21 July 2022

The Chair
Finance and Expenditure Committee
Parliament Buildings
Wellington 6160
fe@parliament.govt.nz

Kia ora,

CENTRAL OTAGO DISTRICT COUNCIL SUBMISSION: WATER SERVICES ENTITIES BILL

GENERAL COMMENTS

1. The views contained in this submission have been made by general agreement between the Central Otago District's councillors but do not necessarily reflect the individual views of each of those councillors on each individual point.

2. The Central Otago District Council (the Council) is fundamentally opposed to the service delivery model proposed under this Bill which will take the management of Three Waters activities from Territorial Authorities and place this with four Water Service Entities (WSEs). Together with our communities we share many concerns regarding the proposal which are outlined in this submission.

3. We believe that the mandating of the reforms is an attack to local democracy and request that the promise to our communities to be able to decide whether our district becomes part of the new reforms or not, should be kept.

4. The Council opposes the way in which the Water Services Entities Bill (the Bill) is being progressed through Parliament at speed and the current lack of detail in the Bill. It is difficult to provide a submission on the Bill because so much detail will be contained in Bills anticipated to come, the constitutions and in other reform programmes.

5. The Council makes this submission on the Bill on the basis that if the proposed reform is to proceed then changes are needed to the Bill in its current form.

6. The Council shares some common goals with Government in wanting to ensure communities are provided with safe and affordable water services that support good public health and environmental outcomes. The Council wants and deserves to be to be an active participant in ensuring such goals are met.

7. The Council is therefore supportive of and accepts the need for regulatory reform to achieve such goals, but considers this has been achieved through the establishment of Taumata Arowai and the Water Services Act 2021.

8. Based on the Council's discussions with other territorial authorities in relation to the Bill, the Council is not alone in its concern over the proposed service delivery model. In the Council's

view, there are better ways to achieve the desired outcomes than to have wholesale change involving such large and complex entities where local knowledge and voices are distanced from the decision makers.

9. Under the proposed four entities model, ***most*** territorial authorities within the Southern Water Services Entity will not have a representative on Regional Representation Group (RRG) and therefore will not have a direct voice at the RRG strategic level. The Otago/Southland region alone currently has seven territorial authorities which includes a mix of metropolitan and rural and provincial councils, and seven runanga. There is no mechanism in the Bill to ensure that the membership of the RRG adequately reflects the many and varied communities located within the entity.

10. In addition, there are substantial overlaps between the Three Waters Reform programme, the reform of the resource management system, and the future for local government review. Ideally, these reforms should be considered alongside one another so that the relationship between the various reform initiatives is clear, including a consideration of timeframes, sequencing of changes, dependencies and resourcing.

11. The Council is particularly concerned that this Bill does not deal with many core issues regarding water services, such as:

    a. the inter-relationship with land planning;
    b. the transfer of assets and liabilities;
    c. the pricing and charging arrangements;
    d. requirements for equitable charging across each entity
    e. economic regulation and consumer protection;
    f. various amendments that will need to be made to other legislation.

12. The Council is also concerned by the absence of any reference to community wellbeing in the Bill. Water services are integral to community wellbeing and promoting the wellbeing of communities is a critical role for territorial authorities. This omission seems at odds with the aims of local government reform.

13. While the Council recognises that the Government's intention is that many of these core issues will be dealt with in subsequent legislation or in the first constitution of the new Water Services Entities (WSEs), these issues are of such fundamental importance to the local government sector that it is difficult to consider this Bill in isolation from such core issues.

14. Council is concerned regarding the control that the WSE will hold in exerting power over the Council's ability to plan for future land use. The Bill provides no clarity on how competing developments from various geographic areas (within a WSE area) will be prioritised, and how in practice this will impact on the Council's spatial planning, everyday planning functions and subdivision processes.

15. In the Council's view:

    i. The core issues that are intended to be dealt with in subsequent legislation and regulations should be incorporated into this Bill so that all the key issues can be considered together. The public and other affected parties would then need the opportunity to make submissions on the amended Bill.

OR

ii. This Bill should be delayed until a subsequent bill is introduced addressing the core issues. Again, this is so that all key issues can be considered together rather than in isolation.

