

THREE WATERS SERVICE DELIVERY REFORM

TERMS OF REFERENCE FOR WORKING GROUP ON REPRESENTATION, GOVERNANCE AND ACCOUNTABILITY OF NEW WATER SERVICES ENTITIES

Date: 8 November 2021

INTRODUCTION, OBJECTIVE AND REPORT

- 1 **Introduction:** The Minister of Local Government and Minister of Finance (who are the three waters reform Ministers, **Government Ministers**) and Local Government New Zealand (representing the national interests of the local government sector, **LGNZ**) wish to continue their good faith relationship to identify solutions in support of the shared interests and objectives of both central and local government with respect to the three waters service delivery reform programme.

The feedback received in relation to the proposed three waters service delivery reform from local authorities and iwi/Māori during August and September 2021 is acknowledged and the establishment of this working group is intended as a 'circuit breaker' process to identify a strengthened approach to the governance framework for the WSEs as contemplated by this Terms of Reference.

The establishment of this working group is supported by the Government Ministers and LGNZ and reflects:

- 1.1 the interests-based partnering relationship each of them committed to under their July 2021 Heads of Agreement (**Heads of Agreement**); and
 - 1.2 the Government's commitment to partnership with iwi/Māori in the three waters reform programme, which LGNZ acknowledges and supports.
- 2 **Objective:** This Terms of Reference relates to the establishment of a working group to:
 - 2.1 consider issues relating to **REPRESENTATION, GOVERNANCE AND ACCOUNTABILITY** of the 4 proposed new Water Services Entities (each a **WSE**); and
 - 2.2 recommend to the Minister of Local Government a preferred strengthened approach to the governance framework for the new WSEs which relates to such representation, governance and accountability (a **Strengthened Approach**) as an alternative to the approach included in the Government's reform proposal released for feedback in July 2021 (the **Originally Proposed Approach**).
 - 3 The establishment and final work programme of the Working Group (refer clause 19 below) has also been informed by the Cabinet decisions made in October 2021 regarding how the three waters reform programme will progress.
 - 4 The Strengthened Approach must:
 - 4.1 propose a strengthened approach to the governance framework for the WSEs, which approach will:

- (a) have regard to issues and concerns that have been raised (at a regional and national level) by local authorities and iwi/Māori in relation to the Originally Proposed Approach;
 - (b) take into account other features of the Government's reform proposal which will influence how WSEs actually operate, given that those features will materially affect the functions and responsibilities that need to be addressed through the governance framework (refer clause 15 below); and
 - (c) acknowledge and have regard to the trust and confidence of stakeholders (including communities, local authorities and the Government) and the Treaty partner necessary for the successful implementation of the reforms and the long-term sustainability of the reformed three waters service delivery model; and
- 4.2 meet the Government's reform bottom lines (refer clause 17 below); and
- 4.3 be practical to implement and likely to achieve greater buy-in from the local government sector than the Originally Proposed Approach.
- 5 **Report:** The Working Group will be asked to provide a report and recommendations to the Minister of Local Government by not later than 7 March 2022 which identifies:
- 5.1 details of the features of the Strengthened Approach including how such features are consistent with the shared reform objectives and the Government's bottom lines (set out in clauses 11 and 17 respectively); and
 - 5.2 such other material matters in relation to its work programme as the Working Group considers relevant.

It is anticipated that a draft of such report and recommendations will be shared with the Joint Three Waters Steering Committee for consideration before being presented to the Minister of Local Government.

