

Departmental Disclosure Statement

Local Government Act 2002 Amendment Bill (No 3)

2013 No 165

The departmental disclosure statement for a government Bill seeks to bring together in one place a range of information to support and enhance the Parliamentary and public scrutiny of that Bill.

It identifies:

- the general policy intent of the Bill and other background policy material;
- some of the key quality assurance products and processes used to develop and test the content of the Bill;
- the presence of certain significant powers or features in the Bill that might be of particular Parliamentary or public interest and warrant an explanation.

This disclosure statement was prepared by the Department of Internal Affairs.

The Department of Internal Affairs certifies that, to the best of its knowledge and understanding, the information provided is complete and accurate at the date of finalisation below.

18 October 2013

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Part One: General Policy Statement

The Local Government Act 2002 Amendment Bill (No 3) implements the Government's decisions regarding a second phase of legislative reform to improve the operation of local government. The Bill contributes to the Government's broader agenda of building a more competitive and productive economy, improving the delivery of public services, and improving housing affordability, by supporting councils to operate more efficiently and effectively.

New Zealand's 78 councils contribute 4 per cent of Gross Domestic Product and manage nearly \$100 billion of public assets. These are largely infrastructure assets that enable the provision of essential services, like water supplies and wastewater treatment. Councils also perform a range of important regulatory functions for households and businesses, and make decisions that can have a significant impact on the local and national economies.

Councils must be able to play their part in creating an environment conducive to sustained economic growth. To do this, they need effective processes and governance arrangements, fair and efficient decision-making and charging practices, and sound asset management planning. The Bill will amend the Local Government Act 2002 to make better provision for these matters.

The 2012 amendments to the Act allowed for the Auckland local boards governance model to be copied, but only in circumstances similar to those in Auckland. This Bill makes local boards available more widely, as an option that can be considered by the Local Government Commission during any reorganisations of local government. A reorganisation involving local boards can provide for effective democratic governance at a community level, while achieving the benefits associated with larger organisations.

There are also opportunities for councils to achieve efficiencies, other than through a reorganisation, by changing the scale at which services and facilities are planned, funded or delivered. However, the current law does not go as far as it could to support councils in this respect. For example, while there are some provisions that could allow improvements in governance and service delivery arrangements, these provisions are not well recognised or understood by councils. The scope and consequences of using the provisions are unclear, and they do little to encourage councils to explore new ways of working. To address this, the Bill includes measures to encourage and facilitate shared services, joint delivery, and other collaborative arrangements between councils.

The Act currently contains consultation, decision-making, and planning provisions that are limiting councils' abilities to design efficient and effective processes, and are not fully achieving the desired results. For example, councils are required to use the special consultative procedure to consult in many circumstances, providing little scope for flexibility or innovation. In addition, the length, presentation and technical complexity of council long-term planning documents are viewed as hindering effective public consultation on important matters.

The Bill introduces a new, focused consultation document for long-term and annual plans, and reduces duplication between these plans. The Bill also removes most of the Act's requirements to use the special consultative procedure, and modernises this procedure so it can accommodate new techniques for communicating and consulting with the public. Having more flexibility about how to consult will enable councils to

design decision-making and community engagement processes that are appropriate to different circumstances, and in proportion with the matter being considered.

The Bill provides for a new infrastructure strategy to be incorporated into long-term plans. The purpose of this strategy is to identify significant infrastructure issues, options and implications for the council over a 30 year period. It will cover, as a minimum, those of the five core infrastructure categories provided by the council (water supplies, sewage treatment and disposal, stormwater drainage, flood protection works, and roads and footpaths). The Bill specifies that certain information derived from asset management planning would be included in the infrastructure strategy. The Bill also amends the principles relating to local authorities to state that asset management planning should be undertaken as part of a council's prudent stewardship of resources.

A 2013 Government review of development contributions identified difficulties associated with the current legislative framework and how it is being implemented by councils. For example, development contributions are being used to fund types of infrastructure that may be better funded from general revenue sources, and the degree of transparency in the apportionment of the costs and benefits of infrastructure is variable. There are also limited mechanisms for resolving challenges to development contributions charges, and opportunities to encourage greater private provision of infrastructure.

The Bill provides a new purpose for development contributions, and principles to direct and guide how they are used by councils. Secondly, there are provisions that clarify and narrow the range of infrastructure that can be financed by development contributions. Thirdly, the Bill introduces a development contributions objection process, with decisions made by independent commissioners. In addition, the Bill encourages greater private provision of infrastructure through the use of development agreements, and includes provisions to improve the transparency of councils' development contributions policies.

