

Who's
putting local
issues on
the national
agenda?

**We are.
LGNZ.**

Secretariat,
Constitutional Advisory Panel
C/o Ministry of Justice
DX SX10088
Wellington

Dear Sir/Madam

Re: Submission to the Constitutional Conversation

Thank you for this opportunity to contribute to the Constitutional Conversation.

The Advisory Panel has been charged with an important task and one that occurs very infrequently. The primary focus of this submission is the constitutional status of local government, although reference is also made to a number of other questions which are relevant to our sector.

Local Government New Zealand represents all 78 local authorities in New Zealand. Our mission, local democracy powering community and national success, emphasises the contribution local democracy and strong communities make to a strong and successful nation. Local democracy, if it is to be strong and sustainable, must be given similar recognition in a constitutional sense as national democracy. That is one of the challenges faced by the Panel.

Councils represent all the citizens of New Zealand. And at the local government conference on the 21 July 2013 local authorities voted unanimously in support of a remit, put forward by Wellington City Council, to the effect:

- i. That Local Government New Zealand will seek to promote an amendment to the Constitution Act 1986 that gives constitutional expression to local government within New Zealand's democratic governance arrangements.
- ii. That local government – its' essential place and significance – be reflected in any future constitutional arrangements for New Zealand that may emerge out of the current constitutional review process.

A remit that receives the full support of all local authorities provides LGNZ with a strong mandate to advocate for its advancement. As this is the first time that the sector as a whole has considered the issue of its constitutional status we should not under-estimate the importance of the policy direction it has given to LGNZ to take up on its behalf.

We are happy to meet with the Panel to discuss our submission.



Lawrence Yule
President
Local Government New Zealand

Contents

| | |
|---|----|
| Summary..... | 3 |
| Submission..... | 4 |
| A relevant question | 6 |
| Why recognition is important to local government | 6 |
| Should there be a single constitutional document? | 7 |
| What is local government’s role in the constitution? | 8 |
| Recommendations..... | 10 |
| Entrenchment | 11 |
| Parliamentary conventions | 11 |
| The NZ Constitution Act 1986 | 11 |
| Specific questions asked by the Panel | 11 |
| New Zealand’s Constitution | 11 |
| Māori Representation and local government | 12 |
| How should Māori views and perspectives be represented in local government? | 12 |
| References | 13 |

Summary

- That the local government system is part of New Zealand's constitutional arrangements is over-due for recognition.
- Should the Panel recommend that New Zealand should have a written constitution, contained in a single document, then that document should refer to local government as a democratic right belonging to all citizens – we refer the Panel to the South African constitution as a good model.
- Should the Panel recommend that New Zealand's 'pragmatic' constitution continue then recognition might take the form of one or all of the following:
 - The New Zealand Constitution Act 1986: Amending this Act to reference to local government recognise and strengthen local government's role in the governance of the nation;
 - Entrenchment: A statute which is entrenched cannot be changed unless that change is supported by 75 per cent of parliamentarians. We recommend that the LGA 2002, the statute that contains local government's powers and purpose should be entrenched; and
 - Parliamentary convention: Parliament could make it a matter of convention that a bi-partisan approach is to be taken whenever 'core' legislation, such as the Local Government Act 2002, was before the House.
- As the indigenous people of New Zealand and by virtue of the Treaty of Waitangi, Māori have a special role in the policy and decision-making process of public authorities, such as local governments.
- In some circumstances this might be best exercised through Māori only wards, however, given the diversity of New Zealand communities and mana whenua organisations themselves, questions about the appropriate form of representation need to be determined locally and regionally.
- LGNZ supports the current policy settings regarding Māori representation.

Submission

The nature of New Zealand's constitutional arrangements is a matter of significant importance to the local government sector.

