

Transforming Three Waters

MAY 2021





In this report we describe
key issues involved in the
Three Waters Reform
Programme, applying our
insights and expertise.
Our team is ready to help
you navigate all aspects
of the Three Waters
Reform process.

Local government is about to have its biggest transformation since 1989.

The Government's Three Waters Reform Programme (**Programme**) is poised to overhaul how water services are funded, financed and delivered in Aotearoa New Zealand through the transfer of water responsibilities and powers to new statutory entities.

By implementing the Programme through a 'partnership-based approach', the Government correctly recognises that the participation and support of local government and iwi/Māori in the Programme will be critical to its success.

Indeed, as the present custodians of the vast majority of water infrastructure in our country, local government has much to offer in terms of technical, political, and cultural expertise and insight. With continued responsibility for the wellbeing of communities, councils have a strong and enduring interest in making the Programme a success – regardless of whether ultimately opting in or out.

Mana whenua exercise kaitiakitanga over freshwater resource within their rohe, and are increasingly looking to participate in the delivery of water and wastewater services. However, iwi and hapū rights and interests in freshwater remain unresolved.

Simpson Grierson stands ready to support the local government sector through the Programme. We are Aotearoa New Zealand's leading advisor to local government, with a long track-record of advising on structural and governance reform and critical Three Waters projects.

We recognise that each local authority will have its own unique issues to grapple with, but there will also be many issues that will be common to all local authorities along the way. We are perfectly placed to advise and represent local government on the issues that are unique to particular communities and also those that affect the sector generally.

In this report we discuss key issues involved in the Programme, applying our insights and expertise. Please get in touch to discuss how our team can help you navigate all aspects of the Three Waters reform process.

For further information or assistance, please contact us.

Kind Regards,



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Three Waters reform – what’s happening and why

The Government is undertaking a far reaching review of Three Waters delivery.

Background

Major transformations are required to meet significant and urgent challenges in delivering water supply, wastewater and stormwater services. The burden of managing and maintaining water services has fallen on local authorities and their council-controlled organisations – some of whom may struggle without support.

The Government’s intention is to consolidate Three Waters services into publicly-owned multi-regional entities, transitioning away from most areas’ current custodians – the local authorities. These will be statutory entities subject to commercial disciplines led by competency-based boards, of sufficient size to create economies of scale. The most recent Cabinet paper on this topic contains hints that a smaller number of water services entities is the Government’s preferred outcome.

The exact scale of the investment required to deliver Three Waters services to acceptable standards remains uncertain, with many assets ungraded and the impacts of climate change on the security of water supplies and the resilience of existing network infrastructure still largely unquantified. However, whatever the scale, it is crystal clear that significant investment will be required.

Systemic challenges vary across communities, but have been categorised by the Department of Internal Affairs (DIA) as:

- **Funding and financing:** funding upgrades required to meet safety standards, keep pace with population changes and build resilience against natural events;
- **Capacity and capability:** attracting and retaining specialists with the technical skills to manage complex water infrastructure;

- **Regulation:** strengthening stewardship, compliance, monitoring and enforcement practices, including imposing formal economic regulation to measure performance.

The challenges have been exacerbated by Covid-19 and resulting forecast decreases in council revenues. Climate change is another aggravating factor, with droughts and other extreme weather events putting further pressure on existing assets (both natural and physical).

While local authorities have a lot in common, each will be impacted in a different way, depending on its assets, the investment required, and its rating base. Striking a balance between councils working together nationally while retaining meaningful representation locally will be fundamental to the success of the Programme.

Reform timeline and next steps

When announced in June 2020, the Government originally signalled a three year period for these reforms. However, the new dedicated water entities are now intended be fully operational by June 2024.

So far, through the DIA, the Government has:

- started distributing stimulus funding of \$523 million to councils (releasing further stimulus is based on achieving agreed milestones);
- developed a large-scale, multi-faceted work programme;
- set up the Joint Central/Local Government Three Waters Steering Committee; and
- begun engagement with councils and iwi/Māori through a series of initial workshops, hui-ā-motu, and webinars.

