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**FOR THE PEOPLE, BY THE MINISTER:
MINISTERIAL INTERVENTIONS IN SUBNATIONAL,
ELECTED BODIES AND A PRINCIPLED APPROACH
TO THEIR FUTURE APPLICATION**

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Contents

I Introduction	5
II Local Government.....	5
A The statutory regime	6
B Interventions in practice	11
1 Christchurch City Council.....	12
2 Kaipara District Council.....	13
3 Environment Canterbury (Canterbury Regional Council, ECan)	14
4 Rodney District Council.....	16
5 Waitomo District Council	17
6 Critiquing the intervention regime's application	17
C Other accountability mechanisms	19
D Summary	20
III District Health Boards.....	20
A The statutory regime	21
B Interventions in practice	23
1 Commissions	24
2 Crown monitors	26
3 Sacking DHB chairs.....	27
4 Critiquing the regime's application	27
C Other accountability mechanisms	29
D Summary	30
IV Boards of Trustees	30
A The statutory regime	31
B Interventions in practice	34
1 Commissions	35
2 Limited statutory managers	36
3 Critiquing the regime's application	37
C Other accountability mechanisms	41
D Summary	42
V Tertiary Institutions.....	42
A The statutory regime	42
B Interventions in practice	45
1 Critiquing the regime's application	46
C Other accountability mechanisms	47
D Summary	47
VI Suggested Intervention Principles	48
A Democracy.....	50
B Subsidiarity.....	52

C Scale of the problem.....	53
D Importance/centrality of the function.....	55
E Timing	56
F Complexity	56
G Evidence/Transparency	56
H Consultation.....	57
I Bipartisan support/Apolitical decision-making	58
J Minimising interventions.....	59
K Summary	60
VI Conclusion.....	60
VII Bibliography.....	63
VIII Word Count.....	73

Diagrams

Diagram 1: Ministerial intervention powers for local government	8
Diagram 2: Ministerial intervention powers for DHBs	22
Diagram 3: Ministerial intervention powers for boards of trustees.....	32
Diagram 4: “Statutory intervention process”	32
Diagram 5: Ministry of Education “support, collaboration and intervention framework” ..	39
Diagram 6: Ministerial intervention powers for tertiary institution councils	44

Tables

Table 1: “Number of statutory interventions, by region as at 31/10/2014”	34
Table 2: Summary of intervention regimes discussed.....	48
Table 3: Comparison of requirements for Crown observers and commissions	51

Abstract

Although frequently ignored, New Zealand's democratically-elected, subnational bodies provide many of the day-to-day services we rely upon, from water and sewerage to healthcare and education. However, the broad discretion enjoyed by ministers responsible for local government, District Health Boards, school boards of trustees and tertiary institution councils means elected representatives could easily be removed with little justification. This paper reviews the ministerial intervention regimes for each of these bodies and concludes that a principled approach to their use is needed to protect democratic values and prevent a concentration of power with the ministers. It suggests democracy, subsidiarity, the scale of the problem, the importance/centrality of the function, timing, complexity, transparency, consultation, apolitical decision-making and minimising interventions as principles upon which to critically analyse past interventions and ensure these powers are used more effectively in future.

I Introduction

Democracy is traditionally considered “government of the people, by the people, for the people”.¹ This apparent unity of purpose and membership belies the tension between elected ministers and other entities whose democratic legitimacy comes from subsets of the wider populace. Such democratic subnational bodies provide indispensable day-to-day services. Eighty-six local authorities control our water and sewerage.² Twenty District Health Boards (DHBs) manage our hospitals.³ Over 2500 boards of trustees govern our primary and secondary schools, while partially-elected councils control eight universities, eighteen polytechnics and other tertiary education providers.⁴ These bodies permit community input rather than a ‘one size fits all’ approach. However, ministerial intervention jeopardises this by displacing locally elected representatives.

This paper argues that current intervention regimes afford ministers too much discretion, potentially harming local democracy, and seeks a principled approach for their future use. Parts II to V examine intervention regimes for local government, DHBs, boards of trustees and tertiary institution councils. Each is considered using three dimensions: the theoretical (the statutory context and formulation of each regime), the practical (examining the effectiveness and justifiability of previous interventions through case studies) and, briefly, the other options for ensuring accountability. Part VI then derives principles transcending and uniting these regimes to encourage better application of ministerial intervention powers. These include higher level concerns like the democratic nature of the body and the principle of subsidiarity, as well as scenario-specific matters, including the scale of the particular problem and the importance of the function concerned.

II Local Government

In this Part, I examine the alarming breadth of ministerial discretion to intervene extensively in local government. While interventions remain rare, their prevalence is increasing, prompting criticism under learning, constitutional, and most importantly, democratic perspectives. A willingness to replace elected authorities inhibits learning and discourages council decision-making, while risking a concentration of power with the minister. It also deprives communities

¹ Abraham Lincoln “The Gettysburg Address” (Dedication of the Soldiers’ National Cemetery, Gettysburg, 19 November 1863).

² Department of Internal Affairs “About local government” <www.localcouncils.govt.nz>.

³ Ministry of Health “District health boards” (14 January 2014) <www.health.govt.nz>.

⁴ NZQA “ITPs in New Zealand” (<www.nzqa.govt.nz>).

of their representatives, who are elected specifically to ensure decisions take account of local conditions.

A The statutory regime

The original Local Government Act 1989 replaced 800 single and multi-purpose entities with 78 regional councils and territorial authorities.⁵ Regional councils manage “natural and physical resources”, water supply, discharges into/onto water, air or land, flood protection and natural hazards.⁶ Territorial authorities are city or district councils, responsible for controlling land use and development, protecting public health and safety and providing infrastructure including sewerage, roads and water.⁷ As well as the Local Government Act 2002 (LGA), such authorities are subject to the Local Government (Rating) Act 2002 and Local Electoral Act 2001.