16. The Council sets out below its submission on the Bill with the intention to improve implementation and outcomes, if the Government continues with the service delivery model proposed under the Bill regardless of the Council's recommendations above.

COUNCIL'S KEY CONCERNS ON THE BILL AS DRAFTED

17. The Council's key concerns regarding the Bill as currently drafted, include:
    a. whether the Bill will achieve its objectives;
    b. the proposed governance and ownership structure of the WSEs;
    c. the protections against privatisation, joint arrangements and the amalgamation or division of a WSE; and
    d. the transitional provisions.

18. For ease of reading, the Council has put its key points in italics at the beginning of each section.

FUNDAMENTAL CONCERN

19. If there is one thing we ask the Select Committee to take from our submission, it is that this reform has been promoted on the basis that future costs for many communities will be unaffordable, and only four entities can provide the scale required to achieve improved affordability. There is however no requirement for standardised pricing for a baseline level of service across a WSE. We consider this is a critical objective of the reform, and as such should be included in Clause 11 of the Bill. The absence of this requirement could significantly disadvantage rural and provincial communities.

20. Clause 13 states the operating principles of the WSE, including:
    c. Being open and transparent, including in relation to –
        i. The calculation and setting of prices; and
        ii. Determining levels of service delivery to communities and consumers; and
        iii. Reporting on the performance of the WSE

21. This is of particular sensitivity to the people of Central Otago who find themselves on the receiving end of a "costs falling where they lie" philosophy in relation to electricity transmission.

22. Similarly to the monopoly utility power that the water entity will hold, Central Otago's transmission lines provider Aurora has a virtual monopoly on electricity transmission across most of the district. Years of significant underinvestment in infrastructure by the company led to the need for a Customised Price Path to be sought through the Commerce Commission. When that CPP was finalised, that breakdown of how the increased cost was to be paid was determined by the Electricity Authority, which using the "costs falling where they lie" philosophy, caused Central Otago to be paying vastly higher costs within the CCP than consumers in Dunedin.

23. Our concerns, given this is a Government organisation applying a pricing philosophy to a monopolised utility is that the same philosophy could flow through to the entity Board if responsibility for the pricing is retained by that Board.

24. Nothing short of having standardisation of pricing for all services under the reforms within the entity area enshrined in legislation will be acceptable to this Council.

SUBMISSION PROPER

SECTION 1 -WILL THE BILL ACHIEVE ITS OBJECTIVES?

25. *<u>Key points regarding achievability of the Bill's objectives:</u> Council considers that the Bill's objectives are missing several key fundamental objectives. There is not enough information to know if the objectives are achievable under the proposed model. It is essential that retention of water assets in public ownership, community wellbeing, and standardised baseline pricing is included as an objective in clause 11 of the Bill,*

26. Clause 11 of the Bill states that the objectives of each WSE are to:
    a. deliver water services and related infrastructure in an efficient and financially sustainable manner;
    b. protect and promote public health and the environment;
    c. support and enable housing and urban development;
    d. operate in accordance with best commercial and business practices;
    e. act in the best interests of present and future consumers and communities;
    f. deliver water services in a sustainable and resilient manner that seeks to mitigate the effects of climate change and natural hazards.

27. The retention of water assets in public ownership is critical, yet it is not identified as an objective of the WSEs. The objectives need to explicitly record that retaining water services in public ownership is an overriding objective.

28. Community well-being also needs to be listed as an objective of the WSEs and addressed in the Bill. For example, the Bill should protect the public's recreational use of land currently used for combined water and recreational purposes. The Bill should also specify a preference for using local contractors for scheduled and re-active works.

29. The Council is concerned that land development could be delayed by the inability of the WSE to meet demand for infrastructure capacity within a timely manner. Territorial authorities have undertaken spatial planning, in consultation with communities to meet the needs for projected growth in each community. If the WSE does not use the growth projections prepared by territorial authorities and respond to the demand for capacity in the 10 and 30 year plans then this will have significant impacts on their ability to support and enable housing and urban development. Provision also needs to be provided to support industrial land development to support business and economic growth.