The Steering Committee comprises independent chair Brian Hanna, local government mayors, chairs and chief executives, representatives of Local Government New Zealand and, officials and advisors from Taituarā, DIA, Taumata Arowai (see box to the right), the Ministry of Business, Innovation and Employment and the Treasury.

Government has agreed that a high-level principle of partnership with iwi/Māori will be followed throughout the reform Programme, and reflected in the new Three Waters service delivery system.

The next key milestone is perhaps preparing a Local Government (Three Waters Reform) Amendment Bill, which will enable councils to participate in the reform process through a bespoke decision-making framework. The Minister of Local Government will request category 2 priority on the 2021 Legislation Programme (which means the Bill must be passed in 2021).

TAUMATA AROWAI – THE WATER SERVICES REGULATOR ACT

Taumata Arowai – the Water Services Regulator Act, establishes Taumata Arowai as the new water regulator. This Crown agent is designed to oversee, administer and enforce the new drinking water regulatory system in particular, while also improving the environmental performance of wastewater and stormwater networks.





Transitional Arrangements

Local authorities can look to Auckland's 2010 amalgamation for insights.

Background

At present, 67 territorial authorities and unitary authorities own and operate the majority of New Zealand's water and wastewater infrastructure. DIA has indicated that it is aiming for the new water service entities – potentially as few as two or three – to be operational from June 2024.

Compared to other aspects of the Programme, relatively few details of the preferred approach to transition can be found in released Cabinet papers or on the DIA website. Nevertheless, Auckland's local government reorganisation in 2010, which included amalgamating the water and wastewater operations of Auckland's seven territorial authorities into a single entity (Watercare Services Limited), provides some valuable insights into the tasks that will need to be achieved by "Day 1" of the new water services entities (see box on page 5).

DIA's briefings to stakeholders have described the main activity of the transitional phase of the reform programme as "confirming how to move from the old to the new system, including price paths, timeframes for handover and interim arrangements". The briefings also refer to the establishment of Transition Regional Water Entity Boards who will "take regional ownership and decision-making during the transition phase until the new water entities are operationally active".

New transition agency or establishment unit

It is not yet clear whether, in addition to Transitional Regional Water Entity Boards, a single transition agency equivalent to the Auckland Transition Agency (ATA), which was created by the Local Government

(Tamaki Makaurau Reorganisation) Act 2009 (LGTMR), will be appointed to oversee the establishment of the new water services entities. The most likely alternative is this function being performed by an "establishment unit" within an existing Government department such as DIA.

As well as developing a "price path" that transitions existing ratepayers and customers on to a common tariff structure, other tasks that any new transition agency would need to undertake, and (potentially) the Transition Regional Water Entity Boards would need to approve, include:

- the development of initial asset management plans for the new water services entities;
- due diligence of the assets and liabilities to vest in each new water services entity, including identifying the appropriate portion of local authority debt attributable to water and wastewater infrastructure that should be transferred to the new entity;
- aspects of the customer relationship beyond simply pricing, for example a customer contract or charter setting out the respective rights and obligations of each entity and its customers;
- integration of IT and other infrastructure;
- workforce planning to ensure the new entities are appropriately staffed; and
- development of a plan to ensure there is operational stability and no loss of service.



HOW WE CAN HELP

Simpson Grierson was the primary external legal adviser to the Auckland Transition Agency (ATA), and, since integration of Auckland's water and wastewater services on 1 November 2010, has assisted Watercare Services Limited with key aspects of the integration including its customer contract, water and wastewater tariffs, consolidation of bylaws, and the relationship with its shareholder, Auckland Council.

Three takeaways for local authorities

Local authorities can gain valuable insights from the 2010 amalgamation of Auckland's water and wastewater operations, in particular, the tasks to be achieved by "Day 1" of the new water services entities.