Establishing the correct balance of authority between local and central government remains a pressing issue that has never properly been addressed since the establishment of the first post colonial law making body, the legislative Council, in 1842. Indeed the fifth item of business of the Legislative Council was the debate and enactment of New Zealand's first local Government Act, the Municipal Corporations Act 1841, which gave municipalities the power to levy a rate and other duties to fund public works and regulations for the good governance of their communities.¹

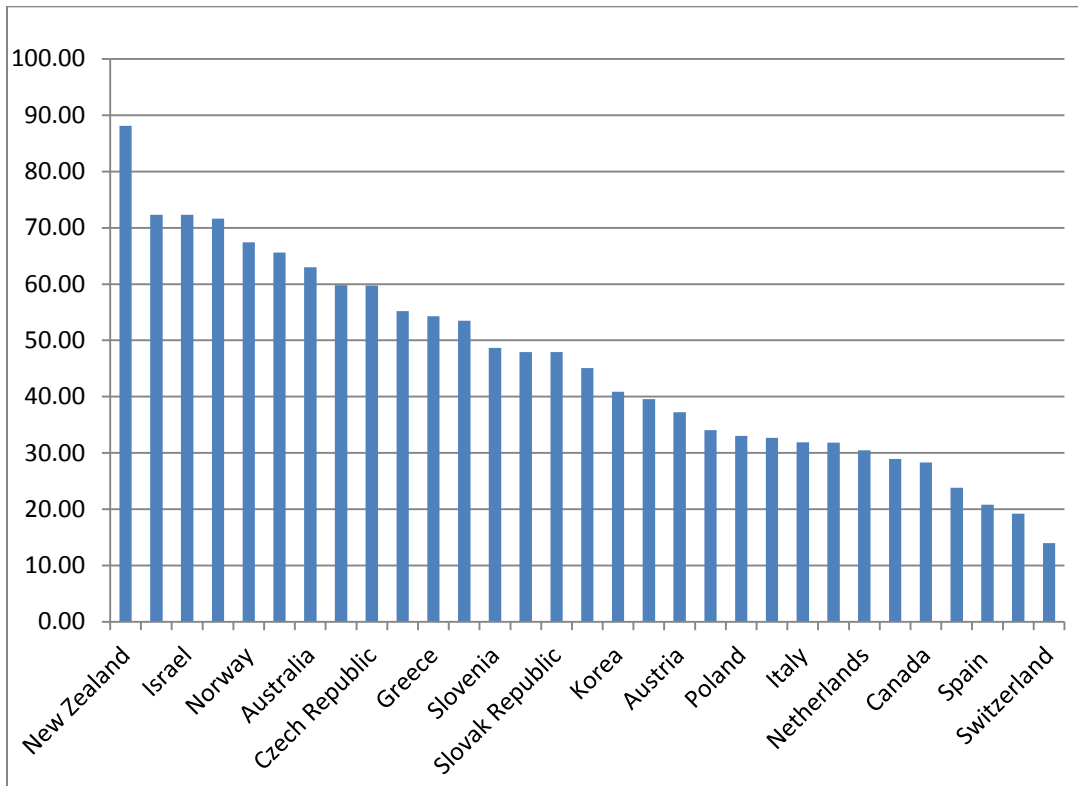
Right from the start it was clear that legislators envisaged that councils should enable citizens to take a broad measure of self-governance, reflecting rights that drew heavily on the Magna Carta, and contribute to the good governance of the nation as a whole – it has never been simply a mechanism to provide essential local infrastructure and certainly has never been a service delivery arm of the central state.

However the critical question, how to guarantee the nature and extent of citizen's powers to exercise a degree of self government has never been addressed, resulting, as we can see from Figure 1 which puts New Zealand in an international context, in an unprecedented growth in the authority and extent of central government in comparison to local government. Put in perspective, the share of public expenditure allocated by local government has fallen from 50% in 1930 to 11% today (Cookson 2007).

¹ The first four items were the Supreme Court Bill, the County Court Bill, the Jury Bill and the Conveyancing Bill.

