

AUT

UNIVERSITY



Council-controlled organisations and community engagement

Catherine Harland

Research Officer, Local Government Centre

18 December 2009

Outline

1. Existing LGA 2002 framework for CCOs
2. Variations from above in LG (Auckland Law Reform) Bill
3. Areas where community engagement is provided for
4. Gaps for submissions on the Bill
5. Conclusions

1. LGA 2002 CCO framework

- **S56 Consultation required before council-controlled organisation established** (1) A proposal to establish a council-controlled organisation must be adopted in accordance with the special consultative procedure before a local authority may establish or become a shareholder in the council-controlled organisation.
- **The special consultative procedure (S83) involves:**
preparing a statement of proposal, including this on the agenda for a meeting of the local authority, making it available for public inspection at various places that provide all ratepayers and residents with reasonable access to it, distributing a summary of information about the proposal and giving public notice of its availability, providing a period for written submissions (must not be less than one month), providing an opportunity for those who wish to be heard to be so, those submission meetings, and meetings where deliberations occur, to be open to the public, making all written submissions available to the public.

1. LGA 2002 CCO framework (2)

- **S57 Appointment of directors**

(1) A local authority must adopt a policy that sets out an objective and transparent process for—

- (a) the identification and consideration of the skills, knowledge, and experience required of directors of a council organisation; and
- (b) the appointment of directors to a council organisation; and
- (c) the remuneration of directors of a council organisation.

- Typically involves Councils establishing:
criteria for appointments, setting out the appointment process (role definition, advertising, interview panel, recommendations for appointment), identifying the range and quality of skills being sought, performance expectations for directors and the chairperson, conflict of interest matters, remuneration, term of appointment, the timing and process for reviewing appointments.

1. LGA 2002 CCO framework (3)

- Councils have the flexibility to:
 - determine the size of the Board (number of Directors)
 - determine if there are to be any non-voting appointees, and if so their roles
 - appoint the Chairperson of the Board (and if desired, the Deputy Chairperson)
 - determine whether or not elected members (Mayor, Councillors, Community Board Members) can be appointed (subject to having the relevant skills, knowledge or experience)
 - if elected members are to be appointed, determine the number or proportion of these on the Board
- So how does the Local Government (Auckland Law Reform) Bill differ from this framework, and what are the benefits of this?

2. ATA to constitute CCOs

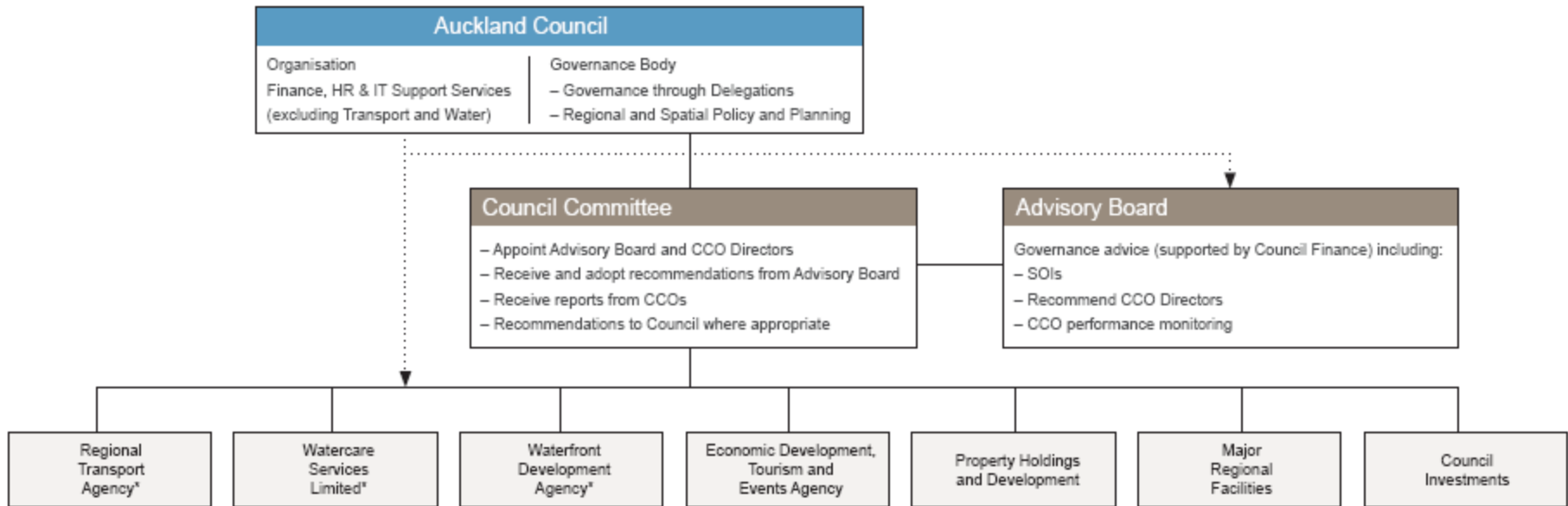
- Special consultative procedure for establishing CCOs [S56] has gone, instead (see p26 Bill):
- **35G Order in Council authorising Transition Agency to constitute council-controlled organisation**