Maintain service levels during transition

Existing territorial authorities and unitary authorities will need to maintain service levels during their final months of delivering water services, despite the likelihood of key staff being seconded to any new transition agency or establishment unit. The LGTMRA imposed on the outgoing local authorities an obligation to co-operate with the ATA and other local authorities to facilitate the reorganisation. This included complying with reasonable requests for employees

to be seconded to the ATA, and with ATA requests for information relevant to the reorganisation.

Transitional agency approval for significant decisions

Another aspect of the LGTMRA that may be replicated is a process for approving local authority decisions during the transition period that might significantly prejudice the reorganisation of water and wastewater services, constrain the power or capacity of the new water services entities, or have a significant negative impact on the assets or liabilities transferred to those entities. Prior to Auckland local government reorganisation taking effect on 1 November 2010, ATA approval was required for significant decisions of the outgoing local authorities, including decisions to purchase or dispose of significant assets, or enter into contracts over a certain financial threshold or that would impose ongoing obligations.

Empower and work with the interim chief executive

The LGTMRA empowered the interim chief executive of the new Auckland Council to appoint staff and enter into contracts to enable the Auckland Council to operate efficiently on and from Day 1. An interim chief executive of each water entity will need to be similarly empowered by legislation.

Funding and Financing

Finding solutions to fund and finance critical investment in Three Waters infrastructure – without impacting councils – will be a key challenge.

Background

The Programme is, in large part, a funding and financing reform.

The inability to fund and finance critical investment in three waters infrastructure is one of the systemic challenges facing our communities.

There will be a number of interconnected issues to be addressed to ensure not only that the new entities are well placed to make the required investment, but also that the existing borrowing strength and capacity of the local authority sector is not adversely impacted.

Debt pricing versus volume

Most local authorities are members of the hugely successful Local Government Funding Agency (LGFA) borrowing programme and thereby able to access debt sourced from international capital markets, often at extremely competitive prices. While the debt pricing (interest rates and coupons) is extremely competitive, this comes at the expense of debt volume.

In order to maintain its high credit ratings (allowing it to attract favourable borrowing terms), LGFA imposes financial covenants on local authorities that act as a limit on the amount of debt that local authorities can take on. This principally occurs through the 'net debt to total revenue' ratios of 175% for most councils and 280% for certain foundational LGFA members with particularly good credit.

LGFA may consider opening its borrowing programme to the new water entities to enable them to raise debt capital through it – particularly as debt for water infrastructure currently represents a significant portion of all LGFA borrowings. However, it is expected that the

new water entities will need to be more highly geared than the local authority sector in order to finance the required investment in infrastructure. Options to ring fence any such debt (and not pass on any increased burden to the many local authorities that guarantee LGFA) will be of critical importance to the local government sector.

Maximising credit strength

A further reason why LGFA can raise competitively priced debt is the strength of its underlying revenue stream. LGFA is guaranteed by most major local authorities which, in turn, can secure their obligations against their statutory rights to raise rates (secured as rates charges on properties) and ultimately force rating sales in a default scenario.

It will be important that the new water entities have similarly strong and stable revenue streams so as to maximise their own credit strength. But this should not come at the expense of flexible and fit-for-purpose revenue generation tools. Watercare, Auckland's statutory water entity, provides one example – it charges per kilolitre of water supplied to a property, as measured by its water meter (a "volumetric" charge). Then it charges separately for wastewater, with a fixed charge for maintaining the wastewater network and a volumetric charge for collecting and treating wastewater. The volumetric charge is set at 78.5% (or 95% for apartments) of the metered volume coming into a property.

We expect that the new water service entities will require a range of revenue generation tools – including those currently used by Watercare and those currently employed by local authorities (eg development contributions). Ensuring that the



new water entities have an appropriate mix of revenue streams, while replicating the strength afforded to local authorities through the rates charge model, will be another critical aspect of the Programme.

Debt separation

The Programme will also need to provide for the new water entities to be able to raise their own significant levels of debt while not eating into the debt capacity of local authorities.