Figure 1

Central government expenditure as a % of total government expenditure



(Source OECD)

Local government plays an important role in the strength and quality of New Zealand’s democracy. In fact many theorists argue that local government is the most important democratic institution because it is only by participating at the local level that individuals learn about democracy. As the political scientist, Richard Mulgan, noted:

“..if democracy is to do with self government, the control of one’s own life and environment, then the most important area of control is the most immediate environment, the locality in which one lives. Home and neighbourhood should take precedence over the wider and more remote units of region, state or nation” (Boston et al).

As the UK Central-Local Concordat, negotiated between the Government of the United Kingdom and the Local Government Association noted, “central and local government both derive their legitimacy from Parliament and the electoral mandate granted to them by individual citizens who look to central and local government to take the lead in ensuring better places and better services”.

In addition the draft World Charter of Local Self Government, currently before the United Nations, also recommends that local government’s role and powers should be included in a nation’s constitution.²

² <http://www.gdrc.org/u-gov/charter.html>

However, local government can only contribute to a strong democracy if the decision-making authority of locally elected representatives is protected and guaranteed. Each time Parliament legislates to give Ministers or senior bureaucrats the right to over-turn legally made decisions by locally elected representatives the quality and strength of local democracy suffers – to the point eventually where local government will cease to be ‘government’.

If local government is to exercise its mandate to enable local citizens to make decision about local services and the nature of their communities then it must be provided with the necessary constitutional certainty around its role, powers and purpose.

A relevant question

It is timely to consider the constitutional status of local government as a number of other societies are having similar conversations.

In September it is expected that Australians will vote in a referendum on the issue of whether local government in that country should be included in the federal constitution. The proposed change stops short of asking for giving local government similar status to the states, however it will, if successful, acknowledge the federal significance of the local government sector.

At the same time the British Parliament, the only other country like NZ which has no single constitutional document, is considering the codification of the relationship between central and local government. On the table for discussion is a proposal for the entrenchment of the Local Government Act 2000, which in practice would require the House of Commons to seek the permission of the House of Lords before embarking on any major amendment.

In New Zealand, by contrast, it takes only 50.1% of votes cast in Parliament to not only radically rewrite the provisions governing local government in this country but to abolish local democracy altogether, should that be Parliament’s will. The ease with which the local government system can be radically re-designed has, over the last 30 years, resulted in considerable change not all of which has been beneficial to either good local government or strong local democracy. In addition, many of the changes have had negative financial implications for citizens and communities.

Why recognition is important to local government

The ongoing uncertainty in which councils are forced to operate undermines public confidence in the local government system and as long as it continues it will have an effect on the willingness of has direct effects on the willingness of talented people to stand as candidates and citizens to vote. In all, uncertainty is detrimental to the strength and vitality of democracy at the local level. Consequently the status of the local government system within our constitutional arrangements is an important issue for councils in New Zealand.

As noted above the matter was debated at local government's annual general meeting recently and our members voted unanimously in support of a proposal to amend the Constitution Act 1986 to acknowledge the existence of local government. The remit also asked that local government's essential place and significance be reflected in any future constitutional arrangements for New Zealand that may emerge out of the current constitutional review process.

The problem is two-fold.

Protecting the decision-making authority of elected members

The essence of representative government is that those who represent citizens and communities can be held accountable for their decisions. Accountability can be undermined in two ways:

- where it is difficult to hold any specific individual or institution accountable for a decision, such as when decision-makers do not control funding; and
- where decisions can be over-ridden in an arbitrary manner by a higher authority.

In both cases the nature of 'government' is eventually diminished and elected representatives reduced to a role akin to a decentralised bureaucracy.

The danger of diminishing government at the local level, by undermining the accountability of elected members, is that the role will no longer attract talented individuals and will also affect the willingness of citizens to vote. The latter has been illustrated by surveys undertaken in the United Kingdom which found the major reason so few citizens voted in local elections was due to the lack of decision-making discretion possessed by local representatives due to the high level of control exercised by Whitehall.

Ensuring a certain and consistent legislative framework

The lack of certainty and the frequency with which governments change the rules and processes governing the way local authorities work undermine the sector's ability to provide good quality local infrastructure and local services, as required by law.

