Caroline Morris · Jonathan Boston
Petra Butler *Editors*

Reconstituting the Constitution

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23.7 Conclusion

It is not clear where the Minister will find allies for his project in the existing Parliament; however politics can generate some interesting bedfellows. In a column in the *Waikato Times*, the former Green MP, Nandor Tanczos called for a "radical localism" and argued that the weak position of local government in our constitutional set up was caused by the nature of our colonial experience as "a farm for England rather than a democracy"[25] and that "because power is seen as flowing down from Her Majesty, rather than originating in the people and flowing up to Parliament, local bodies [sic] provide no constitutional constraint on the Government."[26]

Internationally the focus also seems to be on finding more effective forms of horizontal integration or forms of co-governance in order to address the complex problems facing communities. As Roiseland notes, in relation to efforts to seek constitutional recognition of local government in Norway, "today there are widespread expectations, formal and informal, directing local and regional governments to engage in issues and problems that can hardly be solved within the frame of the same institutions."[27] Put simply, dealing with today's wicked issues will require much more inter-governmental collaboration that we have seen in the past.

The focus of this chapter has been on whether or not greater constitutional recognition for local government would be helpful, to democracy and to better outcomes for New Zealanders. It is not a discussion on what services councils should provide and whether or not citizens have enough ability to influence the choices made by their elected members. These are valid discussions but should not be confused with the desirability of limiting the role of central government by further empowering sub-national government. They are issues we can expect to be explored in some depth during discussions on the Minister's project *Smarter Government – Stronger Communities*.

It might be over-optimistic to assume that Parliament will seriously reconsider the relative status of itself and local government but change seldom comes without struggle. The Minister's constitutional review paper provides yet another opportunity for the sector to promote its case.

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[25] Tanczos (2010).

[26] Tanczos (2010).

[27] Roiseland (2010), p. 137.

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Chapter 24
The Role and Governance of Sub-National Government: Current Issues

David Shand

24.1 Introduction

This paper addresses two major issues arising from the report of the Royal Commission on Auckland Governance[1]:

(a) The future relationship between the government and the Auckland Council; and
(b) Māori representation.

It then considers three other key issues in local government:

(a) The so-called "power of general competence" and the debate on "core services";
(b) "Fiscal responsibility" in local government; and
(c) Performance measurement/management in local government.

24.2 The Relationship Between Central Government and the New Auckland Council

The establishment of unitary local government covering one third of New Zealand's population, spending about $3 billion per annum and employing more than 5,000 staff creates a potentially powerful body. Some have even suggested it may herald a return

Chair of the independent Commission of Inquiry into Local Government Rates in 2007 and a member of the Royal Commission on Auckland Governance in 2008–2009.

[1] Royal Commission on Auckland Governance (2009).

D. Shand (✉)
41 Cockle Bay Road, Cockle Bay, Manukau 2014, New Zealand
e-mail: pelorusshand@aol.com

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to the provincial system of government, and that the new mayor may be almost as powerful as the Prime Minister. Although cynics may suggest that central government enjoys a "divide and conquer" relationship with fragmented local government this is not evident either from the previous government's decision to establish the Royal Commission or from the current government's decision to establish a unitary council for the Auckland region. Central government appears to want Auckland to "speak with one voice".

While it is obviously too early to see how the power relationships may change, a few things seem obvious. Firstly, the powers of the new Auckland Council have been somewhat limited through the legislative arrangements for Auckland council controlled organisations (CCOs). Secondly, while the new mayor will be a key New Zealand figure, the powers of the mayor individually are quite limited and do not reflect the concept of an executive mayor or a form of executive local government which replicates our strong executive central government. Thirdly, in theory no major decisions on Auckland infrastructure or other major expenditures will be possible without the agreement of central government – and likely also the Auckland Council. Both will bring "money to the table" so the issue is whether the government and the Auckland Council can agree, and if not, what any final decision will be. For example, there is only one transport network in Auckland, not separate regional and national ones.

So it remains to be seen how this relationship will develop, noting that the government rejected the Commission's recommendations for a separate minister for Auckland, for a Cabinet Committee on Auckland, for a joint social issues board and for a full partnership arrangement in land transport. It remains to be seen whether the new Auckland Council can effectively articulate its priorities in social issues and infrastructure in such a way that they can be lined up with central government priorities. There is also a challenge for central government – whether it can coordinate its own activities in Auckland to reflect both national and regional priorities. Progress has been made in the past 3 years in central government departments coordinating their activities in Auckland but much more needs to be done.

This coordination issue also has implications for other New Zealand regions. Beyond this, the establishment of a unitary council for Auckland seems to have limited implications for the rest of New Zealand. While we are likely to see more unitary councils and amalgamations no other unitary council will come even close to the size and national significance of the Auckland Council.