BACKGROUND

- 6 **Heads of Agreement:** The Government Ministers and LGNZ entered into the Heads of Agreement to set out their respective partnering commitments to support achieving their shared objectives for three waters service delivery reform.
- 7 The Heads of Agreement came about as a result of the successful collaborative engagement undertaken between DIA and representatives of the local government sector since May 2020, during which time the Joint Three Waters Steering Committee has provided input and helped influence the development of the Government's three waters reform proposals.
- 8 **Feedback on Government's three waters service delivery reform proposal:** Under the Heads of Agreement the Government Ministers agreed to an 8 week period (commencing 1 August 2021) for individual local authorities to consider the impact of the proposed reforms on them and their communities and an opportunity to provide feedback. Some local authorities also sought community views during this period.
- 9 In parallel, Government officials have been undertaking a range of engagements with iwi/Māori to inform the policy development processes. These engagements

have been undertaken consistent with good Treaty practice and in line with the expectations of the Government. Some local authorities have also engaged with iwi/Māori within their areas.

- 10 **Ensuring recognition of rights and interests of iwi/Māori in three waters service delivery:** In their Heads of Agreement, the Government Ministers and LGNZ each recognised:
 - 10.1 Te Tiriti o Waitangi/Treaty of Waitangi and the protection and promotion of iwi/Māori rights and interests in the delivery of three waters services, including through existing Treaty settlement mechanisms;
 - 10.2 the importance of working in partnership, and acting reasonably and in good faith, with the Treaty partner throughout the reform process; and
 - 10.3 three waters service delivery reform as a significant opportunity to improve outcomes for Māori.
- 11 **Shared reform objectives:** The reform objectives shared by central government and LGNZ are set out in the Heads of Agreement. The shared objectives that are most relevant to the governance framework for the WSEs are:
 - 11.1 continued public ownership, including safeguards (including legislative protection) against privatisation;
 - 11.2 ensuring that the new WSEs will listen, and take account of, local community and consumer voices;
 - 11.3 improving the coordination of resources and planning, and unlocking strategic opportunities to consider New Zealand's infrastructure and environmental needs at a larger scale;
 - 11.4 undertaking the reform in a manner that enables local government to continue delivering (in a sustainable manner) on its place making role and broader 'wellbeing mandates'; and
 - 11.5 ensuring that the new WSEs are set up for future success, including preserving their ability to borrow to accelerate investment and meet future investment demands.
- 12 **Future state:** Any operating model that supports the three water service delivery system in the future must be able to respond to the following in a way that is sustainable:
 - 12.1 compliance with much higher, and consistently enforced, water quality standards than has been the case before now;
 - 12.2 a backlog of infrastructure renewals, as well as keeping pace with the growth and development aspirations of communities;
 - 12.3 external pressures such as climate change, natural hazards, workforce shortages, and economic regulation.
- 13 **Issues have been identified by the local government sector relating to the governance framework for the WSEs:** It is acknowledged that through the 8 week feedback period local authorities have raised issues and expressed concerns in

relation to the governance framework proposed in the Originally Proposed Approach (including by comparison to the current model for delivery of three waters services by local authorities – whether directly or through council-controlled organisations).

- 14 **Matters to be considered in developing a Strengthened Approach:** The recommendations and positions of the Working Group in relation to the governance framework forming the Strengthened Approach will consider, among other matters:
- 14.1 what local authority ownership on behalf of communities means and how it is provided for, and how it is reflected in the governance framework;
 - 14.2 the size, composition and functions to be carried out by any oversight bodies for a WSE (e.g. regional representative group comprising representatives of mana whenua from within the geographic area covered by the WSE and the local authorities as owners of the WSE, and board selection/appointments panel or committee);
 - 14.3 the process for setting and documenting strategic direction and performance expectations for each WSE, including the weight any such process carries in the design of the governance framework;
 - 14.4 the process for appointment and removal of members of the board of a WSE and their oversight bodies (noted in paragraph 14.2 above);
 - 14.5 the role of the oversight bodies in scrutinising entity and board performance including considering mechanisms for holding the board to account for performance of the WSE, including with respect to its strategic direction and performance expectations, to its relevant oversight body, and mechanisms for holding the oversight bodies to account;
 - 14.6 how provision is made for access to resources to support any governance and oversight bodies to perform their roles, including the means of funding advisory services in relation to board appointments, monitoring entity and board performance;
 - 14.7 the extent to which, within a nationally-consistent governance and accountability framework, there is flexibility for bespoke governance and accountability mechanisms to be developed for a WSE (for example in relation to the size and composition of oversight bodies, selection processes, and the process for setting strategic direction); and
 - 14.8 mechanisms for resolving differences that may arise in relation to the governance and oversight framework including as between owners or between owners and the entity.
- 15 It is acknowledged that the governance framework is part of a broader package of measures to implement the three waters reform programme, and the role of the Working Group is to focus on the governance framework within this broader system. The broader system (which is outside of the governance framework and not part of the review of the Working Group) will include matters such as:
- 15.1 system stewardship arrangements and the role of central government, including in providing strategic direction through Government Policy Statements or through a Crown intervention framework;