For this to happen, the new entities will need a sufficient degree of separation from local authorities – both through disbursed control and the absence of any legal or moral recourse to local authorities for their debt obligations. The degree of separation will need to sufficiently ensure that any debt taken on by a new water service entity does not get counted in the LGFA covenants of its owning or controlling local authorities, or attributed to them by rating agencies.

HOW WE CAN HELP

As New Zealand's leading local government funding and financing advisers, our recent experience covers the full breadth of issues that will need consideration as part of the Programme. For instance:

- **IFF** – we advised the Crown on the development and implementation of the new 'SPV' Infrastructure Levy Model under the Infrastructure Funding and Financing Act 2020 (**IFF Act**). The IFF Act enables local authorities, Māori and iwi, and developers to partner and deliver infrastructure, unrestricted by local authority debt limits. It permits certain approved SPVs (special purpose vehicles) to collect levies directly from those who benefit from the infrastructure and means that infrastructure can be developed without needing to increase the relevant local authority's debt burden. Our work included

the creation of a new infrastructure funding tool for SPVs, a rates charge model to support SPV borrowing, and providing for financial covenant separation between SPVs and local authorities. The IFF Act's model may be a useful precedent for the way that the proposed new water entities raise money for infrastructure and operate.

- **LGFA** – we have advised the local government sector on the design, establishment and ongoing operation of LGFA. This includes recent work to restructure the LGFA borrowing programme to allow council-controlled organisations to raise debt through LGFA without adversely impacting the positions of existing local authority borrower and guarantors. We anticipate that the local government sector will need similar representation should LGFA seek to make its programme available to the new water entities.



Asset Management

What are the responsibilities and duties of the new entities, and what does that mean for local authorities?

Background

Changes to asset management practices will be significant after the creation of the new water entities. Transferring infrastructure and staff, as well as maintenance, delivery and other service functions, will need to be considered and worked through.

Current landscape

There are number of provisions in the Local Government Act 2002 (LGA02) that would currently create statutory obstacles for local authorities to make decisions to participate in the Programme, including provisions:

- obliging local authorities to maintain water services and prohibiting them from divesting ownership; and
- relating to consultation, long term planning and decision making.

It is proposed that these statutory obstacles would be removed or amended through legislative changes to facilitate the Programme. Others, like the prohibition on granting security over water assets, would probably remain in some form.

There are, however, no specific restrictions on who may construct or own water services infrastructure in the LGA02, as the provisions proceed on an assumption that such infrastructure is primarily owned and operated by local government entities (which reflects current reality). The LGA02 expressly envisages that local authorities may wish to enter into arrangements with a non-local government entity to provide water services.

What's next?

While decisions on the preferred service model have yet to be made and are subject to detailed continuing policy, legal and commercial work, and consultation with iwi and local government, critical issues to understand will be:

- how any transfer of infrastructure is implemented, and the resulting financial impact on council balance sheets;
- the extent that responsibility for stormwater, as opposed to drinking water and wastewater, will be affected through the reform process (stormwater management networks include assets owned by third parties and therefore requires an integrated approach across urban development and land use planning frameworks – functions that will be more aligned to the ongoing focus of local government);
- how the new water entities and councils will work together to ensure effective management of stormwater assets and proper integration of the three waters network;
- identifying the point at which control and responsibility for any physical assets are to be given and taken and ensuring that this is aligned with, and is reflected in, relevant asset plans maintained by local authorities;
- identifying what statutory powers will need to be conferred on the new water entities to enable them to manage their asset base (such as powers of entry, to construct on private land, to check services, to make bylaws, to protect assets and to regulate asset use), and how any such powers will interrelate with existing local authority powers; and



- the role and future for local government after reforms are completed, and ensuring local government remains robust and thriving – a topic for the recently announced 'Review into the Future of Local Government' to address in detail.

Future water service providers will also need to be transparent, likely in the face of increased oversight and regulatory requirements. Robust disclosure requirements about asset conditions, service performance and costs of delivery are certain, combined with supervision by Taumata Arowai.

HOW WE CAN HELP

Simpson Grierson has extensive experience with the tools and statutory powers needed for long term asset management across a variety of structures and projects.