The Governor-General may, by Order in Council, made on the recommendation of the Minister, authorise the Auckland Transition Agency to establish, with effect on and from 1 November 2010, 1 or more entities as council-controlled organisations of the Auckland Council.
- **The Order in Council:**
 - must specify the objectives of the CCO and the governance structure of the organisation.
 - may specify any other details concerning the structure and operation of the council-controlled organisation.
- **No public consultation is required**

2. Termination of CCOs

- By Order in Council the Minister can identify existing CCOs that will be terminated and specify where the activities of these CCOs will pass to i.e.
 - Auckland Council,
 - another existing CCO that is not going to be terminated but will become a CCO of the Auckland Council, or
 - any newly established CCO
- Some constraint is identified, the Minister must be satisfied that dissolution “does not inappropriately constrain the discretion and accountability of the Auckland Council” [S35F(3)(b)]

2. ATA Proposed Structure and Governance Framework for CCOs



* These CCOs have previously been approved by Cabinet or are legislated for.

Document issued to Chief Executives 3 December 2009 and available on www.ata.govt.nz under Auckland Council tab.

- In the new year ATA plans to “publish a Discussion Document on CCOs for consideration and feedback”. It is unclear whether the public will be able to provide feedback or it will be restricted to Councils, affected organisations and staff.

2. Minister may appoint initial CCO directors

- Requirement for adopting a policy that sets out an objective and transparent process for CCO directors [S57(1)] has gone, instead:
- **35H Minister may appoint initial directors of certain council-controlled organisations**

The Minister may, by notice in the *Gazette*, made on the recommendation of the Transition Agency, appoint the initial directors of a council-controlled organisation
- The Minister may:
 - appoint directors for terms of up to three years (one-third each for 1, 2, 3)
 - on any terms and conditions the Minister prescribes.
- Auckland Transition Agency (a non-elected body) will have responsibility for identifying directors and proposing terms and conditions according to any mechanism they devise, for whatever CCOs they propose.
- **No transparent process is required for director appointments**

2. Transport CCO variations (1)

- **35I Minister of Transport and Minister may appoint initial directors of Auckland Transport** using the *Gazette* and ATA recommendation process
 - appointments for no more than three years (one-third each for 1, 2, 3)
 - on any terms and conditions the Minister prescribes.
- **Again, no transparent process will apply**
- **S45(2)** The board of directors comprises
 - “(a) no fewer than 6 and no more than 8 voting directors, of whom 2 may be elected members of the governing body of the Auckland Council; and
 - (b) 1 non-voting director nominated by the NZ Transport Agency”
- **Auckland Council has no discretion as to number of appointees** but important to note ARTA was also established without this discretion and substantial central government funding will flow to Auckland Transport.

