or principally for the benefit of all or a significant part of its region, and not for the benefit of a single district.
- (6) Subsections (4) and (5) do not—
 - (a) prevent 2 or more local authorities engaging in a joint undertaking, a joint activity, or a co-operative activity; or
 - (b) prevent a transfer of responsibility from one local authority to another in accordance with this Act; or
 - (c) restrict the activities of a council-controlled organisation; or
 - (d) prevent a local authority from making a donation (whether of money, resources, or otherwise) to another local authority or to a person or organisation outside its district or region or outside New Zealand—
 - (i) if the local authority considers, on reasonable grounds, that the donation will benefit its district or region, or the communities within its district or region; or
 - (ii) if the local authority considers, on reasonable grounds, that a benefit will be conferred on the local government sector as a whole; or
 - (iii) for emergency relief; or
 - (e) prevent a local authority from making a donation (whether of money, resources, or otherwise) to a local government body outside New Zealand to enable it to share its experience and expertise with that body.

14 Principles relating to local authorities

- (1) In performing its role, a local authority must act in accordance with the following principles:
 - (a) a local authority should—
 - (i) conduct its business in an open, transparent, and democratically accountable manner; and
 - (ii) give effect to its identified priorities and desired outcomes in an efficient and effective manner;
 - (b) a local authority should make itself aware of, and should have regard to, the views of all of its communities; and
 - (c) when making a decision, a local authority should take account of—
 - (i) the diversity of the community, and the community's interests, within its district or region; and
 - (ii) the interests of future as well as current communities; and
 - (iii) the likely impact of any decision on each aspect of well-being referred to in [section 10](#);
 - (d) a local authority should provide opportunities for Māori to contribute to its decision-making processes;
 - (e) a local authority should actively seek to collaborate and co-operate with other local authorities and bodies to improve the effectiveness and efficiency with which it achieves its identified priorities and desired outcomes; and
 - (f) a local authority should undertake any commercial transactions in accordance with sound business practices; and
 - (fa) a local authority should periodically—
 - (i) assess the expected returns to the authority from investing in, or undertaking, a commercial activity; and
 - (ii) satisfy itself that the expected returns are likely to outweigh the risks inherent in the investment or activity; and
 - (g) a local authority should ensure prudent stewardship and the efficient and effective use of its resources in the interests of its district or region, including by planning effectively for the future management of its assets; and
 - (h) in taking a sustainable development approach, a local authority should take into account—
 - (i) the social, economic, and cultural well-being of people and communities; and
 - (ii) the need to maintain and enhance the quality of the environment; and
 - (iii) the reasonably foreseeable needs of future generations.
- (2) If any of these principles, or any aspects of well-being referred to in [section 10](#), are in conflict in any particular case, the local authority should resolve the conflict in accordance with the principle in subsection (1)(a)(i).

Section 14(1)(c)(iii): replaced, on 14 May 2019, by [section 7\(1\)](#) of the Local Government (Community Well-being) Amendment Act 2019 (2019 No 17).

29 Commission is body corporate with full powers

- (1) The Commission is a body corporate with perpetual succession.
- (2) For the purpose of performing its functions, the Commission has—
 - (a) full capacity to carry on or undertake any activity, do any act, or enter into any transaction; and
 - (b) for the purposes of paragraph (a), full rights, powers, and privileges.
- (3) The Commission is a public office for the purposes of the [Public Records Act 2005](#).

Section 29(3): inserted, on 22 October 2019, by [section 15](#) of the Local Government Act 2002 Amendment Act 2019 (2019 No 54).

30 Functions and powers of Commission

- (1) The Commission has the functions, duties, and powers conferred on it by this Act or any other enactment.
- (2) Without limiting subsection (1), the Commission may—
 - (a) provide information about local government; and
 - (b) promote good practice relating to a local authority or to local government generally.