24.3 Māori Representation

The recommendation for three Māori seats (one member appointed by the Mana Whenua Forum and two elected from the Māori roll) reflected the Commission's views on the importance of Māori representation as opposed to consultation (many Māori being consultation-weary). This recommendation also reflected the

requirements of the Local Government Act 2002 (LGA) to ensure that Māori have opportunities to contribute to decision-making processes, the fact that Māori do not currently have a seat at the table in Auckland and the apparent success of separate Māori representation on the Environment Bay of Plenty (Regional Council) which is provided for by special legislation rather than the LGA. Interestingly, nobody seems to recall that the Local Government Amendment Act of 1986 which changed the then Auckland Regional Authority (ARA) electoral boundaries to follow parliamentary electoral boundaries (including parts of the then Northern and Eastern Māori electorates), thereby providing for two Māori seats on the ARA. This provision was repealed, seemingly without being noticed, as part of the 1989 local government reforms.

The Commission's view was that Māori are not "just another ethnic group" and their special position as New Zealand's first people and their special status under the Treaty of Waitangi justified this guaranteed representation. Having one appointed, as opposed to elected, Mana Whenua member created some controversy but the Commission considered this appointment was appropriate in view of the special mana whenua guardianship responsibilities (kaitiakitanga) for land, natural resources and the environment.

Separate Māori seats remain provided for under the LGA, either through a decision of the local council or by a poll of voters and these avenues remain. However, the Commission's view was that legislating for guaranteed Māori representation on the establishment of the new Council would put the desirable framework in place from the beginning and that the benefits of the arrangement would quickly be evident to all.

24.4 Core Services

Permit me to begin here with some reminiscing. From 1971 to 1977 I was a member of the Wellington City Council. I was a member of the Trading Committee which oversaw the operations of no fewer than five municipal undertakings – the Municipal Electricity Department, the Milk Department, the City Abattoir, the City (bus) Transport Department (but not providing services to the northern suburbs) and the airport. These days, the Wellington City Council carries out none of these functions and only one remains with local government – public transport now being the responsibility of the Wellington Regional Council. I was also a member of the Housing Committee. Apart from the special funding and responsibility for pensioner housing, the City Council was the major landlord in Wellington providing some 2,000 public rental units and with an ambitious programme to continually expand this, reflecting in part the driving force of the then chairman of the Housing Committee (who was the leader of the Citizens and Ratepayers Group). This public housing role continues in Wellington, although central government funding has been necessary for it to continue.

At the time, the Wellington City Council did not accept that it had a role in economic development. This role now seems to be widely accepted as a local and regional government function, involving even the provision of broadband in some cases. In 1974 the Council cautiously began an explicit involvement in community development issues with the appointment of a community development officer, but this was kept under a tight rein by conservative elements in the Council, including the then Town Clerk.

What does this tell us about alleged expansion of local government activities, beyond so-called core services? The view put forward by groups such as Grey Power and the New Zealand Business Roundtable is that the requirement under the 2002 LGA to pursue the four well-beings (economic, social, cultural and environmental) has led to a significant expansion into (unspecified) non-core activities. Interestingly, the provisions of the 1974 LGA contained similar broad powers.[2] But both pieces of legislation are permissive rather than mandatory. For example, it is up to each elected council to decide how far it wishes to involve itself in particular services related to the four well-beings or indeed how it interprets the four well-beings. This seems appropriate.

The 2007 Rates Inquiry concluded that the broad empowerment provisions of the 2002 LGA had not been a significant driver of expenditure increases. It noted that many local authorities have been involved for many years in social and cultural expenditures including libraries, aquatic centres, art galleries, museums and urban renewal projects. It noted that increased investment in community activities was more a reflection of higher community expectations and the need for urban areas to compete for population and business, with councils now seen as having a role in the "place-shaping" activities necessary to achieve this.[3]

The Royal Commission on Auckland Governance further pursued this issue, particularly emphasising the importance of the new Auckland Council taking a proactive role in promoting social well-being, in partnership with central government.[4] Adopting the Ministry of Social Development's broad definition of social well-being (as covering health, knowledge and skills, paid work, economic standard of living, civil and political rights, cultural identity, leisure and recreation, physical environment, safety and social connectedness), it noted the significant impact of local government activities on many of these and the need for local government to embed social well-being issues in its policy, planning and monitoring frameworks, noting urban design and public transport as two areas where local government has the predominant impact on social well-being.

[2] The Local Government Act 1974, section 598(1) provided that "The Council may . . . undertake, promote and encourage the development of such services and facilities as it considers necessary in order to maintain and promote the general well-being of the public and may promote or assist in promoting cooperation in and coordination of welfare activities in the district."

[3] Funding Local Government, Report of the Local Government Rates Inquiry Panel (2007).