Since local authorities manage \$100 billion of public assets, spending 4% of New Zealand’s GDP (\$7.5 billion) annually, central government has, unsurprisingly, refused to relinquish control entirely.⁸ The 2012 amendments to the LGA Part 10 gave the Minister of Local Government additional powers to assist local authorities and “intervene in [their] affairs... in certain situations”.⁹

While each intervention option has particular prerequisites, all necessitate either a “problem” or a “significant problem”. A problem requires a current or potential issue reducing the authority’s ability to implement the purposes of local government or “a significant or persistent failure” to perform statutory duties.¹⁰ This may include “[im]prudent management of ... revenues, expenses, assets, liabilities, investments, or general financial dealings”.¹¹ A significant problem further requires “actual or probable adverse consequences for residents”.¹² Including “potential” issues widens the definition immensely, while “significant” adds little

⁵ These together make up local authorities under the Local Government Act 2002, s 5; Peter McKinlay “Future of Local Government Summit: A New Zealand Perspective” (paper presented to the Local Government Centre, Auckland) at 1 and 2.

⁶ Local Government Act, s 149(1); Resource Management Act 1991, s 30.

⁷ Resource Management Act, s 31, Local Government Act, ss 5 and 146.

⁸ (12 June 2012) 680 NZPD 2839.

⁹ Local Government Act, s 253. The 2012 amendment also made other significant changes including the removal of the four well-beings, however these are beyond the scope of this paper.

¹⁰ The civil emergencies aspect of ministerial powers will not be examined in this paper; Local Government Act, s 256.

¹¹ Section 256 (b)(i).

¹² Section 256.

since situations constituting “problems” will virtually always have “probable adverse consequences”.

The purposes of local government are enabling local democracy and providing “good-quality local infrastructure,...public services, and performance of regulatory functions” in the “most cost-effective [way] for households and businesses”.¹³ Good-quality is further defined as “efficient, effective and appropriate to present and anticipated future circumstances”.¹⁴ Thus, failing to get value for money may permit intervention.

The Minister has six intervention options. These are:

- requiring information,¹⁵
- appointing a Crown Review Team (CRT),¹⁶
- appointing a Crown observer,¹⁷
- appointing a Crown manager,¹⁸
- appointing a commission,¹⁹ and
- calling or postponing a general election.²⁰

These appear hierarchical, from minor monitoring to major intervention.²¹ A Minister can require information as to the problem’s nature and plans to address it.²² Alternatively, a CRT can independently assess problems and recommend action to the minister or authority.²³ Crown observers assist in addressing problems, monitor progress and make further recommendations to the Minister, while a Crown manager may also direct the local authority in addressing the problem.²⁴ Appointing a commission to take over the local authority’s functions and powers, with councillors remaining in office in name only, is the most invasive option.²⁵ Calling a

¹³ Section 10.

¹⁴ Section 10(2).

¹⁵ Section 257.

¹⁶ Section 258.

¹⁷ Section 258B.

¹⁸ Section 258D.

¹⁹ Section 258F.

²⁰ Section 258M.

²¹ New Zealand Treasury *Regulatory Impact Statement – Better Local Government* (March 2012) at [184].

²² Local Government Act, 257(1).

²³ Section 258(4).

²⁴ Sections 258B(4) and 258D(4).

²⁵ Sections 258F and 258K.

general election allows a fresh start.²⁶ While the council must pay appointees' fees, they are responsible only to the minister.²⁷