- 15.2 the role of local authorities in strategic planning decisions including through existing and proposed planning and regulatory mechanisms relating to land-use planning;
 - 15.3 the development of a new economic regulation regime and consumer protection mechanisms relating to the new three waters service delivery system.
- 16 The following additional matters, which have also been raised in feedback on the Government's three waters service delivery reform proposal, will continue to be considered separately as part of the broader package of measures to implement the three waters reform programme and are outside the scope of what the Working Group will consider:
- 16.1 the resource management planning interface between individual local authorities and their WSE including responding to local voice and the prioritisation of local needs;
 - 16.2 the approach to economic regulation and consumer protection;
 - 16.3 the processes that WSEs will be required to use for preparing their asset management plans and pricing and charging plans, including how local authorities, mana whenua and consumers will input into these;
 - 16.4 the future functions, duties and obligations of the new water entities in respect of rural and community schemes, including the principles and process for determining which rural supplies should transfer to WSEs;
 - 16.5 the principles and process for transitioning certain stormwater assets to the new WSEs.
- 17 **Government's bottom lines:** The Government Ministers require the following reform bottom lines to be achieved for the reforms to meet their objectives:
- 17.1 **Treaty partnership** – that the governance framework for each WSE is set up to give effect to the Crown's Treaty obligations by giving effect to the principle of partnership with iwi/Māori across the rohe/takiwā served by that WSE, including by:
 - (a) ensuring that mana whenua from within the geographic area covered by a WSE have joint oversight of the WSE together with the relevant local authorities,
 - (b) integration within a wider system of iwi/Māori rights and interests in water,
 - (c) reflecting a Te Ao Māori perspective,
 - (d) supporting clear accountability of the WSE to iwi/Māori,
 - (e) improving outcomes for iwi/Māori at a local level (e.g. by addressing inequities in access to quality three waters service delivery); and
 - (f) enabling iwi/Māori to have rights and mechanisms of influence over the WSE that correspond to those provided to the local authorities served by the WSE.

17.2 **Good governance** – that the board directly governing a WSE:

- (a) has a clear role and responsibilities;
- (b) is comprised of appropriately qualified and experienced members who are free of conflict of interest and selected through a process that is meritocratic and competency based;
- (c) has board members that individually and collectively have appropriate duties and obligations to act in the best interests of the WSE and the communities served by that WSE, consistent with the statutory purpose and objectives given to the WSE; and
- (d) has board members that collectively have competence relating to the Treaty of Waitangi, mātauranga Māori, tikanga Māori, and Te Ao Māori.

17.3 **Public ownership** – that each WSE remains in public ownership, including local authority and/or community ownership, and with strong protections in place that prevent privatisation (of the WSE itself and the essential three waters service delivery assets they own).

17.4 **Balance sheet separation** – that the WSE governance framework, when taken together with the broader measures to implement the three waters reform programme (refer clause 15 above), will provide the WSE with the financial capacity (including through the ability to borrow) to meet the future three waters service delivery investment needs (including any existing infrastructure deficit) of the region it serves without:

- (a) resulting in the debt of the WSE consolidating on the balance sheets of the relevant local authorities; or
- (b) requiring additional financial support from the Crown (beyond what the Crown has already agreed to provide; that being a liquidity facility on similar terms to those available to the Local Government Funding Agency, and the 60/40 risk-sharing arrangement in the event of a natural disaster) or local authorities.