Compare: 1974 No 66 s 37W

41A Role and powers of mayors

- (1) The role of a mayor is to provide leadership to—
 - (a) the other members of the territorial authority; and
 - (b) the people in the district of the territorial authority.
- (2) Without limiting subsection (1), it is the role of a mayor to lead the development of the territorial authority's plans (including the long-term plan and the annual plan), policies, and budgets for consideration by the members of the territorial authority.
- (3) For the purposes of subsections (1) and (2), a mayor has the following powers:
 - (a) to appoint the deputy mayor;
 - (b) to establish committees of the territorial authority;
 - (c) to appoint the chairperson of each committee established under paragraph (b), and, for that purpose, a mayor—
 - (i) may make the appointment before the other members of the committee are determined; and
 - (ii) may appoint himself or herself.
- (4) However, nothing in subsection (3) limits or prevents a territorial authority from—
 - (a) removing, in accordance with [clause 18](#) of Schedule 7, a deputy mayor appointed by the mayor under subsection (3)(a); or
 - (b) discharging or reconstituting, in accordance with [clause 30](#) of Schedule 7, a committee established by the mayor under subsection (3)(b); or
 - (c) appointing, in accordance with [clause 30](#) of Schedule 7, 1 or more committees in addition to any established by the mayor under subsection (3)(b); or
 - (d) discharging, in accordance with [clause 31](#) of Schedule 7, a chairperson appointed by the mayor under subsection (3)(c).
- (5) A mayor is a member of each committee of a territorial authority.
- (6) To avoid doubt, a mayor must not delegate any of his or her powers under subsection (3).
- (7) To avoid doubt,—
 - (a) [clause 17\(1\)](#) of Schedule 7 does not apply to the election of a deputy mayor of a territorial authority unless the mayor of the territorial authority declines to exercise the power in subsection (3)(a);
 - (b) [clauses 25](#) and [26\(3\)](#) of Schedule 7 do not apply to the appointment of the chairperson of a committee of a territorial authority established under subsection (3)(b) unless the mayor of the territorial authority declines to exercise the power in subsection (3)(c) in respect of that committee.

42 Chief executive

- (1) A local authority must, in accordance with [clauses 33](#) and [34](#) of Schedule 7, appoint a chief executive.
- (2) A chief executive appointed under subsection (1) is responsible to his or her local authority for—
 - (a) implementing the decisions of the local authority; and
 - (b) providing advice to members of the local authority and to its community boards, if any; and
 - (c) ensuring that all responsibilities, duties, and powers delegated to him or her or to any person employed by the local authority, or imposed or conferred by an Act, regulation, or bylaw, are properly performed or exercised; and
 - (d) ensuring the effective and efficient management of the activities of the local authority; and
 - (da) facilitating and fostering representative and substantial elector participation in elections and polls held under the [Local Electoral Act 2001](#); and
 - (e) maintaining systems to enable effective planning and accurate reporting of the financial and service performance of the local authority; and
 - (f) providing leadership for the staff of the local authority; and
 - (g) employing, on behalf of the local authority, the staff of the local authority (in accordance with any remuneration and employment policy); and
 - (h) negotiating the terms of employment of the staff of the local authority (in accordance with any remuneration and employment policy).
- (2A) In the case of a unitary authority for a district that includes 1 or more local board areas, a chief executive appointed under subsection (1) is also responsible to the unitary authority for—
 - (a) implementing the decisions of each local board within the district of the unitary authority; and
 - (b) implementing each local board agreement; and
 - (c) providing advice to each local board and its members; and
 - (d) providing the administrative and other facilities for each local board that are necessary for the board to carry out its functions and perform its duties.
- (3) A chief executive appointed under subsection (1) is responsible to his or her local authority for ensuring, so far as is practicable, that the management structure of the local authority—
 - (a) reflects and reinforces the separation of regulatory responsibilities and decision-making processes from other responsibilities and decision-making processes; and
 - (b) is capable of delivering adequate advice to the local authority to facilitate the explicit resolution of conflicting objectives.
- (4) For the purposes of any other Act, a chief executive appointed under this section is the principal administrative officer of the local authority.

76AA Significance and engagement policy

- (1) Every local authority must adopt a policy setting out—
 - (a) that local authority's general approach to determining the significance of proposals and decisions in relation to issues, assets, and other matters; and
 - (b) any criteria or procedures that are to be used by the local authority in assessing the extent to which issues, proposals, assets, decisions, or activities are significant or may have significant consequences; and
 - (c) how the local authority will respond to community preferences about engagement on decisions relating to specific issues, assets, or other matters, including the form of consultation that may be desirable; and
 - (d) how the local authority will engage with communities on other matters.
- (2) The purpose of the policy is—
 - (a) to enable the local authority and its communities to identify the degree of significance attached to particular issues, proposals, assets, decisions, and activities; and
 - (b) to provide clarity about how and when communities can expect to be engaged in decisions about different issues, assets, or other matters; and
 - (c) to inform the local authority from the beginning of a decision-making process about—
 - (i) the extent of any public engagement that is expected before a particular decision is made; and
 - (ii) the form or type of engagement required.
- (3) The policy adopted under subsection (1) must list the assets considered by the local authority to be strategic assets.
- (4) A policy adopted under subsection (1) may be amended from time to time.
- (5) When adopting or amending a policy under this section, the local authority must consult in accordance with [section 82](#) unless it considers on reasonable grounds that it has sufficient information about community interests and preferences to enable the purpose of the policy to be achieved.
- (6) To avoid doubt, [section 80](#) applies when a local authority deviates from this policy.