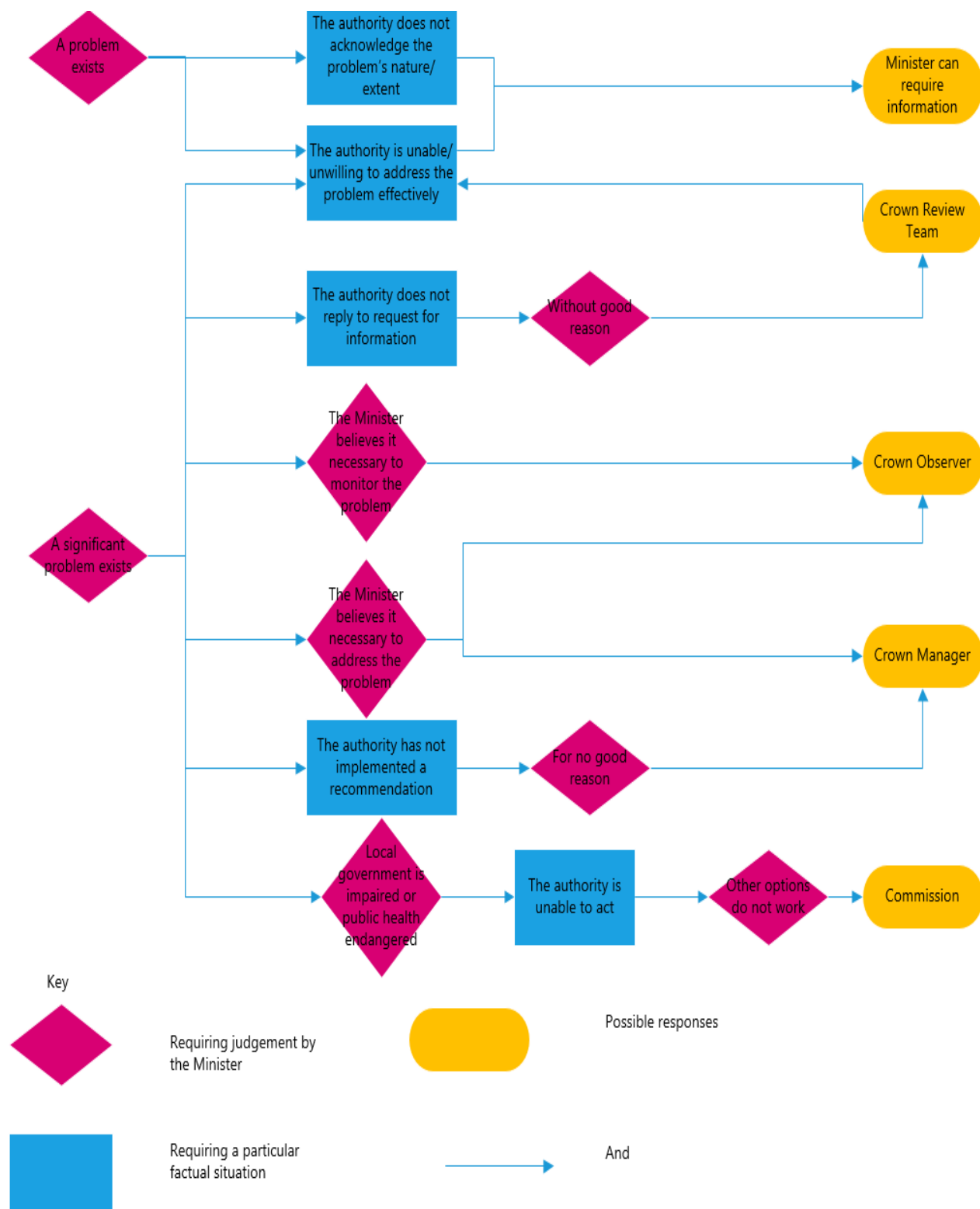


Diagram 1: Ministerial intervention powers for local government

²⁶ Section 258M(1).

²⁷ Sections 258W and 258Y.

A Minister may also intervene upon request from the local authority or a pre-existing appointed body.²⁸

Despite this hierarchy of intervention options, there is no equivalent hierarchy of thresholds for their use. Instead, the Department of Internal Affairs (DIA) considers Part 10 a “menu”, implying free choice based on personal preference, which appears accurate.²⁹ For example, a local authority hesitating to act upon recommendations may face a CRT if considered unwilling to address the problem, or a more invasive Crown manager for failing to implement recommendations.³⁰

Particularly concerning is the number of discretionary decisions involved. A Crown observer or manager’s availability is based purely upon a Minister’s view of the situation, while the less powerful CRT requires that the authority be unable/unwilling to act, which is quantitatively ascertainable.³¹ Furthermore, most criteria for appointing a commission, and thus displacing elected representatives entirely, require only ministerial judgment.³² The regime also allows punitive action against local authorities. An authority failing to do as recommended risks a Crown manager’s appointment; not responding to requests for information within the Minister’s chosen timeframe may prompt a CRT.³³

Ministers must issue a list of factors which might influence intervention decisions.³⁴ The guiding principles published in 2013 included transparency, that local authorities should resolve their own issues and that assistance should be proportionate to the problem’s nature and potential consequences. Matters identified as “likely to detract” from local authorities’ capacity to meet the purposes of local government are listed as “financial mismanagement”, relationship breakdowns, “serious capability deficiencies of elected members” and dysfunctional governance.³⁵ While the published list is extensive, the Minister may consider non-listed factors.

²⁸ Sections 257, 258, 258B, 258D, 258F and 258M.

²⁹ Department of Internal Affairs “Implementing the 2012 Amendment Act” <www.dia.govt.nz>. This concurs with the Local Government Act, s 254(4).

³⁰ Local Government Act, ss 257 and 258D.

³¹ Sections 258B and 258D.

³² Section 258.

³³ Sections 257 and 258F.

³⁴ Section 258O.

³⁵ “Notice Regarding Ministerial Powers of Assistance and Intervention” (28 March 2013) 38 *New Zealand Gazette* 1111 at 1140.

The present provisions significantly tightened local government's leash. Pre-2012, a Review Authority was required before further intervention, delaying matters significantly.³⁶ Even convening that authority required a significant or persistent failure to meet obligations or "significant and identifiable" mismanagement (potential problems, now capable of triggering much greater intervention, were insufficient).³⁷ Once a Review Authority reported, the Minister could appoint a commission or call an election, but only if the reviewers recommended it, the local authority requested it or could not hold meetings due to lack of a quorum.³⁸ Alternatively, an appointee could perform obligations in place of local authorities "wilfully refusing or substantially refusing" to act and thus impairing local government or endangering public health.³⁹ Such high thresholds meant provisions were often circumnavigated.⁴⁰

The arguments for and against amending the LGA are instructive as regards its future application. The Bill's supporters focused on financial concerns, citing rates increasing 6.8% and debt increasing from \$2 billion to \$8 billion.⁴¹ Reform was needed to encourage "fiscal responsibility", competition and productivity.⁴² Treasury suggested that a lack of intervention powers was contributing to rates increases,⁴³ despite evidence that existing powers were seldom needed, councils did not require assistance and other statutes already permitted limited interventions.⁴⁴ There were also concerns to reduce "excessive costs and time delays" and stop local government's perceived expansion. Maggie Barry MP argued that:⁴⁵

Councils need to be pulled back into line... Councils need to be kept under control...
Government does the governing, local authorities deliver the services...

Such concerns apparently triumphed, with ministerial powers broadened by Supplementary Order Paper to allow intervention without demonstrable financial mismanagement. The DIA considered the amendments "a shift from a reactive, significant response to a proactive and graduated approach", despite their enabling far more drastic and immediate action.

