The case for restructuring has not been made (19 July 2022)

Ministry of Health audits and ESR reports show that the quality of NZ's drinking water, in general is excellent. Meeting problems in challenged areas would require significantly fewer taxpayer dollars, leaving more for real needs rather than top heavy administration. However, advertising dangerous drinking water has been one of the government approaches to convince people that the changes in the bill are essential.

The financial modelling used to justify the proposals is flawed. Please read again the FarrierSwier and Castalia reports. There is no provision for paying back the large loans which are included, yet a multiplier of around 6 for entity debt is three times what is allowed the local authorities by government, based on an equivalent asset base. The 3.5% interest rate is already invalid. The government is playing with the authorities, not yet committing in the bill as they should (since they forbid the authorities to use the assets as security) to take over their water services debts and/or disputing their size. Problems with the centralized polytechnic sector, show these untried centralized entities will at best stutter into life, with several years of positive development lost and many hundreds of millions of taxpayer dollars also lost in the process. And its to be all 'user pays'.

Alternative models have been put forward by Local Authorities, having more continuity with current arrangements, but leaving scope for improvements, especially for smaller authorities. These have not been taken seriously, which is unwise since the authorities are currently the groups with real expertise when it comes to water.

Motivation for the bill is not water or jobs but co-governance

The government justifies the changes by saying 8000 high paying jobs will be created. The Minister also uses repeatedly the phrase 'economies of scale' as an additional justification. The new jobs will be expensive, and those at the top will want to receive salaries of the order of $400,000 per annum. Senior managers of the local authorities carry out many functions, including water related activities, and this economy of scale for the authorities will be lost. Because of the complexity and local nature of most water operations, economies of scale by way of shared plant will be limited, and establishing large pipes and pumps between towns and cities will be very expensive of land, materials and time. Serious amounts of new maintenance will be required. It seems both ministers and advisory committees know little of water and its needs. These realities lead me to believe that co-governance and a transfer of substantial water ownership to the non-Crown treaty parties is the real aim of this restructuring. This is tribalism and I will end this section with a quotations from President Obama and from Professor Rata (2013):

> "Ethnic-based tribal politics has to stop. It is rooted in the bankrupt idea that the goal of politics or business is to funnel as much of the pie as possible to one's family, tribe, or circle with little regard for the public good. It stifles innovation and fractures the fabric of the society. Instead of opening businesses and engaging in commerce, people come to rely on patronage and payback as a means of advancing. Instead of unifying the country to move forward on solving problems, it divides neighbour from neighbour."

-Barak Obama (2006)

> "Tribalism and democracy are incompatible – they cannot exist together as political systems in one nation. The condition for democracy is everywhere the end of tribalism with its birth-ascribed inequality and exclusive kin membership"

-Elizabeth Rata (2013)

Targeted support for disadvantaged groups or protection for non-Crown treaty parties are both acceptable parts of NZ's democratic government, but the introduction of tribalism is not.

The bill removes democratic rights of citizens

Under current arrangements, central and local government representatives are subject to elections every three years, with each citizen of voting age having one vote of equal value. As far as water services are concerned, in the city of Hamilton where I live these make up more than one third of the work of the Council and a very large proportion of the city's assets. The direct effect of the proposed changes would be to remove a very large part of existing democratic control from citizens. Yes, there will be at most one representative from the local authority on the RRG, but that person will have to consider the needs of all 22 authorities in Region B, making the influence of any voter from Hamilton so negligible as to be non-existent.

This loss of democratic rights is serious. It has not been subject to any discussion by ministers, nor the subject of any section of the bill. Because of this the bill must not be enacted without a full discussion, Royal Commission and referendum. Clearly, it is the type of reform espoused in the government commissioned planning document entitled He Puapua. It is noted that document does not mention democracy once in over 120 pages. But the UNDRIP article 46 requires that no action based on the declaration should be illegal or endanger the unity or democracy of a nation state. Thus, the bill is in breach of the UNDRIP. Ministers should send it back to Te Puni Kokiri and require it to be rewritten so as to be at least compliant with the declaration, and not go beyond it. They should seek other substantial changes as well, such as writing it in English and in Te Reo, rather than in the dialect Maori-English, removing all footnotes and background colours.

The potential loss of democratic rights is also serious because It endangers our membership of the United Nations. We are required to continue as a democratic state. The same applies to other proposed enactments if they include similar co-governance components.