Section 76AA: inserted, on 8 August 2014, by [section 20](#) of the Local Government Act 2002 Amendment Act 2014 (2014 No 55).

*Annex 2 Gazette Notice Regarding Ministerial Powers of Local
Government Assistance and Intervention 28 March 2018.*

NEW ZEALAND GAZETTE

Notice Regarding Ministerial Powers of Local Government Assistance and Intervention**Background**

Section 258O of the Local Government Act 2002 ("Act") requires the Minister of Local Government ("Minister") to publish in the *New Zealand Gazette* a list of matters relevant to determining what action, if any, to take under subpart 1 of Part 10 of the Act, which relates to Ministerial powers of assistance and intervention in relation to local authorities.

The Minister may consider any relevant information in addition to the matters set out in this notice.

The Minister may also, pursuant to section 258N of the Act, consult any person, group or organisation on any aspect of the decision whether to provide assistance or to intervene, including on the development of the terms of reference for a Ministerial body, and on the selection of the Ministerial appointees.

Taking into account a broad picture of a local authority's circumstances, the final decision, whether to act or otherwise, rests with the Minister.

List of matters to which the Minister must have regard**(a) Guiding Principles**

In making decisions under Part 10 of the Act and determining what action, if any, to take under Subpart 1 of Part 10 of the Act, the Minister is likely to adopt the following guiding principles:

- Ministerial action should be informed by the purpose of local government and the role of, and principles relating to, local authorities, as set out in Subparts 1 and 2 of Part 2 of the Act;
- local authorities' accountabilities is to their ratepayers and residents;
- elections are the primary mechanism for communities to express satisfaction or dissatisfaction with elected representatives;
- Ministerial assistance or intervention should have regard to:
 - what the local authority has done, is doing, or plans to do about the problem; and
- the costs of benefits of assistance or intervention;
- Ministerial assistance or intervention should be proportionate to:
 - the nature and magnitude of the problem;
 - its potential consequences; and
 - its duration to date and its likely duration if not addressed;
- Ministerial assistance or intervention should endure for only as long as necessary to resolve the problem and provide for a transition back to normal democratic processes; and
- Ministerial decisions regarding assistance or intervention should be transparent.

(b) Matters likely to detract from the ability of local authorities to give effect to the purpose of local government

- The matters or circumstances relating to management or governance of local authorities that the Minister considers are likely to detract from the ability of local authorities to give effect to the purpose of local government within their districts or regions are:
 - financial mismanagement; and/or
 - a significant failure in service delivery; and/or
 - dysfunctional governance, which includes:
 - failure or breakdown of key relationships; and/or
 - serious capability deficiencies of elected members or the chief executive, of the local authority.

(c) Types and sources of information

When making decisions under Part 10 of the Act, the Minister is likely to consider the following types and sources of information:

- Plans or reports from the local authority, which are voluntarily supplied, required under section 257 of the

NEW ZEALAND GAZETTE

Act or any other enactment, or requested under any enactment;

- audit reports, including assessment of the accuracy and adequacy of financial reporting required by Regulations made under section 259 of the Act; and
- reviews, reports or communications from any person, group or organisation.

Dated at Wellington this 28th day of March 2018.

HON NANAIA MAHUTA, Minister of Local Government.

2018-gol558

04-04-2018 13:59

Bibliography

A Cases

Cain v Canterbury Regional Council [1998] EMC Christchurch CC36/98.

CP Group Limited & Ors v Auckland Council [2020] NZHC 89.

Kidd v Southland District Council [2019] NZHC 1947.

Lab Tests Auckland Ltd v Auckland District Health Board [2008] NZCA 385, [2009] 1 NZLR 776.