[4] The research paper commissioned by the Royal Commission on this topic is particularly apposite. See Rowe (2008).

It will be interesting to see how the new Auckland Council takes up this challenge, given that the platform of some candidates includes focusing the council on "core issues" – in all cases undefined. The Local Government Act Amendment Bill introduced into Parliament on 20 April 2010 seeks to "encourage councils to focus on core services" by requiring them to have particular regard to the importance of:

- Network infrastructure;
- Public transport services;
- Solid waste collection and disposal;
- The avoidance or mitigation of natural hazards; and
- Libraries, museums, reserves, recreational facilities and other community structures.

It is difficult to see this "encouragement" having any significant impact on what local government actually does, but perhaps Minister Hyde derives some encouragement from this symbolism, although it does not appear that his National party partners are convinced that local government activities need reining in. It is also interesting to note the definition of network infrastructure and community infrastructure.

24.5 Fiscal Responsibility in Local Government

It is interesting to note that for local authorities there is no requirement as under the Fiscal Responsibility Act 1994 to define fiscal responsibility or to set any fiscal targets – except for the requirement for the Long Term Council Community Plan (LTCCP) to include forecast financial statements over the 10 years of the LTCCP and for the general requirement for a balanced budget in section 100 – unless it is otherwise prudent to do so. The Rates Inquiry recommended a requirement for the adoption of medium-term (3-year) targets which might cover such measures as the rate of increase in operating expenditures and the level of rates, as well as some measure of the level of debt in relation to assets. Only a small number of councils have adopted such targets.[5]

The Rates Inquiry also explicitly rejected the suggestion of "rate capping" by central government as a mechanism of fiscal responsibility. It regarded rate capping as too blunt and intrusive an instrument, given the wide variety of financial situations and expenditure needs of different councils. Also it would be difficult to define precisely and would not cover alternative revenue sources to rates such as user charges which would impact on households in a similar way to rates.

[5] Hutt and Christchurch cities are two councils with fiscal targets. Hutt City has a target that rates should rise by no more than 0.5% per capita annually and that debt levels should be reduced.

The Rates Inquiry's proposal for financial targets has not found much favour in local government. It appears that the concept of targets (or fiscal plans) as opposed to mere forecasts of costs set out in the LTCCP, is not well understood in local government. In other words the LTCCP is regarded as a "passive forecast" rather than a plan or target.

Accrual accounting and budgeting coupled with the general requirement for a balanced budget each year have obvious implications for fiscal responsibility. There are also the requirements in sections 101 and 102 of the LGA to manage financial matters prudently and to adopt funding and financial policies which provide certainty and predictability about sources and levels of funding. In the audit of the 10-year LTCCPs the Auditor-General may comment on cases where council financial policies as reflected in the LTCCP are not financially prudent and if necessary issue a qualified audit opinion on the LTCCP. The Rates Inquiry pointed out that by raising sufficient revenue to cover all costs, including such non-cash items as depreciation expense, some local authorities have been levying rates higher than otherwise necessary and building up significant cash reserves. Some authorities have recognised this point.

To be fair, local government is required to adopt a wide range of financial policies, which could be regarded as onerous in terms of required analysis and decision-making. Section 102 of the LGA requires the adoption of funding and financial policies covering amongst others:

- Revenue and financing policy, which is the most critical policy for understanding an authority's financial strategy;
- Liability management, including managing various exposures and any limits on debt; and
- Investments, including mix of investments and risk management policies.

While these policies may be clearly stated or described, there is generally little discussion of their rationale. Nor is there any requirement to go to the next logical step of determining or quantifying the effects of such policies on the level of rates increases. The Rates Inquiry recommended that councils explain more fully the rationale and impact of the policies required to be set out in the statement of revenue and financing policy.

The Local Government Act 2002 Amendment Bill requires that councils produce a financial strategy setting out their (self-determined) limits on rates, rates increases and debt levels and targets for returns on council investments for the 10-year LTCCP period. It also requires these limits to be accompanied by an assessment of the council's ability to maintain existing service levels and meet additional demands for services within these limits. While the 10-year time horizon seems unnecessarily lengthy, provided these limits are properly defined and measured, presumably using a standard template, this seems overall a sound approach, and consistent with the recommendations of the Rates Inquiry.

The provisions of the Amendment Bill to standardise the classification used in councils' financial statements also seem a useful contribution to improving financial accountability. Similarly, the provision for pre-election reports on the financial

performance and position of the councils for the 3 years prior to the election and the financial plans and prospects for the next 3 years are also welcome and are consistent with the Rates Inquiry suggestion that the focus of financial planning should be on the 3-year period ahead rather than on the 10-year LTCCP horizon.