Finally, the Bill includes technical corrections and refinements to existing provisions in the Local Government Act 2002.

Part Two: Background Material and Policy Information

Published reviews or evaluations

2.1. Are there any publicly available inquiry, review or evaluation reports that have informed, or are relevant to, the policy to be given effect by this Bill?	YES
<p><i>Report of the Local Government Efficiency Taskforce</i>, 30 November 2012 <i>Development Contributions Review Discussion Paper</i>, Department of Internal Affairs, February 2013 <i>Report of the Local Government Infrastructure Efficiency Expert Advisory Group</i>, 22 March 2013</p> <p>These documents are all accessible at: http://www.dia.govt.nz/better-local-government</p>	

Relevant international treaties

2.2. Does this Bill seek to give effect to New Zealand action in relation to an international treaty?	NO

Regulatory impact analysis

2.3. Were any regulatory impact statements provided to inform the policy decisions that led to this Bill?	YES
<p>Three regulatory impact statements were produced to inform the policy decisions that led to this Bill:</p> <ol style="list-style-type: none"><i>Better Local Government: Opportunities to improve efficiency</i>, July 2013<i>Better Local Government: Improving development contributions</i>, July 2013<i>Better Local Government: Improving infrastructure delivery and asset management</i>, August 2013 <p>All of these RISs were prepared by the Department of Internal Affairs. They are accessible at the following link, under the 'local government' heading: http://www.dia.govt.nz/diawebsite.nsf/wpg_URL/Resource-material-Regulatory-Impact-Statements-Index?OpenDocument</p> <p>Note: the third RIS covers similar material to part C of the first RIS, but expands on this material. The third RIS was prepared to accompany a later Cabinet paper, which responded to a Cabinet Committee request for additional advice.</p>	

2.3.1. If so, did the RIA Team in the Treasury provide an independent opinion on the quality of any of these regulatory impact statements?	NO
None of the RISs met the threshold for Treasury RIA Team assessment.	

2.3.2. Are there aspects of the policy to be given effect by this Bill that were not addressed by, or that now vary materially from, the policy options analysed in these regulatory impact statements?	YES
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The Treasury RIA Team advised that the regulatory impact analysis requirements did not apply to policy proposals relating to local boards / two-tier governance arrangements because there are no significant effects on businesses, individuals or not-for-profit organisation. Any secondary or tertiary impacts (arising from the implementation of the local boards option by the Local Government Commission in particular cases) are unlikely to be significant or to increase compliance and transaction costs.

The RIS on development contributions considered six policy options, and option 2a corresponds with the provisions in the Bill. The other RISs correspond well with the policies being given effect by this Bill.

Extent of impact analysis available

2.4. Has further impact analysis become available for any aspects of the policy to be given effect by this Bill?	NO
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2.5. For the policy to be given effect by this Bill, is there analysis available on:	
(a) the size of the potential costs and benefits?	YES
(b) the potential for any group of persons to suffer a substantial unavoidable loss of income or wealth?	NO

Pages 21-22 of the RIS *Better Local Government: Improving development contributions* provide an indication of the costs and benefits associated with the policy option given effect by this Bill (option 2a in the RIS).

It has not been possible to quantify the costs and benefits associated with the other policies to be given effect in this Bill. This is due to the non-financial nature of these policies and the fact that they will affect and be implemented by 78 very diverse local authorities, each with different organisational structures, processes, community expectations, etc. Many of the proposed amendments to the legislation are designed to encourage and enable councils to operate more efficiently and effectively (in a variety of ways). The extent to which this occurs, and any cost savings and other benefits achieved, will depend on if/how each council takes up the opportunities provided.

2.6. For the policy to be given effect by this Bill, are the potential costs or benefits likely to be impacted by:	
(a) the level of effective compliance or non-compliance with applicable obligations or standards?	YES
(b) the nature and level of regulator effort put into encouraging or securing compliance?	NO
<p>Territorial authority non-compliance, or token compliance, with changes to the development contributions provisions proposed in the Bill have the potential to reduce the benefits associated with potential reductions in development contribution charges. The degree to which the benefits may be reduced is hard to establish as development contributions are currently used by 45 territorial authorities, whose actions and responses will be determined by a wide diversity of capacity and capability levels, community expectations, priorities, and policy approaches.</p> <p>It was assumed that compliance would be higher where duties and obligations were made explicit in statute, and lower where compliance was voluntary (such as where non-statutory guidance was the only mechanism to be used to change practices or behaviours). Assumptions were also made that those territorial authorities that currently do not require development contributions to be made for community infrastructure would not subsequently introduce such requirements, while those that do, would reduce their requirements in line with proposed legislative changes. Failure by a territorial authority to comply with legislation is challengeable through the Courts by any person.</p>	

Part Three: Testing of Legislative Content

Consistency with New Zealand's international obligations

3.1. What steps have been taken to determine whether the policy to be given effect by this Bill is consistent with New Zealand's international obligations?
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No relevant international obligations were identified. (This was confirmed by referring to Appendix 3 of the Legislation Advisory Committee, *Guidelines on Process and Content of Legislation*, which contains a list of legislation that implements various treaties.)