Mackenzie District Council v Electricity Corporation of New Zealand [1992] 2 NZLR 41 (CA).

Mangawhai Ratepayers and Residents Inc v Kaipara District Council [2016] NZSC 48.

New Zealand Forest Owners Association Inc v Wairoa District Council [2022] NZHC 761.

Rogan v Kaipara District Council [2018] NZCA 478.

Wellington City Council v Woolworths New Zealand Limited (No 2) [1996] 2 NZLR 537.

B Legislation

1 New Zealand primary and secondary legislation

Civil Defence Emergency Management Act 2002.

Crown Entities Act 2004.

Environment Canterbury (Temporary Commissioners and Improved Water Management) Act 2010.

Health Act 1956.

Inquiries Act 2013.

Local Government Act 2002.

Local Government Act 1974.

Local Government (Rating) Act 2002.

Local Electoral Act 2001.

Local Government (Auckland Council) Act 2009.

Local Government Regulatory Systems Amendment Act 2019.

Local Government Act 2002 Amendment Act 2012.

Public Service Act 2020.

Public Finance Act 1989.

Resource Management Act 1991.

Senior Courts Act 2016.

State Services Act 1998.

2 *Bills*

Local Government Bill 2001 (191-1).

C Treaties, Conventions and Declarations

Rio Declaration on Environment and Development A/Conf.151/26 (1992).

Transforming Our World: the 2030 Agenda for Sustainable Development A/RES/70/1 (25 September 2015).

Treaty on European Union 92/C 191/01 (signed at Maastricht on 7 February 1992, entered into force 1 November 1993).

D Texts and Online Commentaries

Jonathan Boston, David Bagnall and Anna Barry *Foresight, Insight and Oversight: Enhancing Long-term Governance Through Better Parliamentary Scrutiny* (Victoria University Wellington 2019).

Geoffrey Palmer and Andrew Butler *A Constitution for Aotearoa* (Victoria University Press 2016).

Kenneth Palmer *Local Authorities Law in New Zealand* (Thomson Reuters, Brookers Ltd, 2012).

Matthew Palmer and Dean R Knight *The Constitution of New Zealand: A Contextual Analysis* (Bloomsbury Publishing Plc, 2022).

Richard Rawlings and Carol Harlow “Regulatory Design and Accountability” in *Law and Administration (Law in Context)* (4th Edition ed, Cambridge University Press, 2021) 282.

Mike Reid “Local Government’s Quest for Constitutional Status” in J Drage, J McNeill and Christine Cheyne (eds) *Along A Fault-Line: New Zealand’s Changing Local Government Landscape* (Dunmore Publishing, 2011).

Ellen Rock *Measuring Accountability in Public Governance Regimes* (Cambridge University Press, 2020).

R Thwaites and Dean R Knight “Administrative Law Through a Regulatory Lens: Situating Judicial Adjudication Within a Wider Accountability Framework” in S Frankel and D Ryder (eds) *Recalibrating Behaviour: Smarter Regulation in a Global World* (LexisNexis, 2013) 529.

E Journal Articles

P Aucoin and R Heintzman “The dialectics of accountability for performance in public management reform” 2000 *International Review of Administrative Sciences* 45.

Andy Asquith “The Role, Scope and Scale of Local Government in New Zealand: Its Prospective Future” (2012) 71 *Australian Journal of Public Administration*.

Mark Bovens “Analysing and Assessing Accountability: A Conceptual Framework” 13 *EUR.L.J.* 447 (2007).

Mark Bovens “Two Concepts of Accountability: Accountability as a Virtue and as a Mechanism” (2010) *West European Politics*, 33:5, 946-967.

Mark Bovens, Thomas Schillemans and Paul 'T Hart “Does Public Accountability Work? An Assessment Tool” (2008) *Public Administration*.

Laura Hardcastle “For the People, by the Minister: Ministerial Interventions in Subnational Elected Bodies and a Principled Approach to Their Future Use” (2015) 13 *New Zealand Journal of Public and International Law* 297.

Jeroen van der Heijden “Regulatory Stewardship the challenge of joining a virtue and a mechanism” (2021) 17 *Policy Quarterly*.

Philip Joseph “Environment Canterbury legislation” (2010) *NZLJ* 193 at 196.

Koppell, J (2005) “Pathologies of accountability: ICANN and the challenge of ‘multiple accountabilities disorder’” *Public Administration Review*, Vol 65 No 1.