Labour's objections to the Bill included the lack of evidence of financial irresponsibility by local authorities, with an independent report showing spending levels were ensuring a "long-

³⁶ Local Government Act, s 254(2) (repealed).

³⁷ Section 254(2) (repealed).

³⁸ Section 255 (repealed) and sch 15 cl 14 (repealed).

³⁹ Section 256 (repealed).

⁴⁰ See Part I.B.

⁴¹ (12 June 2012) 680 NZPD 2843.

⁴² New Zealand Treasury, *Regulatory Impact Statement – Better Local Government*, above n 21, at 7.

⁴³ At 7.

⁴⁴ At 7 and 22.

⁴⁵ (12 June 2012) 680 NZPD 2858.

lived asset base”.⁴⁶ Rather than arguing that local government expansion was legitimate, MPs claimed it had not occurred, perhaps suggesting a preference for limited local government.⁴⁷ The Greens concentrated on the democratic implications of shifting power away from communities, in what they considered a “major constitutional change”.⁴⁸ The lack of consultation obligations and the “subjectivity” the Bill introduced were also criticised.⁴⁹ New Zealand First considered it a “central government power grab”.⁵⁰

The Bill’s Select Committee received 775 submissions.⁵¹ The Auckland District Law Society called the Part 10 proposals “constitutionally untenable” in light of “the notion of a separate institution of local government”.⁵² Many submissions echoed this concern for democracy,⁵³ and fear of ministers misusing power.⁵⁴ Submitters also believed that existing processes, like annual audits, afforded local government enough support and the local government sector or independent agencies could accommodate any additional needs.⁵⁵ Local government processes might also stagnate if councillors were constantly looking over their shoulders.⁵⁶ Other submitters denied reform was necessary; local government was acting as required by balancing central government power.⁵⁷

Thus, there was significant opposition to the Government’s extending intervention powers in local government. However, it is the level of discretion the amendments afford that is most concerning, particularly since the case studies below reveal a willingness to use these powers in the interests of politics, rather than the community.

B Interventions in practice

Past usage of intervention powers may inform speculation as to future uses. While it should be noted that only Christchurch City Council’s Crown manager was appointed under the current

⁴⁶ NZIER *Is local government fiscally responsible? NZIER report to Local Government New Zealand* (11 September 2012) at i and 12.

⁴⁷ Local Government Act 2002 Amendment bill (27-2) (select committee report) at 9-10.

⁴⁸ At 15-16.

⁴⁹ (12 June 2012) 680 NZPD 2848.

⁵⁰ Local Government Act 2002 Amendment bill (27-2) (select committee report) at 20.

⁵¹ At 17.

⁵² Auckland District Law Society “Local Government Act 2002 Amendment Bill” at [43].

⁵³ For example, Human Rights Commission “Submission on the Local Government Act 2002 Amendment Bill” at [2.16].

⁵⁴ At 4.7 and Kapiti Coast District Council “Kapiti Coast District Council Submission on Local Government Act Amendment Bill” at 7-8.

⁵⁵ Human Rights Commission, above n 53, at 4.8.

⁵⁶ New Zealand Public Service Association “Local Government Act 2002 Amendment Bill Submission of the New Zealand Public Service Association Te Pukenga Here Tikanga Mahi to the Local Government and Environment Select committee” at 11.

⁵⁷ At 5.

regime, earlier interventions remain informative. Since the present statute is even more permissive of ministerial intervention, it seems likely that similar, if not more stringent, action would have been taken under its provisions. These previous interventions, while few in number, reveal a somewhat inconsistent approach to utilising the LGA powers. Furthermore, that four out of five have occurred in the last five years suggests ministers are increasingly willing to displace elected councils.

1 Christchurch City Council

In 2012, Christchurch City Council requested a Crown observer to assist with post-earthquake “governance issues”,⁵⁸ following public anger at the chief executive’s \$68,000 pay rise and “quite destructive” council leaks and squabbles.⁵⁹ The observer would offer advice, develop a council charter and report to the minister.⁶⁰ Should issues remain unresolved within “weeks, not months”, a commission would be appointed.⁶¹ The observer’s appointment preceded the LGA’s 2012 amendments and had no statutory basis. An organisation calling itself ‘Council Watch’ requested that the Ombudsman and Crown Law investigate the appointment’s legality since local government is “constituted separate from central government under an Act of Parliament for a reason”.⁶² It considered the move a subversion of democracy and the principle that taxation requires representation.⁶³

The observer, Kerry Marshall, identified a “breakdown in trust and the blurring of the line between governance and management”, which had been exacerbated by councillors publicly criticising staff members.⁶⁴ However, progress was made and his contract ended on 1 July 2012.⁶⁵

The following July, International Accreditation New Zealand revoked Christchurch City Council’s Building Consent Authority status following prolonged “compliance and performance issues” in terms of speed and quality, prompting the council to request a Crown

⁵⁸ Department of Internal Affairs “Summary of Crown Observer Proposal” <www.beehive.govt.nz>.

⁵⁹ Ben Heather “Council observer to meet councillors” *The Press* (online ed, Christchurch, 30 January 2012); Sam Sachdeva “Government observer appointed to council” *The Press* (online ed, Christchurch, 28 January 2012).

⁶⁰ Nick Smith “Crown Observer to assist ChCh City Council” (press release, 27 January 2012).

⁶¹ Sachdeva, above n 59.

⁶² Council Watch “Crown Law Asked to Investigate Minister’s Decision” (press release, 30 January 2012).

⁶³ Council Watch, above n 62.

⁶⁴ Rachel Young “Contract for council’s Crown observer to end” *The Press* (online ed, Christchurch, 26 June 2012).