18 **Government commitment to listen and respond:** Throughout the development of the three waters reform programme, representatives of both central and local government have had regard to the need (consistent with the other reform bottom lines) to ensure appropriate local representation and influence within the governance framework of the WSEs and that the WSEs are accountable to the local communities they will serve. The Government Ministers have:

18.1 made it clear that there is flexibility for how the reform model approaches these issues so long as the reform bottom lines can be achieved; and

18.2 committed under the Heads of Agreement to discuss in good faith how the proposed three waters service delivery reform model and design can best accommodate these issues in a manner consistent with the shared reform objectives.

It is acknowledged that the recommendations and report of the Working Group are likely to be developed and presented in parallel with the Government's ongoing three waters reform programme work (including the introduction of Water Services Entity Bill and its passage through the select committee process). These matters

will require ongoing coordination, transparency and good faith discussions consistent with the commitments and shared objectives set out in this Terms of Reference.

WORKING GROUP ESTABLISHMENT

- 19 **Working Group:** The working group is intended to bring together a group of experienced local government sector practitioners (able to represent the diversity of perspectives, interests and priorities from across the local government sector, including the 4 proposed new WSE regions) and iwi/Māori representatives (**Working Group**) to work through the following, as regards the governance framework of the new WSEs:
 - 19.1 Reviewing and analysing the work already carried out by Government officials in developing the three waters reform proposals, including the Originally Proposed Approach;
 - 19.2 Reviewing and analysing feedback received from local authorities and iwi/Māori (as collated and provided to the Working Group by LGNZ and/or DIA) and any alternative approaches/options put forward by local authorities;
 - 19.3 Reviewing, learning from and building on the work undertaken by other iwi/Māori and local government sector working groups already operating within the different proposed WSE regions and, where appropriate, carrying that into the Strengthened Approach (the intention being to support and complement, and avoid undermining, region-specific arrangements that are already under development);
 - 19.4 Seeking to identify a Strengthened Approach (refer clause 2 and 4 above) and make any relevant recommendations, together with advice or observations on any features or options that are to be preferred or not preferred; and
 - 19.5 Providing a sounding board for LGNZ and/or the Government Ministers (that may involve providing guidance and perspective as policy continues to be developed and refined).
- 20 The Working Group will not be undertaking consultation with iwi/Māori or the general public. However, the Working Group will be expected to operate in an open manner and ensure it has the benefit of a range of stakeholder views.
- 21 **Resourcing and support – role of DIA:** DIA will support, and assist with, the work of the Working Group, including by providing secretariat support and sharing the policy work and options analysis already carried out by the Government in developing the bottom lines and Originally Proposed Approach.
- 22 DIA will ensure the necessary resources and advisory support are committed and made available to the Working Group, including to ensure the development and analysis of available options is robust and comprehensive and consistent with the Government bottom lines.
- 23 In general, representatives of DIA's three waters reform team shall be entitled to attend meetings of the Working Group as observers (not as members).
- 24 **Role and responsibilities:** In undertaking its role, the Working Group must:
 - 24.1 have regard to the strategic context (including the elements contributing to the national case for change) and members must perform their role in the

spirit of seeking to identify an approach that is best for the needs and interests of New Zealand and New Zealanders and which clearly articulates the weighting of priorities, the trade-offs made and the supporting rationale for such choices;