30. The Council is concerned that land development could be delayed by the inability of the WSE to meet demand for infrastructure capacity within a timely manner. The Council requests that specific provisions are included in the Bill requiring the WSE to provide infrastructure capacity to meet the needs of Territorial authority growth projections, and spatial plans.

31. Given the current lack of information (particularly regarding financial matters and consumer protections), it is unclear whether each WSE will be capable of achieving their clause 11 objectives.

32. Success is likely to depend at least partly on the level and sources of funding received by the WSE. Under clause 129 of the Bill, the Minister can issue a Government Policy Statement on water services. However, there does not appear to be a corresponding commitment from the Government to assist in funding the WSE. This means that WSEs may be in the position of being given an unfunded mandate. Without government funding, the costs will inevitably fall to consumers.

33. If the WSEs take on significant amounts of debt (which seems inevitable if Government funding is not guaranteed), there is a risk that the costs will be higher for consumers than they would be if the current model was retained. It will be vital to have robust consumer protections and economic regulation.

34. Although there will be a balance sheet separation for three waters, the Council is concerned that this comes at the expense of added complexity, the loss of direct community knowledge and voices and the removal of democratic decision making.

35. There is also a lack of consideration given to how to resolve competing priorities of a WSE and an individual territorial authority or community.

SECTION 2 – GOVERNANCE AND OWNERSHIP STRUCTURES

36. *<u>Key points regarding governance and ownership structures</u>: The Council's concern is that* ***<u>most</u>*** *territorial authorities will not have a direct representative voice on the RRG. In the case of the Southern WSE, there are up to seven places for 22 Councils. There is no mechanisms to ensure that membership of the RRG adequately reflects the varied communities and geographical area of the WSE.*

37. Given the strategic role of the RRG, it is a priority for the Council to have a direct voice on the RRG. However, under the proposed model, the Council is not assured of this. The RRG

consists of between 12 and 14 members. Half of these members are required to be represented by mana whenua and half from the territorial authorities (clause 27). The Southern WSE (Schedule 2, Part 4) includes the districts of 20 territorial authorities plus part of the Marlborough and Tasman District Councils' districts. If there is a maximum of seven membership spaces for territorial authorities, there will clearly be many territorial authorities without a direct voice at the RRG strategic level. In fact, ***most*** territorial authorities will not have a direct voice on the RRGs.

38. The Bill provides no clarity on how members from 22 territorial authorities will be selected for 6 or 7 positions on the RRG. The Council anticipates that the constitutions of the WSEs will largely determine the composition and procedures of the RRGs. However, there is no certainty on this because the constitutions have not yet been provided. If decisions are to be by consensus, then there needs to be a mechanism available if consensus is not achieved.

39. There is no mechanism in the Bill to ensure that the membership of the RRG adequately reflects the many and varied communities located within the WSE, and in particular provides adequate geographic coverage of the Southern Water Services Entity.

40. Council opposes the appointment of the entity board being through the regional representative group and prefers the original independent selection panel proposed.

41. The appointment of the Board, and removal of Board members are two of the most crucial functions in the whole reform process. It is crucial to the efficiencies being gained that the reform programme is based on that the best people be appointed to the roles on the Board. Allowing for the process to be run directly by the RRG opens the door to cronyism, political manoeuvring and other factors that we believe will almost inevitably lead to a worse outcome for the end consumer.

42. In addition, some of the requirements contained in the Clause 25 of the second Cabinet briefing paper in relation to the then-proposed Independent Selection Panel are likely absent from a board selection panel created from members of the RRG. In particular we refer to:
    - 25.3 be independent of the entity's Representatives and
    - 25.5 be appropriately qualified to assess and select members of the water services entity board
    - These are crucial components and their absence will weaken recommendations or appointments made by the board selection panel. Council submits that consideration must be given to the legislation reverting back to the Independent Selection Panel originally proposed.

43. The territorial authorities without a direct voice on the RRGs will need to rely on the "collective duty" of the members of the RRG. This duty is set out at clause 29 which states that the RRG must perform their duties, functions and powers "wholly or <u>mostly</u> for the benefit of all communities in the entity's service area". The Council questions what this means and recommends that "mostly" is deleted to ensure all regions are considered. This is of particular concern in the Southern WSE given the large geographic area, the disparate needs of such diverse regions and the fact that most territorial authorities will not have a representative.