2. Transport CCO variations (2)

- **S45(3)** The board of directors elect the chairperson and deputy chairperson from among themselves
- **Auckland Council has no discretion to appoint the chairperson or deputy chairperson** i.e. can not directly appoint the Mayor or any of their Councillors to chair the board.
- A new Schedule 2 added to LG (Auckland Council) Act 2009 sets out substantial detail about the directors, term of appointment (set at 4 years, except for elected member appointees), duties, remuneration, expenses, interest disclosures for Auckland Transport.
- Government is enshrining in legislation what would typically be set out in a local authority policy on directors as per LGA02 S57, providing little room for flexibility into the future for Auckland Council.

2. Prohibition on Councillors on CCOs

- The Council must not appoint a person to be a director of a substantive council-controlled organisation if the person is, at the time of the appointment, a member of the governing body of the Council.
- Again, Auckland Council's flexibility compared with other local authorities governance of CCOs is constrained.
- Why is the CCO governance arrangements for Auckland Council so tightly prescribed?
 - Transport, may appoint up to 2 elected members
 - Substantive CCOs, none can be appointed
 - Non-substantive CCOs, silent so presumably LGA02 flexibility is provided?

2. Watercare

- An existing organisation that will continue, albeit with different functions and responsibilities.
- Governance appears to be changing, not by legislation, but via an amendment to clause 18 of the existing Shareholders Agreement, subject to approval by the Minister of Local Government, that will enable directors of retail water companies to be appointed to the board of Watercare by the Shareholders Representative Group
- It is assumed the existing board of Watercare will therefore be changed by the SRG prior to 1 November 2010.
- Watercare is exempted by the Bill from the status of being a CCO of Auckland Council until 1 July 2012, till then, it will be a local government organisation (LGA02 S124)
- Until 30 June 2015 there are restrictions on price setting and the form and asset ownership of Watercare, thereafter the Auckland Council may decide (subject to other prevailing legislation)

2. Benefits of Variations

- Provides the Auckland Transition Agency and the Minister with substantial flexibility to ‘get on and make things happen’ without the requirement for transparent public input which could be seen as slowing things down when rapid decision-making and change is required to provide direction and certainty for existing CCOs and staff that will be impacted.
- Enables the Auckland Transition Agency to develop a structure for CCOs and the governance framework that will apply to these without widespread public consultation.
- Enables the Auckland Transition Agency and the Minister to terminate existing CCOs and reconfigure them under a new framework without the need for a public, or open transparent process.

2. Risks of Variations

- The role of the Auckland Council could be substantially disempowered should a considerable number of CCOs be established without sufficiently strong capacity and oversight being provided within the Council to set the strategic direction and have the boards and CCOs follow this.
- There is no mechanism provided for the public to input into the creation of the CCOs and little flexibility for the elected Auckland Council to change these, especially in the period up to 1 July 2012 (first 20 months of the new Council).
- Legislative restrictions on the governance structure for Auckland Transport and substantive CCOs will limit the opportunity for change into the future.

3. Provision for Community Engagement

- [S111] The mayor is required to establish and appoint members, by 31 March 2011, to:
 - a Pacific Peoples Advisory Panel
 - an Ethnic Peoples Advisory Panel
- This requirement expires on 1 November 2013 i.e. applies for the first term of the new Council
- [S35L] Chief Executive of Ministry of Pacific Island Affairs must develop proposals in relation to establishing the Pacific Peoples Advisory Panel for the new mayor to consider. Must consult with the ATA and each existing local authority and may consult with any other person.
- [S11(2)(cc)] ATA is required, in consultation with the Secretary for Internal Affairs, to develop proposals in relation to establishing the Ethnic Peoples Advisory Panel for the new mayor to consider.