Consistency with the government's Treaty of Waitangi obligations

3.2. What steps have been taken to determine whether the policy to be given effect by this Bill is consistent with the principles of the Treaty of Waitangi?

Te Puni Kōkiri was consulted on the Cabinet papers containing the policies to be implemented by this Bill, and no Treaty-related or other relevant issues were raised.

Note that while local government is not a party to the Treaty, the Local Government Act 2002 contains a Treaty of Waitangi provision and requirements that are intended to facilitate participation by Māori in local authority decision-making processes. Although the Bill contains minor amendments to the general decision-making provisions in the Act, it was established early in the policy process that the specific provisions relating to Māori contributions to decision-making processes would not be subject to review. The Bill does not amend these provisions.

Consistency with the New Zealand Bill of Rights Act 1990

3.3. Has advice been provided to the Attorney-General on whether any provisions of this Bill appear to limit any of the rights and freedoms affirmed in the New Zealand Bill of Rights Act 1990?	Yes
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Advice provided to the Attorney-General by the Ministry of Justice, or a section 7 report of the Attorney-General, is generally expected to be available on the Ministry of Justice's website upon introduction of a Bill. Such advice, or reports, will be accessible on the Ministry's website at: <http://www.justice.govt.nz/policy/constitutional-law-and-human-rights/human-rights/bill-of-rights/>

Offences, penalties and court jurisdictions

3.4. Does this Bill create, amend, or remove:	
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(a) offences or penalties (including infringement offences or penalties and civil pecuniary penalty regimes)?	NO
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(b) the jurisdiction of a court or tribunal (including rights to judicial review or rights of appeal)?	YES
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Clause 53 and Schedule 7 in the Bill create a form of appeal right for those objecting to territorial authorities' requirements for development contributions. The objections are to be determined by development contributions commissioners, who have the same or similar powers and functions as a tribunal.

3.4.1. Was the Ministry of Justice consulted about these provisions?	YES
<p>The Ministry of Justice was consulted on drafts of the Cabinet paper pertaining to development contributions. Ministry of Justice officials were also asked to provide advice on the type and nature of the powers that development contributions commissioners should have in order for them to carry out their functions fairly and efficiently.</p> <p>No concerns were expressed in relation to proposals in the Cabinet paper. Ministry of Justice officials provided advice in relation to the development contributions objection process and powers of development contributions commissioners. This input has been reflected in the proposals to the degree considered practicable within the broader policy framework proposed. Appendix One to this document provides further information on the advice provided, and how this has been addressed.</p>	

Privacy issues

3.5. Does this Bill create, amend or remove any provisions relating to the collection, storage, access to, correction of, use or disclosure of personal information?	NO

External consultation

3.6. Has there been any external consultation on the policy to be given effect by this Bill, or on a draft of this Bill?	YES
<p>This is described in Appendix One to this document.</p>	

Other testing of proposals

3.7. Have the policy details to be given effect by this Bill been otherwise tested or assessed in any way to ensure the Bill's provisions are workable and complete?	YES
<p>This is described in Appendix One to this document.</p>	

Part Four: Significant Legislative Features

Compulsory acquisition of private property

4.1. Does this Bill contain any provisions that could result in the compulsory acquisition of private property?	NO

Charges in the nature of a tax

4.2. Does this Bill create or amend a power to impose a fee, levy or charge in the nature of a tax?	YES
<p>Development contributions are a form of levy or charge imposed on developments by territorial authorities in order to recover a portion of the costs those local authorities have incurred in providing infrastructure for the development. Whether a development contribution is technically a charge or levy is dependent on the practice of individual local authorities and the nature of the infrastructure asset or network for which development contributions are being required.</p> <p>Clauses 36, 45, 48 to 61, 65, 67, 73 and Schedule 7 of the Bill amend the development contributions provisions already contained in section 106, Part 8 Subpart 5, and Schedule 13 of the Local Government Act 2002. Appendix Two to this document provides further information about these provisions.</p>	