Sascha Mueller “Incommensurate Values? Environment Canterbury and Local Democracy” 2017 *NZJPIL* 293.

Matthew Palmer “New Zealand Constitutional Culture.” *New* (2007) 22 *NZULR* 565.

Graham Taylor “Judicial Review and Rating: a Brief History” 27 May 2022 *Capital Letter*.

F Parliamentary and Government Materials

1 Gazette Notices

“Notice Regarding Ministerial Powers of Local Government Assistance and Intervention” (4 April 2018) *New Zealand Gazette* No 2018-go1558.

“Appointment of Commission to Tauranga City Council” (5 February 2021) *New Zealand Gazette* No 2021-go384.

2 Other materials

“Termination of the Current Commission and Appointment of a Further Commission to the Tauranga City Council” (4 April 2022) *New Zealand Gazette* No 2022-go1531. Cabinet Office *Royal Commission on Auckland Governance, Initial Government reaction* Cabinet Minute (09) 8/10 (9 March 2009).

Crown Law *Te Pouārahi, The Judge Over Your Shoulder, A Guide to Good Decision-making and the Law in New Zealand* (2019) <<https://joys.crownlaw.govt.nz>>.

Controller and Auditor General *Public Accountability: A Matter of Trust and Confidence* (B29[19e] 2019) <www.oag.govt.nz>.

Controller and Auditor General *Insights into local government: 2020 (Report B29[21f])* (Controller and Auditor General 2021).

Controller and Auditor General *Long-term Plans* (Office of the Auditor-General, Wellington, 2018).

Wyatt Creech *Investigation of the Performance of Environment Canterbury under the Resource Management Act & Local Government Act* (Ministry for the Environment 2010).

Department of Internal Affairs *Arewa ake te Kaupapa, Raising the Platform – The Future of Local Government Review – Interim Report* (October 2021)

<www.futureforlocalgovernment.govt.nz>.

New Zealand Government *He Waka Eke Noa Towards a Better Future, Together New Zealand's Progress Towards the SDGs* (2019) www.mfat.govt.nz.

New Zealand Parliament *Local Government Amalgamation Parliamentary Research Paper 8* (October 2014) <<https://www.parliament.nz/en/pb/research-papers/document/00PLLawC51141/local-government-amalgamation>>.

G Reports and Papers

Mark Bovens *Analysing and Assessing Public Accountability A Conceptual Framework EUROGOV No C-06-01* (European Governance Papers (EUROGOV), 2006).

Local Government New Zealand *The 2020 Local Government Manifesto: Getting the democratic balance right in New Zealand* (Local Government New Zealand 2020).

Mike Reid *Structures and roles for enabling local authorities to maximise their contributions to community wellbeing and adapt to meet future challenges* (2021).

New Zealand Institute of Directors *Four Pillars of Governance Best Practice for New Zealand Directors* (2021).

H Internet materials

Prof. Dr. Mark Bovens, Professor of Public Administration at the Utrecht University School of Governance since 1997 <<https://www.uu.nl/staff/MAPBovens/CV>>.

Sharon Brett Kelly, “Co-governance: Time to get on with it?” (podcast, 5 October 2022) The Detail www.rnz.co.nz.

Department of Internal Affairs “Glossary - Local Government in New Zealand” <www.localcouncils.govt.nz>.

Department of Internal Affairs “Three Waters Reform Programme” www.dia.govt.nz.

Department of Internal Affairs “Review into the Future for Local Government” Future for Local Government <www.futureforlocalgovernment.govt.nz>.

Department of Internal Affairs “Background to the Local Government Act 2002” <<https://www.dia.govt.nz>>.

Department of Internal Affairs “Government Decisions in Response to the Royal Commission on Auckland Governance” <<https://www.dia.govt.nz>>.

Ministry for the Environment “Overview of the resource management reforms” (21 January 2022) Ministry for the Environment <https://environment.govt.nz>.

Ministry of Justice “New Zealand’s Constitutional System” <www.justice.govt.nz> .

Public Service Commission “What is the Public Sector?” <www.publicservice.govt.nz/resources/what-is-the-public-sector/>.

I Unpublished Papers

Dean Knight *Constitutional practice in local government: growing constitutional culture when acting locally* Plenary address to SOLGM (Society of Local Government Managers), Marlborough Colloquium (Blenheim, New Zealand; January 2019).