The co-governance of the RRG and its advisory committees is in breach of NZs constitution

The 'Lands' case of 1987 has been misinterpreted by successive governments because Justice Cooke used the word 'partnership'. This was qualified in the judgements of the other court of appeal justices to something 'akin to a partnership' between the Crown and the non-Crown treaty parties. This latter phrase is accurate . 'Treaty partners' is quite inaccurate and builds expectations which should not exist and significantly reducing the Crown's responsibility to govern for all New Zealanders. Cooke was troubled by how he had been misinterpreted, especially because 'partnership' rapidly became interpreted as 50/50, and so it has solidified in the minds of the legislators. He qualified his meaning. In two successive judgements, he declared it was not necessarily 50/50 but depends in each case on the circumstances. These important precedents supersede the Lands case, but have been ignored, making the universal use by government of a 50/50 co-governance model option, ultra vires.

> "Partnership certainly does not mean that every asset or resources in which the non-Crown parties (my words) have some justifiable claim to share must be divided equally. There may be national assets or resources as regards which, even if the non-Crown parties have some fair claim, other initiatives have still made the greater contribution."

-Cooke, P. NZLR 1989 2 [NZLR] 142,152.

> "As regard to those Crown assets to which the principles do apply, this Court has already said in the forests case, that partnership certainly does not mean that every asset or resource in which the non-Crown parties have some justifiable claim to share must be divided equally."

-Cooke. P. 2 NZLR 1989 513, 527.

These are all judgements, clarifying and qualifying the 1987 the use of 'partnership'.

We need to undo Cooke's rewriting of the Treaty/Te Tiriti – it is fracturing our society:

Dame Anne Salmond speaks out against 'co-governance.:

> "In very recent times, Sir Robin Cooke's rewriting of Te Tiriti as a binary 'partnership between races' has been interpreted as a split in kawanatanga or governance at the national level. The division of populations into 'races' however is a colonial artefact that cuts across whakapapa and is scientifically obsolete. It is not a sound basis for constitutional arrangements in the 21st century."

The word 'akin' was used because, because, analogous to the use of 'partnership' in law which is a business relationship, the treaty parties should act towards each other in good faith. To say it again. the Crown and non-Crown treaty parties are not 'treaty partners' and certainly not 50/50, they are are and remain 'parties to the treaty'.

Not only is this a breach of the current NZ constitution, which rules out co-governance because it requires strict democracy, the non-Crown treaty parties in their plan, He Puapua, want to completely change the NZ constitution, as well as rewrite NZ law. There are no fewer than 103 references to 'constitution' or 'constitutional' in He Puapua (but as I said none at all to 'democracy'), and their plans are already being implemented, without a mandate, without a clear publicised critique of that plan by government or a clear statement of what parts will be implemented and what parts will not.

In her speech to parliament in February 2022, the PM laid out the major legislative programme of the Government for the year. The co-governance agenda, at least as reported by Stuff, did not get a single mention.

The bill is in breach of the Bill of Rights Act. In section 5 we see we are to maintain 'a free and democratic society'. The bill represents a very significant reduction in democratic rights, without any recognition by the Government that this is taking place, and why part of our rights should be removed. Crown Law's advice to Parliament on the bill is deeply flawed and should be rewritten. The phrase 'apparently consistent' should be replaced by 'inconsistent'.

In addition, being democratic is part of our constitution at its highest level. Our membership of the UN requires we remain so. The Introduction to the Cabinet manual states democracy is part of our constitution. Even UNDRIP in article 46 requires it to be maintained. It is unconscionable that a government could act to reduce in such a major way the democratic rights of citizens.

In happier times we had the statement in the annual report of the DIA June 2020:

> New Zealand is a well-functioning democracy, across central and local government: Both central and local government have big impacts on the lives of New Zealanders. The smooth running of New Zealand's democratic institutions is important to the accountability

and transparency that gives people trust and confidence in democracy.

The bill is in breach of the NZ Crimes Act 1961

Legislation should be internally consistent and written according to existing law. (They can of course change existing law, by repealing and replacing the existing version.) The oath of office of all MPs requires this. However, the water services entities bill includes a taking of rights from existing local authority owners who administer the services on behalf of the citizens under their jurisdiction. This taking then is also from the citizens. The taking is in on the face of it in breach of section 219 of the NZ Crimes Act 1961, an act which binds the Crown. There is no formal consent process in the bill for the taking, either for the local authorities or the citizens. There is no offer of compensation or negotiation process for compensation for either the local authorities who hold the assets in trust for citizens who have paid for the assets.

Unbridled power? One often hears that 'parliament is sovereign', so it can do what it wishes no matter what - all that is required to pass a bill effectively into law is a simple majority vote in the House of Representatives. In the words of Geoffrey and Mathew Palmer, they have "Unbridled power". However, this is not completely so. MP's must act in accordance with their oath of allegiance, and not do anything which contradicts existing law without repeal or amendment of the old law, or write a law which is self-contradictory. That would be ultra vires.

