



**LEGISLATION ADVISORY COMMITTEE**

PO Box 180  
Wellington 6401

Phone 04 494 9897

Fax 04 494 9859

[www.justice.govt.nz/lac](http://www.justice.govt.nz/lac)

Email [sam.miles@justice.govt.nz](mailto:sam.miles@justice.govt.nz)

14 August 2012

Nicky Wagner  
Local Government and Environment Committee  
Parliament Buildings  
P O Box 18 041  
**WELLINGTON 6160**

Dear Nicky Wagner

**Local Government Act 2002 Amendment Bill 2012**

**Introduction**

1. The Legislation Advisory Committee (LAC) was established to provide advice to the Government on good legislative practice, legislative proposals, and public law issues. It has produced, and updates, Guidelines on the Process and Content of Legislation as appropriate benchmarks for legislation, which have been adopted by Cabinet.
2. The terms of reference of the LAC include:
  - to scrutinise and make submissions to the appropriate body on aspects of Bills introduced into Parliament that affect public law or raise public law issues;
  - to help improve the quality of law-making by attempting to ensure that legislation gives clear effect to government policy, ensuring that legislative proposals conform with the LAC Guidelines, and discouraging the promotion of unnecessary legislation.
3. The LAC is grateful for the extension that the Committee granted it to prepare this submission.

## Nature of the submission

### *The new purpose of local government*

4. Clause 7 amends section 10 of the Local Government Act 2002 (purpose of local government) by replacing s 10(b), a broadly worded power to promote the social, economic, environmental and cultural well-being of communities with the following:
  - (b) to meet the current and future needs of communities for good-quality local infrastructure, local public services, and performance of regulatory functions in a way that is most cost-effective for households and businesses.
5. The intention of clause 7, as evidenced by the explanatory note, appears to be to restrict the services local authorities provide and the roles they perform, and to require them to be focused on operating efficiently.
6. The difficulty is that this intention may not be given effect to because of the uncertain scope and effect of various expressions in clause 7. The consequential uncertainty will create a heightened litigation risk.
7. Difficult wording in clause 7 includes the use of the terms “most cost-effective” and “good quality,” even though the latter term is defined in the new section 10(2). Although the term “cost-effective” is a well-defined technical term that refers to the ratio of value for cost, it will be difficult to make a practical assessment of the “**most** cost-effective” way of meeting the various specified “needs” without any litigation becoming a contest between many (expensive) experts. One solution to this problem might be to replace the words “in a way that is most cost-effective” with “in a way that the local authority is satisfied is cost-effective.” Such wording would make the local authority consider cost effectiveness explicitly, but is more likely to leave the decision with the authority rather than the courts.
8. It is also unclear what the terms “local infrastructure” and “local public services” are intended to cover. For example, if the term “local infrastructure” includes sports grounds and concert halls, the question remains whether it also includes movie theatres, convention centres or golf courses that compete with the private sector. Further, it is unclear whether “local public services” includes business and/or tourism development, and if not, whether local authorities will be required to stop doing those things.
9. Most significantly, the new purpose provision does not make it clear whether local government bodies can no longer undertake activities that would amount to the promotion of the "social, economic, environmental and cultural well-being of communities," which is part of their current purpose under section 10 of the Local Government Act. Therefore, the question remains whether they will be considered to be acting ultra vires, or outside their purpose, if they undertake such activities.

10. As a consequence of the lack of certainty in clause 7, there is a real risk of court challenges to actions by local authorities and local authorities not knowing what they are empowered to do.
11. The LAC accepts that while Parliament has the right to constrain and direct local government in what it can do and the means it can use, citizens, including elected councillors, their staff and advisers, should be able to expect a reasonable degree of certainty in the law. Further, Parliament has a corresponding obligation to make its intentions clear. Therefore, if the Government wishes to restrict local authorities from undertaking certain activities, it should be clear about what those restrictions are.
12. Further, the LAC submits that if certain activities that local authorities are currently permitted to undertake are intended to be prohibited under the new legislation, transitional arrangements will need to be made to either grandparent the validity of current activities of that kind or ensure an orderly transition out of them, where the change in law will make a difference.

#### *Use of CCOs and CCTOs*

13. The LAC notes that it is unclear whether local authorities will be able to do more through council controlled organisations (CCOs) or council controlled trading organisations (CCTOs) than they will be able to do directly. The Committee could usefully consider whether the Statute should make the position of possible constraints over the use of CCOs and CCTOs clearer.

#### *Investment*

14. So long as local authorities had a general power of competence, it may not have been necessary to refer to investment powers or duties in the statute.
15. However, curtailing the general power raises the issue of whether local authorities can do, as investments, activities that might not satisfy the "most cost-effective" test.
16. "Local public services" might or might not include a fashion week, Sevens Tournament, or art exhibition, though the venues for them might well be covered by "local infrastructure". This raises an issue of whether a local authority could avoid the services and infrastructure definition issues, and potential issues relating to cost effectiveness, by deciding that it was an appropriate investment to subsidise or underwrite such events. The point may become more acute if the local authority has provided the infrastructure in which such events are held (either under section 10(b) or as an investment decision). The LAC does not have a view on whether or not a local authority should be able to treat such events in this way but does believe that it is appropriate to ask Parliament to make the position clear.
17. The matter should not be left for determination by the courts, either in declaratory judgment proceedings or judicial review brought by disgruntled ratepayers or competing event organisers.

*Provisions relating to the appointment of a Commission*

18. The LAC wishes to draw the Committee's attention to the provisions in the Bill that empower a Minister to appoint a Commission without having previously been through the steps of appointing a Crown Review Team, Crown Observer and a Crown Manager. The LAC, in particular, suggests that the Committee consider the appropriateness of the criteria that the Minister must fulfil to appoint a Commission under new section 258D. The new section 258D(1)(a) provides that the Minister may appoint a Commission if:
  - (i) he or she believes on reasonable grounds that a significant problem relating to the local authority is impairing, or likely to impair, the good local government of the local authority's district or region; and
  - ii) the local authority is unable or unwilling to effectively address the problem; and
  - (iii) the problem is such that appointing a Crown Review Team, a Crown Observer or a Crown Manager to the local authority is unlikely to prevent the significant problem impairing the good local government of the local authority's district or region.
19. Under new section 258D, the Minister has the power to appoint a Commission that must perform the functions and duties and exercise the powers of the local authority and its members under the Local Government Act and any other enactment, subject only to any limits on its authority set out in the terms of reference, and to the exclusion of the members of the local authority. During the term of the Commission, the local authority members remain in office, but are prevented from acting and are not entitled to be paid any salary, allowances, or expenses under the Local Government Act or any other Act.
20. The Minister also has the power to postpone the next triennial general election for members of the local authority under new section 258G. The LAC suggests that the Committee consider the question of whether such a power is appropriate.
21. Finally, the new section 258R provides that the Minister may terminate a Ministerial appointee's (defined as a Crown Manager, Crown Observer or a member of a Crown Review Team or of a Commission) appointment at any time by notice in writing, and no compensation is payable to the person as a result of the termination.
22. The LAC urges the Committee to satisfy itself that the constraints around the appointment and dismissal of Commissioners are sufficient.

**Conclusion**

23. Thank you for taking the time to consider the LAC's submission. The LAC wishes to be heard on this submission.

Yours sincerely

A handwritten signature in black ink, appearing to read "Grant Hammond". The signature is fluid and cursive, with a large initial "G" and "H".

Hon Sir Grant Hammond  
Chair