Retrospective effect

4.3. Does this Bill affect rights, freedoms, or impose obligations, retrospectively?	NO

Strict liability or reversal of the usual burden of proof for offences

4.4. Does this Bill:	
(a) create or amend a strict or absolute liability offence?	NO
(b) reverse or modify the usual burden of proof for an offence or a civil pecuniary penalty proceeding?	NO

Civil or criminal immunity

4.5. Does this Bill create or amend a civil or criminal immunity for any person?	NO

Significant decision-making powers

4.6. Does this Bill create or amend a decision-making power to make a determination about a person's rights, obligations, or interests protected or recognised by law, and that could have a significant impact on those rights, obligations, or interests?	NO
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However, decisions by development contributions commissioners are about how a territorial authority has applied or used its development contributions policy to charge development contributions on a development; they do not apply directly to the rights of a person to develop land. A person may be indirectly affected by a decision of a development contributions commissioner where they have a personal stake in the amount of the development contribution that may need to be paid.

Any person can seek a judicial review of a decision made by a development contributions commissioner. The decisions of commissioners will also be provided to the Secretary for Local Government for monitoring and evaluation purposes.

Powers to make delegated legislation

4.7. Does this Bill create or amend a power to make delegated legislation that could amend an Act, define the meaning of a term in an Act, or grant an exemption from an Act or delegated legislation?	NO

4.8. Does this Bill create or amend any other powers to make delegated legislation?	YES
<p>Clause 65 of the Bill extends the regulation-making powers in section 259 of the Local Government Act 2002. The extension enables the Minister of Local Government to recommend the making of regulations to the Governor General concerning the manner and content of applications, notices and other documentation to help implement the proposed new development contributions consideration and objection processes.</p> <p>The purpose of the power is to enable regulations to be made that encourage and direct reconsideration and objection processes to be administered in a fair and consistent manner, while also providing guidance to objectors and other parties as to the information they are required to supply to make processes run efficiently. The level of technical detail that would be provided in the regulations would be of an extent and nature that is not generally considered appropriate for primary legislation.</p> <p>The new regulation-making powers are limited to administrative matters concerning the content and form of documents and technical procedural matters for development contributions reconsideration and objection processes only. They will be subject to normal regulation making processes (consultation, Cabinet committee and Cabinet approvals and the Governor General agreeing to the recommendation that regulations be made, for example) and disallowance, Regulations Review Committee complaint oversight, and regulatory impact statement requirements. There is no proposal to waive to the 28-day rule that applies to regulations.</p>	

Any other unusual provisions or features

4.9. Does this Bill contain any provisions (other than those noted above) that are unusual or call for special comment?	NO

Appendix One: Further Information Relating to Part Three

Offences, penalties and court jurisdictions – question 3.4.1

The Ministry of Justice was consulted on drafts of the Cabinet paper pertaining to development contributions. Ministry of Justice officials were also asked to provide advice on the type and nature of the powers that development contributions commissioners should have in order for them to carry out their functions fairly and efficiently. No concerns were expressed in relation to proposals in the Cabinet paper. Ministry of Justice officials did however provide advice in relation to development contributions objection process and powers of development contributions commissioners.

Ministry of Justice officials suggested:

- that the objection provisions being proposed for development contributions are essentially the same as that for a tribunal. Development contributions commissioners should therefore have access to powers regarding the conduct of hearings, requiring evidence, summoning witnesses, setting and waiving timeframes that are commonly found with other models of tribunal;
- development contributions commissioners should have protections similar to those available to judges sitting in the District Court, and consideration should also be given to witnesses having protections similar to those of witnesses appearing in a Court;
- it would be preferable, and more consistent with other tribunal models, if the reconsideration process being proposed (which precedes the formal objection process) was made mandatory rather than optional;
- the Minister of Local Government (who will have the function of appointing development contributions commissioners) should also have the power to de-register or remove commissioners who are incapable of performing their functions, have neglected those functions, or on the grounds of misconduct; and
- consideration should be given as to whether there should be a further right of appeal (beyond the objection process) to a general Court (such as the High Court on points of law, for example). If this is done, then it should be clear that the development contributions commissioners are the first instance decision makers (dealing with matters of merit) and the Court appeal is related to matters of statutory interpretation and compliance with the law.

In response, the Bill incorporates provisions relating to the conduct of hearings, evidence, witnesses, setting and waiving timeframes, and protection of sensitive information similar to those found in other tribunal models or quasi-judicial settings such as resource consent hearings under the Resource Management Act 1991. Legal protections have been incorporated for both development contributions commissioners hearing objections and witnesses.