Such errors might be deliberate, due to an oversight or be of minor consequence. However, if a significant error is pointed out, either by Crown Law, or by the Select Committee through a written and/or spoken submission from a citizen, or otherwise, then the error would need to be fixed, or the bill withdrawn if the error was fundamental to the bill's structure.

The law is paramount: The weighty requirement that MPs act 'according to law' is required by the oath of allegiance sworn by each new MP at the start of their first parliamentary session:

"I, [name], swear that I will be faithful and bear true allegiance to Her Majesty Queen Elizabeth the Second, Her heirs and successors, according to law. So help me God."

The bill initiates a taking: Currently the local authorities are the actual owners of the water services assets. Should the bill become law then all their ownership rights will have been removed. Once all rights have been removed, they no longer can be validly called 'owners'. To call them 'local authority owners', as the bill so frequently does (except for the odd place where the Entities are called the 'owners' revealing the real intent of the Minister and Government), is ultra vires.

Since they could no longer be called owners, the true nature of the actions which would be initiated by the bill are immediate, using the phrase of the Crimes Act 1961 sections 219 and 408, it is 'a taking'.

Intent is present: the Minister on behalf of the Crown has the mental purpose to take the water services, and to deprive the LAs, and the citizens of NZ permanently of their rights regarding the services.

Consent is not present: the Minister has not sought consent. If it is the Hamilton City Council that will be giving or not giving consent to the proposals. It is invalid, because the formal seeking of consent is not part of the bill. In addition, there has been no consultation with the citizens other than during the short time before the select committee hearings, and other than with the major

beneficiaries, the non-Crown treaty parties. The Select Committee hearings are not suitable for the government to obtain consent or otherwise.

Even so, the transfer of assets and services to the proposed Entities is very large, the loss of democratic rights very significant, and the consequences of the proposed actions very complex. Since what is proposed alters the NZ constitution in a major way, and could affect our standing with the UN, a major public debate accompanied by a Royal Commission, or referendum should be required.

The deprivation is intended to be permanent: By encoding the proposed changes in legislation and establishing the Entities, the Minister and Government intend the proposed structures to be permanent. Thus, they intend a permanent loss of ownership rights and a permanent loss of democratic rights. That a future government might repeal the bill should it become law is not at all relevant to this deprivation and its permanency.

Individual Loss of interest in water services properties: My wife and I have paid rates to the Hamilton City Council for over 50 years. This rate has included a component for water services, which includes a part for the needed capital investment and part for the use of the services. In addition, when each of our several homes were built, a development fee was paid for the cost of reticulating water services in the related subdivision. This contribution was part of the cost of the land we bought, so we contributed that way as well. Thus, we have 'an interest' in the water services that we use which is being 'taken', it is being taken without our consent, and there is no part of the bill which would indicate that any rights in the water services, either ownership or democratic, will be returned. Thus, we are being permanently deprived of our interest in the water service properties.

There is no provision in Part 6 Subpart 4 amend the Crimes Act 1961 section 219 or 408. Such an amendment clause would not sit well with the public because it would reveal the true nature of the Government's actions. However, without such a clause the Water Services Entities Act would be in breach of the Crimes Act and thus constitute unsafe legislation. In mathematical terms we would have one act saying a particular action would be unlawful or false, and another act saying that action would be lawful or true, at the same time. Students of mathematical logic would call this a 'contradiction'. It can be demonstrated that if you accept such pair of propositions, then you can demonstrate that any other proposition, however absurd, is true. The entire structure of mathematics, and the law would collapse. Whatever you think of mathematics, it trumps the sovereign power of parliament, and thus the law also.

In short, the bill for Water Services Entities has four ingredients: it is a taking, there is no consent, the taking is permanent, and there is no compensation which is required by law:

"…it is the right of every person to use his assets as he pleases and to be compensated if they are appropriated for public purposes."-[2006]NZSC 112,, [2007] 2 NZLR 149 at [43]

Therefore, the bill is not according to law, so must be withdrawn. In addition, the proposed structures represent a loss of democratic rights for individual citizens of New Zealand. This is in contravention of the constitution of New Zealand. This loss is serious and significant and endangers our status as a democratic state. It also endangers our membership of the United Nations and is being done without a mandate. For this reason alone, the bill must be withdrawn, and all the matters outlined here addressed before resubmission.

Kevin Broughan (Emeritus Professor of Mathematics) 19 July 2022