⁶⁵ Sam Sachdeva “Crown observer should stay until election” *The Press* (online ed, Christchurch, 2 June 2012).

manager under the LGA.⁶⁶ Labour's attempt to urgently debate the matter in the House was rejected since the outcome of the government's actions was not yet clear.⁶⁷ Doug Martin, formerly Jenny Shipley's chief of staff, was appointed Crown manager, to oversee the council's building control functions and ensure it regained accreditation.⁶⁸ His initial review identified a "lack of a clear point of accountability", leadership problems, inadequate resourcing and cultural issues.⁶⁹

Christchurch City Council reapplied for accreditation in May 2014, with preliminary findings approving the cultural change but cautioning that modifications were "very recent" with some processes only "partially implemented".⁷⁰ By November, most issues had been resolved.⁷¹ The Crown manager's contract expired on 31 December 2014. His tenure has been controversial, running up \$9 million in "unexpected costs".⁷² His appointment is the only intervention under the current regime.

2 *Kaipara District Council*

Problems arose in Kaipara when Kaipara District Council undertook a public-private partnership rather than paying outright for the Mangawhai wastewater scheme, but lacked the skills to implement it effectively.⁷³ The resulting \$85.2 million debt blowout rendered it New Zealand's most indebted council per capita and ratepayers revolted over proposed 31% rates increases.⁷⁴

Kaipara District Council invited the Minister to appoint a Review Team (circumventing the LGA's provisions on appointing a Review Authority). Their report found the council unable to rectify problems and catalysing the rates strike.⁷⁵ A "failure of governance" had broken the

⁶⁶ APNZ "Chch consents crisis: Crown manager to be appointed" *The New Zealand Herald* (online ed, Auckland, 4 July 2013); "Notice of Intention to Appoint a Crown Manager Pursuant to Section 258D(1)(b)" (11 July 2013) 88 *New Zealand Gazette* 2354.

⁶⁷ (9 July 2013) 692 NZPD 11774.

⁶⁸ "Notice of Intention to Appoint a Crown Manager Pursuant to Section 258D(1)(b)", above n 66.

⁶⁹ Doug Martin *Monthly Progress Report of the Crown manager to the Christchurch City Council* (6 September 2013) at [32]-[33].

⁷⁰ IANZ *Building Consent Authority Accreditation Assessment Report* (17 November 2014) at 3.

⁷¹ At 3.

⁷² Lois Cairns "Consents rights bid cost council \$9m" *The Press* (online ed, Christchurch, 2 July 2014).

⁷³ Office of the Auditor-General *Inquiry into the Mangawhai community wastewater scheme* (November 2013) at [2.7] and [4.42].

⁷⁴ John Hartevelt and Nick Unkovich "Commissioners installed in Kaipara" *The Dominion Post* (online ed, Wellington, 13 August 2012).

⁷⁵ Greg Gent, Leigh Auton and Peter Tennent *Report of the Kaipara District Council Review Team* (17 August 2012) at [25]-[26], [30]-[31] and [50]-[51]; Office of the Auditor-General *Inquiry into the Mangawhai community wastewater scheme*, above n 73, at 10.

community's trust and commissioners were needed to enable a cultural shift.⁷⁶ An Auditor-General's report also found that Kaipara District Council had failed in "its fundamental legal and accountability obligations" and "effectively lost control of a major infrastructure project".⁷⁷ Management was so poor that the council's losses could not be calculated, the best estimate being \$63.3 million.⁷⁸

Kaipara District Council consented to commissioners being appointed to enforce rates, address illegal rates, review financial strategies and work with the community.⁷⁹ The Kaipara District Council (Validation of Rates and Other Matters) Act 2013 passed with cross-party support, legalising rates the High Court had ruled illegitimate.⁸⁰ The commissioners have subsequently issued summons to 300 rates "strikers" and added arrears to 200 mortgages.⁸¹

3 *Environment Canterbury (Canterbury Regional Council, ECan)*

In September 2009, ten Canterbury mayors complained to then-Minister of Local Government, Rodney Hide, of slow consent processes and fractious relationships with ECan.⁸² Hide commissioned a wide-ranging review of ECan's operations, headed by the Rt Hon Wyatt Creech (Jenny Shipley's deputy Prime Minister).⁸³ Since the DIA was concerned that the high threshold for convening a Review Authority had not been met, this was not an LGA review. RMA review powers were however exercised.⁸⁴

The report found major flaws in ECan's water consenting processes, concluding that Canterbury's water management was too complex to entrust to a regional council.⁸⁵ Central government intervention was needed to address this "single most significant issue facing the Canterbury Region".⁸⁶ ECan was only processing 29% of consents on time, the least of 84

⁷⁶ Gent, Auton and Tennent, above n 75, at [2]-[3].

⁷⁷ Office of the Auditor-General *Inquiry into the Mangawhai community wastewater scheme*, above n 73, at 9.

⁷⁸ At 10.

⁷⁹ "Appointment of Commissioners of the Kaipara District Council" (31 August 2012) 110 *New Zealand Gazette* 3155; David Carter "Kaipara Council commissioners appointed" (press release, 29 August 2012).

⁸⁰ Kaipara District Council "Kaipara Commissioners reject MRRA rates exemption" (press release, 4 October 2013); *Mangawhai Ratepayers' and Residents' Association Inc v Kaipara District Council* [2013] NZHC 2220.

⁸¹ Rob Stock "Council targets 500 rates rebels" *The Dominion Post* (online ed, Wellington, 23 November 2014).

⁸² Environment Canterbury "Mayors' letter to Minister out of left field" (press release, 23 September 2009); Paul Gorman "Environment Canterbury's work under the gun" *The Dominion Post* (online ed, Wellington 29 October 2009).