Councils need to plan for the long-term - for some infrastructural services this involves 100 years or more. Willingness to make necessary long term investments is inevitably diminished by the risk of unexpected changes in the rules and regulations affecting the way in which services are managed or delivered, along with the cost of borrowing.

To protect the decision-making authority of elected members and provide the certainty needed for long term investment and stewardship of community assets LGNZ believes that a much higher threshold than the 50.1% of the votes currently required to amend the Local Government Act is necessary - the ease with which governments are able to intervene in the democratic choices of local citizens, without a national interest mandate, risks trivializing governance at the sub-national level.

Should there be a single constitutional document?

LGNZ has no fixed views on whether there should be a single constitutional document or whether the constitution should continue as a group of constitutional documents – the pragmatic constitution referred to in 2005 constitutional review.

If the Panel recommends a single constitutional document then it is our view that it should refer to local government as being part of the overall governance system of New Zealand. As a way of doing this we recommend the post-apartheid constitution of the Republic of South Africa, where local government is explicitly referenced. Section 40 of the South African constitution states:

*In the Republic, government is constituted as national, provincial and local spheres of government which are distinctive, interdependent and interrelated. All spheres of government must observe and adhere to the principles in this Chapter and must conduct their activities within the parameters that the Chapter provides.*³

The clarity of the reference in the South Africa constitution is highly symbolic and protects the integrity of the local government sector, while not in any way diminishing the ability of the provincial and federal governments to enact laws or undertake initiatives to enhance the quality of local decision-making.

The 2005 Constitutional Inquiry used the phrase ‘New Zealand’s pragmatic constitution’ to describe the mix of legislation and conventions that are regarded as having constitution significance. LGNZ believes that our core legislation, namely the Local Government Act 2002, the Local Electoral Act 2001 and the Local Government (Rating) Act 2002, should be regarded as components of that pragmatic constitution.

Unfortunately that view is not widely held and we are concerned at the ease with which such important statutes can be amended. We believe that significant change to the essential roles and powers of local government should require a high degree of cross-party support, without this there is a risk that local government will become a political football. Under-investment or sub-optimal performance at the local level caused by uncertainty about role and function is likely to create serious risks to the national economy.

What is local government’s role in the constitution?

The desire of communities for a level of self government is widely regarded as a constitutional right. For example, note the sentiments of the first English settlers in Port Nicholson who, in 1839, drafted a bill to incorporate the town of Wellington:

“The powers which the proposed Bill would confer ... are consistent with the immemorial usage of giving every body of men (sic) collected together within the limits of a town ... a complete local organization adequate to all emergencies and adapted to meet the ever varying wants of the community ... they preserve those constitutional principles which every Englishman is taught to regard as his birthright” (Carman 1970 p.25).

Local government plays a range of constitutional roles, for example.

Local government as constitutional safeguard

Local authorities provide a form of check and balance on the role of central government allowing communities not only to voice policy differences and have those views represented publicly, but also to fund and implement at the local level services which meet local preferences, complementing in some cases the services provided by central government or filling a void where services are not central government responsibilities.

³ www.google.co.nz/#sclient=psy-ab&q=south+african+constitution+pdf&oq=south+african+constitution&gs_l=hp.1.1.0l4.1210.6038.0.8735.26.18.0.8.8.0.323.4299.2-17

This role is more important in countries, such as NZ and Britain, which lack a written constitution. As G.W. Jones, a British political philosopher noted, “in a country without a written constitution local government takes on an added significance, since it is the only legitimate check on the power of central government”.

Distributing power

New Zealand is not only a highly centralised state it is regarded as the most centralised country in the OECD, at least using a fiscal decentralisation measure (The Economist 2009). While much of the growth of central government can be explained by the need to achieve economies of scale, given the sparsely populated nature of New Zealand and our history of highly fragmented local authorities lacking the capacity to undertake many essential public functions, this is no longer the case.