24.6 The Performance Management Framework

New Zealand is one of the few OECD countries where there is no standardised set of performance measures (which may be mandated by central government or may be voluntary benchmarking undertaken by local authorities themselves) to enable judgments to be made about non-financial performance. Of course, the limitations of such benchmarking need to be fully considered and the difficulty of forcing all local government activities into a limited number of performance indicators needs to be recognised. But these issues aside, international experience suggests there is value in such performance measurement and comparison, provided the emphasis is on using the information in a positive sense for performance improvement, rather than negatively to remonstrate with local authorities for perceived poor performance.

The Rates Inquiry recommended in the longer term a system of performance benchmarking should be developed to better demonstrate council (and council controlled organisations') performance over time and in comparison with other councils.

The Royal Commission on Auckland Governance report, in a little noticed chapter entitled "Achieving a High-Performance Auckland Council", also identified the need for a new performance management system, including the need to develop customer service standards for all Auckland Council activities and to ensure rigorous performance monitoring of council controlled organisations through their Statement of Intent.

The LGA currently provides a complex performance management framework based on developing desired community outcomes, preparing a 10-year LTCCP reflecting these community outcomes as well as intended service levels, preparing an annual plan, and then finally an annual report. While the LGA does not define "outcomes" they are obviously linked to achieving the four well-beings set out in the Act as the key objectives of local authorities (although it may be a challenge to establish these linkages). Community outcomes are intended to reflect strategic choices and tradeoffs. Local authorities are required to carry out a process at least every 6 years for establishing the community outcomes and to monitor, and at least once every 3 years report on progress in achieving community outcomes as part of the three-yearly updating of the LTCCP. The council's annual report must also identify the community outcomes to which each group of council activities relates and report on any measurement during the year of achievement of community outcomes. The annual report includes a comparison between actual levels of service provision and intended levels of service provision set out in the LTCCP.

However, the quality of community outcomes definition and the extent to which they really guide the operations of local authorities appears from the Auditor-General's reports to be problematic. It appears to be a major challenge for many authorities to develop a comprehensive performance management framework that links the effects of their operations on the four well-beings with the monitoring of community outcomes and performance against planned levels of service. The challenge therefore is to develop meaningful community outcomes which are linked upwards to the four well-beings and downwards to levels of service under the various activities carried out by the authority. Planned levels of service relate to the contribution council activities make to community outcomes.

The Auditor-General's report on LTCCPs during the period 2006–2016 comments on improvements in this performance information but also comments that the development of performance frameworks clearly needs further work.[6]

This explicit focus on outcomes contrasts with the approach in central government, with its formal focus on outputs in the Public Finance Act 1989, although this was long ago refined into a system of "budgeting for outputs and managing for outcomes" based on statements of intent, which can be regarded as akin to a strategic plan.

The Local Government Act Amendment Bill proposes to simplify this performance management structure by better integrating the community outcomes and LTCCP exercises and standardising non-financial performance measures for infrastructure services and to streamline non-financial reporting to focus on major issues. The details of these provisions remain to be seen but this is a new and welcome approach.

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[6] Controller and Auditor-General (2007), p. 6.

Part 10
Protecting Future Generations

Jonathan Boston

One of the most critical challenges facing the international community is to ensure that humanity exercises prudent stewardship of the environment – both locally and globally – and lives within the biophysical limits of the planet. If we fail, the consequences for future generations will be severe. Indeed, there is the risk of inflicting large-scale and irreversible damage to key biophysical systems, thereby seriously undermining the wellbeing of people for many generations to come. But how can we ensure that global public goods, such as the oceans and atmosphere, are properly valued and cared for? And how can we ensure that environmental values are respected and that the interests of future generations are adequately protected? After all, neither the environment nor future generations have voting rights. Within the democratic world, they are entirely dependent on the goodwill of current generations of voters. Is this goodwill sufficient? If not, is there a case for endeavouring to protect the environment and future generations through constitutional means and, if so, how effective are such measures likely to be?

In the closing chapters of this volume, a distinguished jurist (Justice Susan Glazebrook) and three young New Zealanders (Rayhan Langdana, Tama Potaka and Kate Stone) offer reflections on how best to protect the environment and future generations, as well as wider issues of citizenship and constitutional reform, with particular reference to New Zealand. In Chap. 25, Justice Glazebrook reviews international and domestic endeavours to recognise the importance of the environment, and considers the role that constitutional environmental rights can play in ensuring the protection of the environment. More specifically, she assesses how a constitutional environmental right might be most effectively formulated. In so doing she evaluates the arguments for and against including an environmental right within a nation's constitution, the appropriate formulation of such a provision (including whether it should be framed as a "right" and whether it should be procedural or substantive in nature), and whether any such provision should also include reference to future generations and biological diversity. Her argument, in short, is that constitutional environmental protections of a substantive nature are important and justified, and that if New Zealand were to promulgate a written constitution, such protections should be included within its scope.