44. Council also questions the meaning of the word "benefit". It could be argued that the underinvestment in infrastructure that is part of the reason some form of reform is needed was for the benefit of the community through keeping rates down, and services affordable. The same applies in similar provisions of the Bill such as s. 47(a).

45. Clause 42 (2) states: 42 *Co-chairpersons and deputy co-chairpersons*

    (2) If the constitution provides for, and requires, a regional representative group to elect or appoint co-chairpersons and deputy co-chairpersons of the group,—

    (a) 1 co-chairperson and 1 deputy co-chairperson must be elected or appointed by the group's territorial authority representatives;

    Council submits that this should read (a) 1 co-chairperson and 1 deputy co-chairperson must be elected or appointed from and by the group's territorial authority representatives to clarify that the co-chair from the territorial authority portion of the RRG must be a member from that portion.

46. The RRG is required to make decisions by consensus of 75% of the regional representatives present and voting. Clarification needs given as to the process when consensus is abandoned, and a vote taken. Suggestion is that it is by the Chair's edict or co-chairs agreement.

47. If a dispute arises between regional representatives, then the regional representative must meet its own costs of the dispute resolution process - clause.*43(3)(b)*. We submit that this could pose an extreme risk of a power imbalance between representatives who can meet this cost and those who cannot.

48. Clause 43 (5) states: *The Minister, with a view to assisting the regional representatives to resolve the dispute, may*

    (a) appoint, and meet the costs of, a Crown facilitator:

    (b) direct the regional representatives to use a particular alternative dispute resolution process for that purpose.

    Council questions whether there should be an "or" between (a) and (b)

49. Clause 32 requires a territorial authority to only appoint elected members, chief executives, or senior managers to the RRG. Council requests that territorial authorities should be free to choose the best people for the role, not confined within these restrictions.

50. It must be noted that the establishment RRG will have a fundamentally significant impact on the successful operation of the entity and that the workload for the original RRG will be far greater than for successor RRG's once the entity has been operating for some time. During this establishment phase, elected members and CEO's/senior staff will be in the midst of preparing council's Long-Term Plans as well as dealing with the effects of the transition to not managing the three waters function of council. We question the capacity for elected members and senior staff or CEO's to handle this crucial set-up role. In addition, the Bill is

silent as to whether a person appointed under 32(2)(a) ceases to be eligible should they cease to be an elected member. We note this restriction doesn't apply to Regional Advisory Panel members under s.50.

51. There is no certainty as to what real influence the Regional Advisory Panels (RAPs) will have on the WSEs and/or RRGs. There is also no detail on the geographical composition of the RAPs apart from requiring an equal representation by territorial authority members and mana whenua panel members.

52. Again, the Council anticipates that the constitutions of the WSEs will largely determine the composition and procedures of the RAPs but is concerned that it has not yet seen the proposed constitutions.

53. The Council is also concerned that, given it is the members of the RRG who can amend or replace the constitution, the territorial authorities that do not have direct representation on the RRGs will be relying on members of the RRGs to ensure geographic representation on the RAPs.

54. The Bill states that the role of a RAP is to provide advice to the RRG about how to perform or exercise its duties, functions and powers *in respect of a particular geographic area*. This conflicts with the RAP's "collective duty" to perform their duties wholly or mostly for the benefit of all communities in the WSE's service area (clause 47). If the RAP is considered a representative panel of the geographic areas, the Council recommends removing the collective duty to benefit all communities in relation to the RAP.

55. The Council requests that, instead of RAPs being optional and left to the constitution of the WSE to determine, that they are mandatory to ensure all geographic areas are considered within the WSE area. This is critical for those areas of the WSE region that do not have a direct representative on the RRG.

56. The board of a WSE must hold at least two public meetings during each financial year that are open to members of the public. Council submits that these be required to be held in different cities within the entity area, and that legislation ensure the viewing of, and participation in these meetings is available via the internet in order that the cost of attendance from distant places does not disenfranchise some customers.

57. Protection is provided to board members and employees of a water services entity from liability by reason only of being a board member or employee. Council submits that this protection should extend the RRG and RAP members as well.