⁸³ Nick Smith and Rodney Hide "Govt announces Environment Canterbury review team" (press release, 16 November 2009).

⁸⁴ Department of Internal Affairs "Powers and Process for Ministerial Intervention in a local authority under the Local Government Act 2002" (14 September 2009) at [17]; Ministry for the Environment "Investigation of Environment Canterbury" (17 September 2009).

⁸⁵ Wyatt Creech, Martin Jenkins, Greg Hill and Morrison Low *Investigation of the Performance of Environment Canterbury under the Resource Management Act and Local Government Act* (February 2010) at i and 7.

⁸⁶ At i, 4, and 5.

authorities, and were 18 years late in implementing a regional plan.⁸⁷ The reviewers also criticised its single-minded focus on environmental protection and “we know best attitude”.⁸⁸ This said, they found that ECan was meeting all other LGA obligations; its major problem was its interpretation of the RMA, and it was making progress.⁸⁹

The report recommended a specialist Canterbury Regional Water Authority be created by legislation, since neither the LGA nor RMA’s options were workable.⁹⁰ In the interim, a temporary commission should replace ECan’s water consent division “as soon as practicable”, with elections restored by 2013.⁹¹ Functions other than water consenting should remain with ECan. By contrast, the DIA recommended against a separate water authority as it reduced the Government’s options regarding “planned work on local government structure”.⁹² However, it now considered that the LGA’s high threshold for intervention was met, despite the Creech report’s uncertainty in this regard.⁹³

Rather than worry about meeting intervention criteria, the Government passed the Environment Canterbury (Temporary Commissioners and Improved Water Management) Act 2010 (ECan Act) under urgency, citing Canterbury’s need for a quick resolution to the uncertainty.⁹⁴ Elected members were replaced by appointed commissioners and elections were suspended until 2013 then further postponed until 2016, with a review of governance options expected in December 2014.⁹⁵ The Minister gained full discretion over commissioners’ appointments, payment and terms of reference, while regulations could temporarily suspend the RMA’s operation in Canterbury.⁹⁶ Part 9, dealing with water conservation, was suspended indefinitely.⁹⁷ The Environment Court’s jurisdiction was removed; only points of law could be appealed to the

⁸⁷ At 6 and 25.

⁸⁸ At 10 and 26.

⁸⁹ At 50.

⁹⁰ At 22 and 11.

⁹¹ At iv, v, 12 and 17.

⁹² Department of Internal Affairs “Implications of appointing commissioners to Environment Canterbury” (12 February 2010).

⁹³ Creech, MartinJenkins, Hill and Morrison Low, above n 85, at 18.

⁹⁴ Department of Internal Affairs “Aide memoire for Cabinet paper “Response to Review of Environment Canterbury” (5 March 2010) at 3.

⁹⁵ Environment Canterbury (Temporary Commissioners and Improved Water Management) Act 2010, ss 10 and 22 as amended by the Environment Canterbury (Temporary Commissioners and Improved Water Management) Amendment Act 2013. As of February 2015, no such report on ECan’s governance has been released.

⁹⁶ Sections 10, 13, 17 and 18.

⁹⁷ Sections 20, 31 and 46.

High Court.⁹⁸ The Minister could also permit the suspension of any application, without compensation.⁹⁹

Opposition MPs roundly criticised the ECan Act as disenfranchising voters.¹⁰⁰ Professor Philip Joseph considered the “disproportionate and excessive” suspension of local democracy to have “menacing implications” and was particularly troubled by its extension beyond the three year Parliamentary term.¹⁰¹ He also criticised the specific targeting of the Hurunui water conservation order application, the Act’s retrospective provisions and the exclusion of the Environment Court as breaching the “fundamentals of a civilised society under the rule of law”.¹⁰² Section 31 was a Henry VIII clause, allowing regulations to override primary legislation.¹⁰³

4 *Rodney District Council*

In 1999, Rodney District Council imploded. The mayor struggled to control meetings as councillors bandied profanities and openly criticised decisions.¹⁰⁴ Standing orders and codes of conduct were ignored.¹⁰⁵

Rodney District Council unanimously requested a Review Authority in October 1999.¹⁰⁶ Following sixty hours of submissions, that authority labelled the Council “clearly dysfunctional” and incapable of the “urgent action... needed to enable it to become a cohesive political entity.”¹⁰⁷ While financial management was adequate, governance issues required immediate resolution to prevent “adverse social, economic and environmental impacts”.¹⁰⁸

While the authority would have preferred the Council to be independently monitored, the then LGA did not permit this, so it recommended a temporary commission.¹⁰⁹ Local Government New Zealand and the Auditor-General supported this conclusion.¹¹⁰ A commissioner held

⁹⁸ Sections 46 and 52 to 53.

⁹⁹ Sections 34 and 44.

¹⁰⁰ (30 March 2010) 661 NZPD 9935.

¹⁰¹ Philip Joseph “Environment Canterbury legislation” [2010] NZLJ 193 at 196.

¹⁰² At 193; Environment Canterbury (Temporary Commissioners and Improved Water Management) Act 2010 Sch 2 Part 2. Also see Ann Brower “ECan Act staggering use of legislative power” *The Dominion Post* (online ed, Wellington, 24 May 2010).

¹⁰³ Joseph, above n 101, at 195.

¹⁰⁴ Margaret Evans “The Role of the Mayor in New Zealand” (Master of Social Science Dissertation, University of Waikato, 2003) at 60.

¹⁰⁵ At 60-61.

¹⁰⁶ Rodney District Council Review Authority *Ministerial Review of the Rodney District Council* (March 2000) at 2.1.

¹⁰⁷ At 1.4 and 4.1.