Our deep and long-standing networks throughout local government means that we are uniquely placed to advise local authorities on the transitional and future asset management issues arising from the Programme. Our recent experience covers the full range of anticipated issues and includes:

- **Watercare** – advising on the Central Interceptor Main Works project, one of the largest and most complex infrastructure projects ever undertaken in New Zealand; and advising on Watercare's 'Enterprise Model' a collaborative and transformational delivery model for the delivery of \$2.4b of capital works over the next 10 years.
- **IFF** – advising on the statutory construction and asset management powers required by SPVs under the Infrastructure Levy Model;
- **Tauranga City Council** – preparing the joint project agreement governing the relationship between Tauranga City Council and Western Bay of Plenty District Council regarding Three Waters network assets;
- **Queenstown Lakes District Council** – advising on and implementing contract models for the delivery of its extensive Three Waters capital works programme;
- **Watercare** – drafting agreement with Waikato District Council for the operation and maintenance of water, wastewater and stormwater services; and
- **Partnership and Franchising** – advising a range of councils on partnership and franchise agreements for the operation of water and wastewater systems.



Ownership and Governance

What degree of control will local authorities have over the new water entities?

The bottom line

From the outset of the Programme, a number of key design features relating to the ownership and governance of the new water entities have been set in stone. The entities:

- must be publicly owned, with mechanisms to recognise Treaty rights and to prevent future privatisation;
- will be statutory entities – meaning they will be corporate bodies that are created by their own statute, with their own design features;
- will have competency-based boards, meaning that professional directors will be appointed with appropriate skills and experience (rather than simply being representatives of appointing shareholders or controllers); and
- will have their own balance sheets – separated from those other entities that own or control them (including, critically, local authorities).

What else is emerging?

It is apparent that the governance of the new entities will involve a multi-faceted eco-system. While still in the design stage, it appears likely to involve fixed rights for local government and iwi/Māori to participate in the strategic direction of the entities and hold them (and their boards) to account. The latest papers from DIA also suggest that the Government is looking at a possible ‘no shareholding’ structure — that is, instead of having shareholders, the new water entities could each be controlled by particular local authorities and mana whenua identified in legislation, with set governance rights rather than shareholdings.

The governance structure is also expected to involve community consultation obligations in connection with each entity’s strategic direction and investment

plans, and must also recognise the wider integrated regulatory system that will exist for these new entities (including water quality regulation under Taumata Arowai, the environmental regulatory role of regional councils, and potential economic regulation to protect customers’ interests).

What rights will local authorities have?

The degree to which local authorities will influence, or control, the new service entities is not yet clear. There is, however, an emerging picture that has been released by DIA, which would see local authorities and mana whenua:

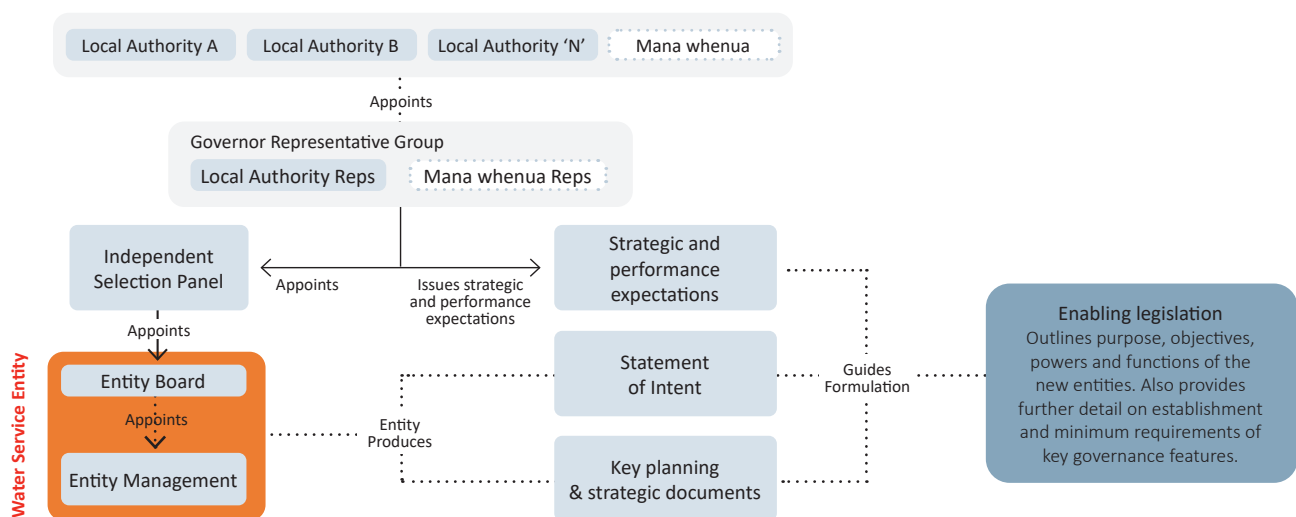
- jointly appoint a Governor Representative Group (GRG) for each new water entity;
- participate (through the GRG) in the appointment of an independent selection panel to appoint a competency-based board and issue strategic and performance expectations for the entity – potentially through a ‘letter of expectations’ or similar document;
- have input into the regulation of three waters outcomes (including as to water quality, resource management, and economic regulation); and
- hold engagement and consultation rights in relation to constitutive and other material documents.

DIA is currently testing variations of this structure – including the degree to which local authorities and mana whenua are involved. Key considerations for each local authority will include ensuring:

- an appropriate balance between protecting its particular interests, on the one hand, and delegating sufficient authority so as to allow the new water entities to operate effectively, on the other;
- that the degree of influence does not prejudice its financial separation from the new water entities;



- that the degree of influence is commensurate with the degree of responsibility (real or perceived) that it will retain towards local communities water service delivery; and
- that, through legislation and written constitutional documents, the degree of influence of each local authority and mana whenua over the board (and ultimately management) of each new entity is clear and workable.



HOW WE CAN HELP

We have a wide range of experience advising on structuring new public sector entities, who owns and runs them, and importantly, the rights and influence of local authorities.

We have a range of experience and different models to draw from. Recent examples include:

- **Auckland local government Reform** – principal advisor to the Auckland Transition Agency on the design of the reform of local government in Auckland in 2010.
- **Council and Crown entities** – the design and establishment of a range of CCOs and Crown entity vehicles, including Crown Irrigation Investments Limited, airport CCOs and shared services vehicles.
- **CRLL** – the design and establishment of City Rail Link Limited (CRLL) as the delivery agent for Auckland's City Rail Link. We had to balance the need for the public shareholders to ensure that CRLL delivered on key objectives (eg timely completion, cost, future proofing and stakeholder engagement) and allowing CRLL appropriate space to deliver the project.
- **LGFA** – the design and establishment of the Local Government Funding Agency – a joint venture initiative between participating local authorities and the Crown. LGFA operates largely autonomously, but subject to parameters set by legislation and local authority shareholders.

Regulatory Matters

What is Taumata Arowai's role and how will it work alongside local authorities?

Background

The new drinking water regulator, Taumata Arowai, has the objectives of protecting and promoting drinking water safety, effectively managing its regulatory system, building capability among suppliers and the wider industry, and giving effect to Te Mana o te Wai.

Taumata Arowai will administer a new regulatory framework focused on implementing system-wide reforms to drinking water and source water, and will be responsible for setting, monitoring, and reporting on the performance of wastewater and stormwater networks.

The regulatory reforms are accompanied by the restructuring of water service delivery arrangements. All territorial authorities and council-controlled organisations must become authorised, or have their drinking water services delivered by an authorised supplier, within five years of the commencement of the Water Services Bill (currently expected to be 1 July 2021, although Cabinet has indicated that timeframes for compliance will be staggered over five years). The effect of the regulatory reform on territorial authorities will largely depend on the form that the new water service entities take, and whether or not each territorial authority chooses to participate in the new water service delivery system.