Concentrating too much power and authority in a single sphere of government is bad for democracy, undermines the ability of citizens to exercise voice and creates the risk of authoritarian behavior. This point was articulated by Prof. John Roberts in 1968:

The growing power of government, as evidenced by its ever increasing intervention in the economic and social affairs of the people, constitutes another reason for the existence of an efficient system of local government. ... an effective local government structure is an important counterweight to the growth of central government power. Local government is not solely a matter of the management of local services; it provides the democratic machinery for the expression of local opinion on all matters of public policy (Roberts 1968).

To be an effective counter-balance to the authority of central government elected members need the protection of a constitution to ensure their roles and decision-making authority are not under-mined.

Promoting democratic participation

Democracy is only effective if citizens participate and make use of the opportunities that democracies provide, such as voting, exercising voice and standing as candidates. There is a wide range of ways in which citizens can exercise their democratic rights from voting, to standing for electoral office to taking part in a campaign of some sort. As the emerging democracies in Eastern Europe discovered after the Berlin Wall fell, democracy is learnt and requires a wide network of organisation through which people learn to become citizens.

Local government is an essential part of this process. People practice their skills as citizens by participating in their local councils, taking part in neighbourhood committees to manage local services or lobby for change. Ideally politicians learn their skills at the local level at which point they can make the decision whether or not they are suited to life as a professional politician at the national level. They also have a chance to experiment, develop new programmes and try out ideas.

Actions by higher level government that reduce the decision-making capacity of local governments diminishes the quality of our democracy by impacting directly on the willingness of people to stand for office and take part in local democratic processes. The closer decisions are made to the communities affected by them the more able citizens are to hold decision-makers to account. This is at the essence of a constitution.

Subsidiarity

Constitutions are necessary to clarify and guarantee the relative powers of different spheres of government. In determining the roles and functions of each sphere of government *Local Government New Zealand* argues a principled approach should be taken - and that this principle should be that of subsidiarity - one of the major recommendations made by the Royal Commission on Social Policy in 1988, and reinforced recently by the Productivity Commission (2013).

Subsidiarity can be described as “the principle whereby decisions should be taken at the level closest to the citizens, town or municipality, and that only those tasks that the local level cannot effectively carry out alone should be referred to higher levels”.⁴

The principle of subsidiarity is gaining increasing acceptance throughout the world, with, for example, the European Union employing the concept as the means of determining the split of responsibilities that needs to occur between states and the developing union. We believe that any discussions about constitutional changes in New Zealand should endorse subsidiarity as the principle upon which to determine the relative roles of local, regional and national spheres of government.

In recent paper commissioned by David Cameron, the British Prime minister, Lord Heseltine states that “to face up to the challenge of increasing international competition, we must reverse the long trend to centralism. Every place is unique. Local leaders are best placed to understand the opportunities and obstacles to growth in their own communities.” (Heseltine 2012 p. 31).

To resist the centralism that is inherent within any governing system New Zealand needs to strengthen the position of local government if it wishes to gain the benefits of a vibrant local democracy and end its status as an international outlier. Strengthening the position of local government requires, by definition, some form of constitutional settlement whereby decisions about the sector’s status and role have wide support in parliament and are ideally bi-partisan.

Recommendations

Should the Panel recommend a written constitution then our preference is for local government to be referenced in that document in a manner similar to the way in which the Republic of South Africa’s constitution references local government, as a distinct sphere of government.

Should the recommendation not be for a written constitution then there are a number of steps that might be taken to strengthen the constitutional status of local government. Three are particularly worthy of attention, entrenchment, parliamentary convention and the 1986 New Zealand Constitution Act.

⁴ World Charter of Local Self Government.