¹⁰⁸ At 7.1 and 1.5.

¹⁰⁹ At 1.6 and 7.1.

¹¹⁰ Sandra Lee “Commission appointed to Rodney District Council” (press release, 10 April 2000).

office from April 2000 until the following March's elections. The Local Government (Rodney District Council) Amendment Act 2000, clarifying the commissioner's role, received cross-party support.¹¹¹

5 *Waitomo District Council*

A 2006 audit of Waitomo District Council's proposed Long Term Council Community Plan labelled it "financially [im]prudent".¹¹² Forecasted surpluses ignored ageing infrastructure and low rate levels,¹¹³ while planned debt increases from \$29.1 million to \$69.1 million and 66% rates increases over 10 years were unsustainable.¹¹⁴ Since LGA thresholds for intervention were not met, informal action was taken. Waitomo District Council agreed to the Minister appointing an expert panel to advise the Council on its financial performance and infrastructure management.¹¹⁵

6 *Critiquing the intervention regime's application*

Previous interventions have been somewhat inconsistent. Christchurch City Council received only a Crown manager having failed in a core function (building consents), while ECan's water consenting failures resulted in its dismissal, generating accusations of political manoeuvring. It is also unclear as to why Christchurch City Council initially received a Crown observer when bickering between councillors and ratepayers' outrage at officials' pay rises are an ordinary part of democracy.

Ultimately, the intervention regime aims to prevent misuse of subnational power by holding local authorities accountable and allowing the minister to act if necessary. Its efficacy can be considered using Bovens' framework for assessing accountability.¹¹⁶ Bovens defines accountability as:¹¹⁷

a relationship between an actor and a forum, in which the actor has an obligation to explain and to justify his or her conduct, the forum can pose questions and pass judgment, and the actor may face consequences.

¹¹¹ (2 May 2000) 596 NZPD 2648.

¹¹² Office of the Auditor-General *Matters arising from the 2006-16 Long-Term Council Community Plans* (June 2007) at 7.63.

¹¹³ At 7.64.

¹¹⁴ At 7.66 and 7.67.

¹¹⁵ At 7.69.

¹¹⁶ Mark Bovens "Analysing and Assessing Accountability: A Conceptual Framework" (2007) 13 *European Law Journal* 447 at 450.

¹¹⁷ At 450.

Here, the relevant actor is the local council, the forum is the minister. This enshrines a hierarchical accountability model repeated in the other regimes examined (a horizontal accountability model might give greater power to assist to other organisations within the local government sphere including Local Government New Zealand).¹¹⁸ The only thing lacking is the ability for the council to explain or justify their decisions, in the absence of a consultation requirement, but a minister would be well-advised to undertake such consultation anyway.¹¹⁹

In considering accountability, Bovens suggests analysing three perspectives. The democratic perspective asks whether there is a link to the electorate to legitimise the use of power.¹²⁰ The constitutional perspective is critical of any attempt to centralise power as this may lead to corruption.¹²¹ Finally, the learning perspective assesses the capacity of public bodies to learn from their mistakes through feedback and reflectivity.¹²²

Regarding the democratic perspective, both the local council and the minister, and thus his/her appointees, have democratic legitimacy, through local body and central government elections respectively. However, the principle of subsidiarity suggests that decisions should be taken as locally as possible, and indeed, local government's proximity to the people arguably grants it greater democratic legitimacy.¹²³ It also better accommodates New Zealand's heterogeneity than central government.¹²⁴

However, going one step further and examining the strength of the democratic link reveals local democracy to be somewhat problematic. Local government may still not represent diverse interests within constituencies.¹²⁵ Low election turnouts (approximately 40%) allegedly diminish its democratic legitimacy, despite choosing not to vote arguably being a democratic prerogative.¹²⁶ Younger residents overwhelmingly fail to vote (34% of 18-29 year olds voted in the 2001 local government elections compared to over 80% of over 50s).¹²⁷ That Regional Councils in particular often appear to be mere providers of technical services rather than an

¹¹⁸ At 460.

¹¹⁹ See Part VI.H.

¹²⁰ Bovens, above 116, at 462-463.

¹²¹ At 463.

¹²² At 463.

¹²³ Steven Thomas and P Ali Memon "New Zealand Local Government at the Crossroads? Reflections on the Recent Local Government Reforms" (2007) 25 *Urban Policy and Research* 171 at 172.

¹²⁴ Mike Reid "Chapter 23: Local Government: The Search for Constitutional Certainty" in C Morris et al (eds) *Restructuring the Constitution* (Springer-Verlag Berlin Heidelberg, London, 2011) at 410.

¹²⁵ Richard Welch "Legitimacy of rural local government in the new governance environment" (2002) 18 *Journal of Rural Studies* 443 at 451.

¹²⁶ Local Government New Zealand "Local elections 2013" <www.lgnz.co.nz>.

¹²⁷ Local Government New Zealand "Voter turnout in New Zealand local authority elections – what's the story?" (<www.lgnz.co.nz>).

“instrument of democratic will” is perhaps off-putting for voters.¹²⁸ However, local democracy is not just about voter turnout, but also residents’ rights to stand for election and the high turnover of local candidates keeps councils sensitive to community concerns.¹²⁹

Studies also show “little clear evidence that policies and expenditure are influenced by voting at local elections” as non-elected officials are primarily responsible for policy-making and daily administration.¹³⁰ Councils also tend to act consistently with the government’s wishes and override community views, producing little regional variation.¹³¹ Thus, local democracy has little impact. Indeed, some have suggested this is preferable, since those not concerned with re-election can make difficult decisions without fear.¹³² However, allowing ministers such wide powers to intervene may actually worsen local government’s democracy problems by making it appear to be merely a central government agent.