58. Council recommends that the Water Ombudsman be included in the list of organisations in clause 131 (b) that the Minister must consult in preparing a Government policy statement

59. Given the lack of certainty regarding the Council's representation at the governance level, the Council would have expected more engagement as a shareholder. Other than engagement relating to planning documentation required by the WSE Board at Schedule 3 of the Bill, it is clear from the Bill that shareholding rights are of limited value.

60. Council recommends that Consumer Forums established under clause 203 should be included in the list of organisations who provide feedback on interactions with the WSE in 195(3) (c).

61. Clauses 115 and 166 make it clear that territorial authorities have no right to instruct and no financial control. It is therefore hard to accept that territorial authorities have any "tangible ownership" in the WSEs.

62. Clause 166(1)(d) appears to prevent a territorial authority from making a grant to the WSE to help fund a project in its region. Is that the intent of the Bill? There may be occasions where the WSE advises that it is unable to fund infrastructure within a specified area but the territorial authority considers that the infrastructure is of such importance to the specified area that it is prepared to fund it. The Council recommends that the Bill allows for such a scenario.

SECTION 3 – PROTECTIONS AGAINST PRIVATISATION, JOINT ARRANGEMENTS, AMALGAMATION AND THE DIVISION OF WSEs

63. *<u>Key points regarding privatisation, joint arrangements, amalgamation and division of WSEs:</u> Although there are mechanisms to protect against privatisation, those mechanisms could be repealed or amended by a simple majority in Parliament. There are not the same protection mechanisms for the amalgamation of WSEs. This is a concern as an amalgamation (say into one WSE for the whole of New Zealand) would further remove local voices.*

64. Section 130 of the Local Government Act 2002 currently protects against privatisation. In contrast, while the Bill has mechanisms to protect against privatisation, it is still technically possible.

65. The Council notes the ability for WSEs to enter joint arrangements for providing water services (up to 35 years in term) under clause 118 of the Bill. The Council is concerned that this clause also raises the possibility of the sale or transfer of existing infrastructure where the WSE believes it is incidental to the joint arrangement, or desirable for the success of the joint arrangement.

66. While there is no mention in the Bill of whether WSEs can potentially amalgamate or be divided in the future, the operation of clause 118 raises concerns that such re-organisations could happen in the future without having to necessarily go through the divestment process set out at Schedule 4 of the Bill.

67. Further thought needs to be given to the potential for joint arrangements and the amalgamation/divisions of WSEs. As drafted, the Bill contains limited checks and balances for such changes. This is a concern as an amalgamation (say into one WSE for the whole of New Zealand) would further distance local voices.

SECTION 4 – TRANSITIONAL PROVISIONS

68. *<u>Key points regarding the transitional provisions:</u> The transitional provisions are operationally difficult, and clause 21 in Schedule 1 is unworkable. The transitional provisions will create*

resourcing and scheduling issues for territorial authorities. Key details are left to be determined by the chief executive of the Department of Internal Affairs (DIA). The Council recommends a more trust-based approach, so that the focus can be limited to significant decisions. The timeframe for delivering the Asset Management Plan is July 2023 does not provide sufficient time to enable robust evidence to be developed to support financial planning, and creates a high risk of delivering sub-optimal outcomes.

69. The Council acknowledges that, to establish new WSEs, there needs to be a great deal of cooperation and information sharing between territorial authorities and an establishment entity. However, the Council also needs to be able to continue with "business as usual" during the establishment period.

70. The Council's key concerns during the establishment period include:
    a. the requirement that an entity level draft asset management plan will be delivered on or before 1 March 2023 for the financial year starting 1 July 2024.
    b. the ambiguity in clause 21 of Schedule 1;
    c. the likely time commitment involved in providing information and seeking and obtaining approvals from DIA;
    d. the ability of territorial authorities to make timely decisions and deliver services during the establishment period; and
    e. the fact that key details are being left to be determined at a later date by the chief executive of the DIA (such as the value of any water related contract that a territorial authority can sign).
    f. The lack of clarity that decisions relating to borrowing should only apply to three waters.