Entrenchment

A statute which is entrenched cannot be changed unless that change is supported by 75 per cent of parliamentarians. When entrenching something new, the Standing Orders and constitutional conventions come into play with the entrenchment rule operating on the basis that it should take more than a simple majority to bind future parliaments. Examples of entrenched legislation include aspects of the electoral system and Parliament's three year term. One criticism of entrenchment is that removing the entrenched status of a statute only requires a simple majority. While double entrenchment has been mooted, in which an entrenchment provision itself is entrenched, it is most probable that the act of entrenching a statute in itself would make parliament reluctant to remove it by simple majority.

Parliamentary conventions

A second option could be a Parliamentary convention. Conventions represent unwritten rules which guide the way in which decision-making occurs. Conceivably Parliament could develop a convention which would apply whenever changes to local government's 'core' legislation were being considered. As an alternative to entrenchment Parliament could make it a matter of convention that a bi-partisan approach should be taken whenever 'core' legislation, such as the Local Government Act 2002, the Local Electoral Act 2001 and the Local Government (Rating) Act 2002, was before the House.

The NZ Constitution Act 1986

The third option would be to amend the New Zealand Constitution Act 1986 to include a reference to local government. Possible wording could be:

- There shall continue to be in New Zealand a nation-wide system of democratically elected local authorities through which collective decisions can be made and acted upon locally by and on behalf of citizens
- The Executive and Legislative, by legislative and other measures, must support and strengthen the capacity of local authorities to manage their own affairs, to exercise their powers and to perform their functions
- Draft legislation that affects the status, institutions, powers and functions of local government must be published for public comment before it is introduced in Parliament, in a manner that allows organised local government and other interested persons an opportunity to make representations with regard to their draft legislation (Hewison 2008).

Specific questions asked by the Panel

New Zealand's Constitution

Do you think our constitution should be written in a single document? Why?

- LGNZ has no strong views on this subject. Should this be a recommendation of the Panel, however, we believe that any written constitution should include reference to the existence of local government. This is discussed above in the body of our submission.

Māori Representation and local government

- The nature and extent of Māori representation in local government decision-making varies across the country. All councils consult to differing degrees with mana whenua and maata waka organisations.
- Councils are encouraged to consult Māori on decisions under the Local Government Act 2002 and on decisions about natural resource management under the Resource Management Act 1991. The Local Electoral Act 2001 also provides councils with an opportunity to create Māori wards; these wards can only be created with the support of the majority of voters in the region. Increasing use is now being made of co-management and co-governance approaches following recent Treaty settlements.

How should Māori views and perspectives be represented in local government?

- LGNZ does not have an official view on Māori representation in Parliament, however, we would suggest that the rationale for Māori constituencies at the national level is not necessarily relevant at the local level. In a number of areas, for example South Taranaki, Kapiti Coast, Hapu and Iwi are quite divided on the merits of Māori wards. The policy question for those organisation is whether the interests of mana whenua groups would be adequately represented by individuals elected through Māori wards.
- LGNZ's view is that current policy settings are appropriate. Māori representation on councils has been growing steadily since 1989. Our last survey of elected member found 8% identified as Māori. Given that the average age of elected members is approaching 60 years of age this partly explains the current share of Māori elected members, given the youthfulness of the Māori population and the fact that most Māori live within only a few local government areas.
- Councils support a broad range of initiatives to provide for Māori representation where it might be lacking through the electoral process. Commonly this involves enabling Hapu and/or Iwi to make appointments to council committees or establishing direct relationships with Hapu/Iwi themselves. More recently the Government has established the Independent Māori Statutory Board in Auckland to achieve the same.
- The issue is more complex issue than generally portrayed in the media.

References

Boston J. (1988) Democratic Theory, Devolution and Accountability, in *From Devolution and Accountability* ed. Martin and Harper

Cookson, J. (2007) How British? Local Government in New Zealand to c1930, *The New Zealand Journal of History*, Vol. 41, No. 2, pp. 143-160.

Hewison, G Mathews, R, Sheppard, J (2005) *Submission to New Zealand's Constitutional Inquiry*.

Roberts, J. & Sidebotham, R. (1968) *Local Government in the Wellington Region: the challenge of chaos*, Victoria University, Wellington.