- 24.2 take account of the reform objectives and other elements and features of the Government's reform proposal (e.g. an economic regulator and enhanced water quality regulation);
 - 24.3 recognise and take into account any particular needs and circumstances of individual WSE regions and not undermine work already undertaken by other iwi/Māori and local government sector working groups in those regions;
 - 24.4 seek external technical expertise to inform its processes and advice;
 - 24.5 seek to protect and promote iwi/Māori rights and interests in the delivery of three waters services and apply the spirit of working in partnership;
 - 24.6 engage with stakeholders to inform its advice and the considerations set out in clauses 24.1, 24.3 and 24.5;
 - 24.7 ensure there is an even-handed, open-minded and evidence-based approach to any problem definition as well as to developing and assessing possible options and solutions;
 - 24.8 ensure frequent, clear and transparent communication (including regarding its programme of work) to LGNZ and DIA to enable them to provide necessary advisory and secretariat support; and
 - 24.9 support DIA in its testing of relevant recommendations and positions of the Working Group with one or more ratings agencies to confirm that they are consistent with the Government's reform objectives and bottom lines.
- 25 These roles and responsibilities will be subject to whatever protocols the Chairperson may require to ensure orderly sequencing and flow of information and achievement of the agreed work programme.
- 26 Members will bring their unique insights and perspectives into the work, and work constructively together. It is the responsibility of all Working Group members to:
- 26.1 abide by any confidentiality obligations already binding on them, along with the standards of conduct outlined in Appendix 1; and
 - 26.2 declare any perceived or real conflict of interests, as described in Appendix 1.
- 27 **Working Group – Membership:**
- 27.1 The membership of the Working Group will be determined by the Minister of Local Government, in consultation with the President of LGNZ, and is intended to achieve the following composition:
 - (a) an independent chairperson (refer clause 28);
 - (b) nine members capable of ensuring that the Working Group is informed of, and appropriately reflects, an iwi/Māori perspective (including consistent with the Government bottom line referred to in clause 17.1);

- (c) nine members capable of representing as much of the diversity of interests and circumstances within the local government sector as is reasonably practicable to do so, including by ensuring not less than 2 members from each WSE region; and
 - (d) the independent Chairperson of the joint Central-Local Government Three Waters Steering Committee.
- 27.2 Further members may be added to the group as and when required (including on recommendation of the Chairperson). Such further members will be selected by the Minister of Local Government, in consultation with the Chairperson of the Working Group and the Chief Executive Officers of LGNZ and DIA.
- 27.3 Members must act in their personal capacity and not on behalf of their organisations or their particular local community.
- 27.4 Individual members have responsibility to:
- (a) work collaboratively to ensure the best overall option for New Zealanders, and the people of each WSE region, is identified in a robust and objective manner;
 - (b) work together to ensure any major barriers to successful options development and analysis are removed;
 - (c) provide the leadership necessary to achieve the development of a coherent and cohesive set of recommendations to the Minister of Local Government that has broad support from all the critical stakeholders represented on the Working Group;
 - (d) participants who are elected members of local authorities are not there to represent their individual local authority interests but to represent the interests of all local authorities facing similar issues and circumstances to their individual local authority (in particular in the WSE region applicable to their individual local authority) and, to the extent practicable, at a national level. In doing so, those participants will rely on their own knowledge and experience; and
 - (e) Iwi/Māori participants are not there to represent their individual iwi/hapu interest but to, where possible, represent a Treaty partner perspective on the options discussed.
- 27.5 The Minister of Local Government may nominate a Crown observer who shall be entitled to attend Working Group meetings and deliberations in order to bring a Crown perspective to matters being considered by the Working Group (including assessing options and any proposed recommendations for consistency with the Government's bottom lines). The Crown observer may authorise one or more nominee/s to attend in his or her place.
- 27.6 The Chief Executive Officer of LGNZ may act as, or nominate another person to be, a LGNZ observer who shall be entitled to attend Working Group meetings and deliberations in order to bring a national local government sector perspective to matters being considered by the Working Group (including any proposed recommendations). The LGNZ observer may authorise one or more nominee/s to attend in his or her place.