Role of regional councils

Regional councils will continue their role as primary environmental regulators. Under the Water Services Bill, while drinking water suppliers must monitor source water quality, regional councils must assess the effectiveness of regulatory and

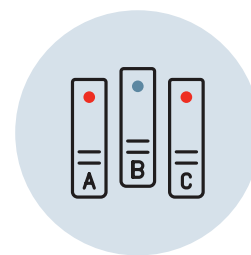
non-regulatory interventions relating to source water every three years. Regional councils must also publish information on the risks to source water quality and quantity on a regional basis.

The first stage of Taumata Arowai's work will be focused on providing regional councils and water service providers with resources, guidance and advice to ensure that they are well placed to give effect to the new framework. The proposed staggered introduction over five years will give water suppliers and Taumata Arowai time to work together on implementing the new regime.

KEY ACTIONS FOR COUNCILS TO TAKE

Cabinet is expected to come to a final decision about the operation and configuration of the new water service entities, and their fundamental features, before the middle of this year. Councils will then have until the end of this year to decide whether or not to participate in the new water delivery system.

Given these timeframes, there will be an interim period when the regulatory regime has come into force, but the new water service entities have not yet been formed. During this time, territorial authorities, as drinking water suppliers, must ensure compliance with the regulatory regime, before those obligations are possibly transferred to the new water entities.



What local authorities need to be aware of

Scrutiny on councils is going to increase. The intensity of regulation will be linked to the scale, complexity, and risk profile of drinking water supply.

However, even with this differentiation in relation to supply, we expect all councils will end up with broader responsibilities than they have at present. Territorial authorities must ensure that their communities continue to have access to safe drinking water, make assessments of drinking water, wastewater and sanitary services, and understand the risks to ongoing access to safe drinking water. The new assessments are broader than the public health aspects of water and sanitary services that territorial authorities are currently obliged to oversee.

Under the Water Services Bill, territorial authorities will be required to consider the findings of those assessments in relation to their current and future infrastructure and long-term plan, district plan and their broader duty to improve, promote and protect public health within their district in accordance with the Health Act. The Water Services Bill also places new responsibilities on territorial authorities when supplies fail or are at risk of failing.

It is important to note that this reform sits within the wider regulatory framework and is intended to complement the reforms that the Government is currently undertaking in relation to freshwater resource management. In the past year, the RMA (by way of national freshwater instruments) has introduced increased policy direction and regulation in respect of takes and discharges into freshwater. Territorial authorities and regional councils will need to comply with the new regulations as well as with existing and future RMA frameworks.

HOW WE CAN HELP

We routinely advise local authorities on regulatory regimes that they variously administer or are subject to, including the RMA framework and its subordinate policy and planning framework, the Health Act, and the ways in which these frameworks interact with councils' obligations under other key local government legislation. This work includes advising councils and water supply entities throughout New Zealand on:

- water supply obligations under the LGA02 and other entity-specific legislation;
- compliance with obligations under the NPS-FM and NES-FM, and how these instruments are to be given effect in water take and discharge resource consent applications, and plan changes; and
- designating and consenting of major water supply, wastewater treatment and stormwater infrastructure.

We are keeping a close eye on the new regulatory framework for the three waters, and can help ensure that your organisation is well placed to make the necessary decisions and understand and comply with the new obligations that will be placed on it.

Our Three Waters Reform Team

New Zealand's leading local government and infrastructure advisers

We have established a dedicated team to help the local government sector respond to the Three Waters Reform Programme and, for those that 'opt-in', navigate the transition to the new service arrangements.

Our team comprises the full range of expertise and experience required to support the sector's legal requirements. That expertise ranges from the day-to-day operation of councils in their statutory

and political environments, to the highest level strategic developments affecting local government as a whole. We advise most of the local authorities in New Zealand, and have extensive and long-standing networks with key policy and decision makers throughout local government. We also have the largest infrastructure team in New Zealand and have guided some of New Zealand's most significant projects and reform processes.

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