71. The sections of the Bill relating to engagement with consumers and RRG do not apply to the asset management plan and funding and pricing plan that will be developed during the establishment period. However, the requirement for the draft asset management plan to be delivered on or before 1 March in the year preceding the financial year to which the draft asset management plan relates appears to still applies.

72. This will require information from territorial authorities to be provided to the Entity Establishment Team at a much earlier date than typically provided for the territorial authority's long term plan process. Accelerating the timelines for the provision of this critical planning information in the establishment period will result in poor quality information being used to develop this significant document. This will result in sub-optimal performance in the first three-year delivery period of the WSEs.

73. Given that less time is required to undertake consultation for the initial asset management plan, there is ability to extend the delivery date for this. The timeline for delivery of capital and operational work programmes and associated budgets from territorial authority's should be March 2023 when these would typically be provided for the long-term plan. This would still provide 15 months for the WSE establishment team to collate information into the WSE asset management plan and funding and pricing plan prior to the establishment date.

74. The definition of "decision" in clause 21 of Schedule 1 is ambiguous and is unworkable as drafted. On one interpretation, it has the potential to capture routine daily transactions that

are probably not intended to be caught (e.g standard drainage easements). The ambiguity arises because of the word "and" at the end of clause 21(a)(ii) and the word "includes" in clause 21(b). Does the clause 21 definition mean that ***<u>any</u>*** decision that relates to the provision of water services or may affect the provision of water services will be captured, and is not limited by clause 21(b)? If so, that clause is extraordinarily wide and would include the hundreds of routine daily transactions that relate to water services. It is difficult to imagine that this is what is intended, but the use of the word "includes" indicates that the list in clause 21(b) is not exhaustive. Alternatively, does clause 21 mean that the decisions are limited to decisions that fall within the subparagraphs of clause 21(b)? This would make more sense, but the clause needs to be amended so that the intention is clear. The Council recommends that the word "includes" be deleted and substituted with the word "is".

75. The decision-making approvals process will take staff time and will cause delays. It is therefore vital that the decisions that the DIA needs to review be limited by the definition of "decision" in clause 21. This could be achieved by introducing into clause 21 an element of significance (using the criteria in clause 24(3) of Schedule 1). In this way, instead of all decisions that "relate[s] to the provision of water services or may affect the provision of water services…" needing to go to the DIA for approval, only decisions that could reasonably be considered significant would be caught.

76. The transitional provisions will create resourcing and scheduling issues for territorial authorities, as the proposed workload would be in addition to current workloads. This situation would be exacerbated if Council's staff are seconded to the DIA (as permitted by the Bill).

77. The Council is concerned that key decisions are being taken away from democratically elected members during the transition period and that key details are to be decided later by the chief executive of the DIA. For example, the chief executive of the DIA will be able to decide:
    a. the length of the Council's water-related contracts (clause 21(b)(vi)(A) in Schedule 1);
    b. the value of the Council's water-related contracts (clause 21(b)(vi)(B) in Schedule 1);
    c. the length of any term borrowing by the Council (clause 21(b)(vii) in Schedule 1); and
    d. who within a territorial authority is classed as having a "senior" management role within the Council (clause 15(1)(b) in Schedule 1).

78. It is essential to have these decisions made now as they affect the practicality of the transitional provisions. If the thresholds in matters a, b and c in the preceding paragraph are set too low, then this will be unworkable for territorial authorities.

79. The distinction between "senior management" and other staff also needs to be clarified as senior management will not necessarily be offered employment by the WSE. This creates uncertainty for staff within territorial authorities. The Council recommends that the distinction be removed or made clear, as opposed to being left to the judgement of the chief executive of the DIA.

80. The Council considers that further work is required to determine how the transitional provisions will work in practice. It is critical that territorial authorities can operate

successfully and efficiently during the transitional period so that there are no detrimental impacts on ratepayers.

81. The Council recommends a trust-based model during the establishment period with fewer requirements regarding routine matters, and that clarification be made that these provisions relate only to decisions associated with three-waters.

CONCLUSION

82. The Council thanks the Committee once again for the opportunity to provide a submission on the Water Services Entities Bill.

83. The Council requests the opportunity to make an oral submission to the Committee on the Bill.

Yours faithfully

Tim Cadogan
MAYOR OF Central Otago