3. Provision for Community Engagement (2)

- Statutory Board to promote issues of significance for mana whenua and Maori of Tamaki Makaurau.
- Board to advise Auckland Council on matters affecting above, and Auckland Council required to 'take into account' this advice i.e. Not 'be consistent with' or the stronger 'give effect to'.
- Board must appoint a maximum of 2 persons to sit on each of the Auckland Councils committees dealing with the management and stewardship of natural and physical resources – unclear if these are voting or non-voting positions – does discretion lies with Council?
- Auckland Council is able to delegate a function to the Board.
- **Advisory roles of the Pacific Peoples, Ethnic Panels and Maori Board extend to the Mayor, Council and local boards but not to CCOs.**
- Auckland Transport is required to establish and maintain processes for Maori to contribute to its decision-making processes.

3. Provision for Community Engagement (3)

- Auckland Transport is able to delegate the exercise of its powers and functions to the Auckland Council (p40 & 136 Bill): either the governing body or 1 or more local boards.
- The power to name or alter the name of a road is not provided to Auckland Transport, assume that Auckland Council could retain or delegate this to local boards.
- In the preparation and amendment of the spatial plan, Auckland Council is required to involve community and private sector participation so that ‘there is public confidence in the plans and decisions made for Auckland’. It must also use the special consultative procedure as part of preparing, adopting or amending the spatial plan.

4. Gaps for submissions

- Too late for legislation, but should the Minister direct the ATA to establish an open mechanism that makes its new year Discussion Document on CCOs available for public feedback?
- No requirement exists for CCOs created by the Order in Council process, for them to engage with the local boards, advisory panels, Maori, community or stakeholders unless specific provision for this will be included by the Minister when specifying details concerning the 'operation' of the CCO that the Minister recommends.
- Should the Bill be amended so the Minister is explicitly required to specify details of mechanisms for engagement between CCOs and local boards, advisory panels, Maori, community, business or stakeholders?
- Should the Bill provide more flexibility for the newly elected Auckland Council to change initial board directors?

4. Gaps for submissions (2)

- How will the public seek to influence the decisions of the Auckland Transport board when there is no requirement for meetings to be notified, agendas and minutes to be made available, public access to be available.
- Part 7 of LGOIMA applies to Auckland Transport only in relation to a meeting where it intends to make, or will make, a bylaw.
- Public Forum has been a useful tool for community input to transport/roading or infrastructure committees of territorial authorities for many years – where will town centres, community or business groups go to express their issues? If they go to Local Boards, how will local boards be able to engage with Auckland Transport to any greater extent than members of the public? Indeed how will the governing body be able to engage apart from the Sol process?
- Should the Bill change so **Auckland Transport's board is required to publicly engage** as part of its decision-making process?

4. Gaps for submissions (3)

- Should there be a requirement for Watercare and/or Auckland Transport to establish **customer advisory boards** to provide input to policy being developed by the organisations?
- Should there be a requirement for Watercare and/or Auckland Transport (in line with other utilities) to develop a policy or **customer charter for operational performance** that sets out what they commit to do, how they will respond where issues arise and any rebates that may apply where performance fails?
- Should Watercare be required to publicly supply annually, **asset management plans and funding plans for longer periods** (5, 10 years?) than just the next financial year (as the Bill provides for) and explain substantive variations that occur from what was indicated the previous year?
- Should an **independent regulator** be established for Watercare?

5. Conclusions

- The effect of the Bill is to provide for rapid change to occur via mechanisms that local government themselves are unable to do i.e. without democratically elected or public input, nor transparent processes.
- The provision for engagement in the Bill between the community, business, stakeholders, local boards, Maori board, advisory panels and CCOs is very weak and needs to be strengthened.
- Otherwise important decisions on local issues and strategic matters (Waterfront Development Agency) are at risk of being made behind closed doors, without democratic input, effective scrutiny or widespread support.