28 **Working Group – Chairperson:**

28.1 A chairperson will be appointed by the Minister of Local Government, in consultation with the President of LGNZ.

28.2 The Chairperson will be responsible for:

- (a) providing overall leadership to ensure the Working Group functions effectively and that all interests and perspectives are being properly considered;
- (b) ensuring that the Minister of Local Government is kept informed of progress and that any impediments to progress are being appropriately raised and resolved;
- (c) chair the Working Group meetings, including finalising the calendar and agendas;
- (d) reviewing the membership composition to ensure the required perspectives and expertise is represented on the Working Group;
- (e) requesting expert advice to support the work being undertaken by the Working Group (such advisors will be engaged, and funded by, DIA);
- (f) reporting on progress, and seeking guidance, particularly on matters of broader policy, strategy or system implications.

APPENDIX 1: STANDARDS OF CONDUCT – CONFIDENTIALITY AND CONFLICTS OF INTEREST

All Working Group members are expected to adhere to the following principles:

Conflicts of interest: Members must perform their functions in good faith, honestly and impartially, and avoid situations that might compromise their integrity or otherwise lead to conflicts of interest, in each case in a way that could undermine trust and confidence in the work (or findings and recommendations) of the Working Group. Proper observation of these principles will protect the Working Group and its members and will ensure that it retains public confidence.

A conflict of interest will occur when a member's private interest interferes, or appears to interfere, with an issue that faces the Working Group. A conflict of interest will also occur when there is a possibility that a benefit may apply to a sector, industry or organisation that they represent. A conflict of interest may be real or perceived.

Any situation that involves or may be expected to involve any real or perceived conflict of interest must be declared immediately to the Chairperson, as soon as the conflict arises (including by using the form in Appendix 2).

At the discretion of Chairperson, members may participate in discussions about issues in which they have declared a conflict of interest.

Confidentiality: In order for the Working Group to operate effectively, members must maintain the confidence of the group, including maintaining confidentiality of matters discussed (including views expressed by other members) at meetings, and any information or documents provided to the Working Group. It is important that all members of the Working Group feel confident to engage in full and frank discussion, free of a concern that their views may be shared or disclosed without their approval. Accordingly, no member shall make any public statement or comment (including to any stakeholder or third party) that identifies any view or position expressed by any individual member of the group.

Subject to the above paragraph, it is acknowledged that the group will operate transparently in relation to positions and recommendations of the group, will be seeking the views of stakeholders and third parties and will provide regular updates to interested parties. No member shall be permitted to otherwise make public statements or comment about the work or deliberations of the Working Group (or any proposed recommendations) without the prior approval of the Chairperson, and the Chairperson may consult with whomever he or she considers appropriate before providing (or withholding) that approval.

Where information is already in the public domain (through no fault of a member), the confidentiality requirements do not apply to that information.

Privacy Act 1993: Members must at all times comply with the requirements of the Privacy Act 1993 and keep information about identifiable individuals confidential.

Official Information Act 1982: All information provided to the Working Group by DIA will be treated as official information under the Official Information Act 1982 and, subject to the requirements of that Act, may be released to the public if there are no grounds for withholding it.

If information is required to be released under the Official Information Act 1982 it will only be released to the extent necessary.

If DIA is considering releasing information under the Official Information Act 1982, DIA will consult with the person who provided the information before making a final decision on release.

APPENDIX 2: CONFLICT OF INTEREST DECLARATION FORM

Name:
<input type="checkbox"/> I declare that there are no conflicts of interest could compromise my objectivity, judgement, integrity or ability to perform the responsibilities of the Working Group to develop a strengthened framework for Representation, Governance and Accountability of new Water Services Entities.
<input type="checkbox"/> I declare the following situation(s) that would cause a conflict of interest to exist:
Please describe how this conflict of interest will be managed:
<input type="checkbox"/> I declare the following situation(s) that may be perceived as a conflict of interest:
_____ Signature & date