The reconsideration process has been left as being optional. This is because in some instances it will be evident from the outset that the reconsideration process will not be appropriate to deal with the nature of the dispute, and forcing persons to go through it may simply be adding time and cost to dispute resolution processes.

The Bill includes provision for the Minister of Local Government to remove development contributions commissioners on the grounds of neglect of duty,

misconduct, or not being incapable of carrying out their duties (such as in instances of serious illness or death).

Although the Bill does not currently incorporate an explicit second-tier appeal right (effectively a third-tier right if the reconsideration process is included), there is a right to seek a judicial review or declaratory judgement in relation to decisions. The necessity for, and merits of, having a more explicit appeal right to the High Court are intended to be tested during the select committee process.

External consultation – question 3.6

External consultation undertaken during the main policy phase is described in the regulatory impact statements reported under question 2.3. The relevant pages are as follows:

- *Better Local Government: Opportunities to improve efficiency*, page 39
- *Better Local Government: Improving infrastructure delivery and asset management*, page 16
- *Better Local Government: Improving development contributions*, pages 36-38

Policy proposals relating to development contributions were informed by public consultation on a discussion paper. This paper and the submissions received are accessible at: <http://www.dia.govt.nz/better-local-government>.

The Department received 129 submissions on this discussion paper, largely from territorial authorities and property developers. Page 37 of the development contributions RIS describes the key themes and concerns arising in submissions, and how policy proposals were amended to address concerns.

As referred to in question 2.3.2, the components of the Bill relating to local boards were not covered in a RIS. During the policy development phase for this matter, there was consultation with the Local Government Commission, Local Government New Zealand, and some local authorities, including the Auckland Council. This consultation indicated there was broad support for making the local boards 'two-tier' governance model available outside Auckland (as part of a reorganisation). It also helped to identify which features of the Auckland local boards model should be replicated in the Bill, and where flexibility might be desirable.

Other testing of proposals – question 3.7

While the Bill was being prepared, a draft for consultation was circulated (in confidence) to Local Government New Zealand, the Society of Local Government Managers, the Office of the Auditor-General, officials at the Local Government Commission, and officials in a few local authorities (including Auckland Council, Taupo District Council, Tauranga District Council, and Hamilton City Council). The wording of several draft sections was also tested with a technical expert at Waipa District Council.

This was done to test and refine potential wording and concepts in the Bill, particularly with a view to avoiding unintended consequences arising during implementation.

As noted above, Ministry of Justice officials provided advice in relation to development contributions objection processes and powers of development contributions commissioners.

Appendix Two: Further Information Relating to Part Four

Charges in the nature of a tax – question 4.2

Development contributions are a form of levy or charge imposed on developments by territorial authorities in order to recover a portion of the costs those local authorities have incurred in providing infrastructure for the development. Whether a development contribution is technically a charge or levy is dependent on the practice of individual local authorities and the nature of the infrastructure asset or network for which development contributions are being required.

Clauses 36, 45, 48 to 61, 65, 67, 73 and Schedule 7 amend the development contributions provisions already contained in sections 101, 106, Part 8 Subpart 5, and Schedule 13 of the Local Government Act 2002. The provisions in the Act enable territorial authorities to require development contributions (in the form of money or land), but only in accordance with a development contributions policy that has been prepared and consulted on by the territorial authority.

Development contributions have been assessed as a fair and appropriate means of ensuring that those who benefit from the provisions of new or expanded infrastructure help pay for it in a manner that is proportionate to the benefit they receive. This reduces the need for those parties who get little or no benefit from the new or expanded infrastructure from having to cross-subsidise those who do benefit, through other mechanisms such as local authority rates (which are a form of tax).

The Bill proposes changes to the existing provisions of the Local Government Act 2002, including a narrowing of the range of infrastructure for which development contributions can be required, new guiding principles to provide consistency of implementation, a requirement to provide more detailed information on projects being paid for from development contributions, and the introduction of new processes by which those being charged can object.

The changes proposed retain the existing legal safeguards whereby any person can challenge development contributions by way of judicial review of declaratory judgements, and introduce new safeguards in the form of a formalised reconsideration process (to deal with low-level disputes or the correction of errors) and an objections process (with decisions made by commissioners who are independent of the objector and the territorial authority). The decisions of the development contributions commissioners can be challenged by way of judicial review, and provision is made for the collection of information related to those decisions to assist ongoing monitoring and evaluation of the objections process.