Considering the constitutional perspective, the intervention regime for local government may be of concern as the Minister could easily remove a council’s power and grant it to ministerial appointees over a minor matter. Even appointing a Crown observer or CRT might influence behaviour. Indeed, simply the threat of being overtaken by a commission at the minister’s behest might ‘encourage’ councils to fall into line or at least, cause decision-making to stagnate as authorities constantly look over their shoulders. However, there having been only five official interventions in fifteen years belies this. Then again, four of those interventions occurred in the last five years, suggesting such activity may be increasing.

Regarding the learning perspective, the current local government regime provides for Crown observers to assist councils rather than simply taking over their powers. However, this presupposes that a Crown observer will be used before a Crown manager or commission, whereas, at present, these seem to be used as discrete options. There is also no consultation mechanism to enhance communication between the minister and council.

C Other accountability mechanisms

For completeness, both the RMA and Building Act 2004 grant their respective ministers power to intervene in local authorities’ affairs, prompting arguments that Part 10’s wide-ranging

¹²⁸ David Walker *Living with ambiguity: The relationship between central and local government* (Joseph Rowntree Foundation, York, 2000) at 8; Welch, above n 135, at 448.

¹²⁹ Local Government New Zealand, above n 127.

¹³⁰ Martin Boddy “Central-local governance relations: theory and practice” (1983) 2 *Political Geography Quarterly* 119 at 124.

¹³¹ At 124. Welch, above n 125, at 452.

¹³² New Zealand Public Service Association *Empowered to serve: A new relationship for central and local government* (September 2011) at 20.

powers are unnecessary. In addition to broad attempts to influence councils through regulations, national environmental standards or national policy statements,¹³³ the RMA allows the Environment Minister to investigate authorities failing to perform their duties and make recommendations on exercising their powers.¹³⁴ Failure to implement recommendations may result in appointees acting in their stead.¹³⁵ A local authority may also be directed to create or change its regional or district plan.¹³⁶ Similarly, the responsible minister, in consultation with the Local Government minister, can, under the Building Act 2004, appoint individuals to perform the local authority's functions.¹³⁷ However, this provision has never been used and these limited powers will not be discussed further.¹³⁸

Other actors who affect local government include the Local Government Commission which can inquire into reorganisation proposals;¹³⁹ the Auditor-General who is responsible for auditing local authorities and their long-term plans¹⁴⁰ and the Ombudsman.¹⁴¹

D Summary

The current intervention regime for local authorities gives ministers very broad discretion, which is increasingly being used. This raises concerns regarding the potential concentration of power with the Minister, stagnation of local government processes and the appropriateness of replacing locally-elected representatives with ministerial appointees.

III District Health Boards

The intervention regime for DHBs includes fewer options (three compared to the six for local government), but grants the minister far wider discretion to intervene, as there need not be a specific problem, merely room for improvement. However, factors such as DHBs being partially minister-appointed arguably legitimise such interventions, despite there being greater scope for misuse.

¹³³ RMA, s 360.

¹³⁴ RMA, s 24.

¹³⁵ RMA, s 25.

¹³⁶ RMA, s 25A.

¹³⁷ Building Act 2004, s 277.

¹³⁸ Rebecca Hoffman *Building Law in New Zealand* (online ed) at [BL277.02].

¹³⁹ *Laws of New Zealand* Local Govt Part I (3) at [19].

¹⁴⁰ At [21]. Public Audit Act 2001, s 14(1); Local Government Act, ss 84(4) and 94(1).

¹⁴¹ Department of Internal Affairs "Roles of central government agencies" (<www.localcouncils.govt.nz>).

A *The statutory regime*

The New Zealand Public Health and Disability Act 2000 replaced earlier, more centralised and more commercial models of healthcare provision with twenty-one (now twenty) DHBs.¹⁴² Together they spend over \$10 billion annually, approximately three-quarters of healthcare funding.¹⁴³ Wielding budgets of over \$1 billion per annum, some rank among the country's biggest entities.¹⁴⁴

DHBs comprise up to eleven members.¹⁴⁵ Seven members are elected during local body elections, while the Minister of Health has discretion to appoint (and subsequently dismiss) up to four more, as well as the chair and deputy chair.¹⁴⁶ These appointments must encourage proportional Maori membership; each DHB requires at least two Maori members.¹⁴⁷ The Board's elected members assist in "provid[ing] a community voice" regarding health services, one of the Act's stated purposes.¹⁴⁸

DHBs' objectives and functions include "to improve, promote, and protect the health of people and communities"; to "seek the optimum arrangement" to effectively and efficiently deliver health services; to reduce disparities in health outcomes between population groups and encourage community participation.¹⁴⁹ In practical terms, they are responsible for New Zealand's primary healthcare and hospitals, making strategic decisions and monitoring finances and service provision.¹⁵⁰

DHBs are Crown agents, so must comply with government policy as directed by the Minister of Health.¹⁵¹ Ministers of State Services and Finance may also jointly implement specific

¹⁴² Sian French, Andrew Old and Judith Healy "European Observatory on Health Care System Health Care Systems in Transition: New Zealand" (EUR/01/5012667 (NEZ) (2001), Wellington 2001) at 29-30.

¹⁴³ Office of the Auditor-General *Spending on supplies and services by district health boards: Learning from examples* (September 2010) at 5.

¹⁴⁴ Reg Birchfield and Jens Mueller "Ailing DHB Directors – Tony Ryall's health sector tonic" (2010) *New Zealand Management* 30; Ministry of Health *District Health Board Elections 2013: Information for candidates* (Ministry of Health, Wellington, 2013) at 2.

¹⁴⁵ Ministry of Health "District health boards" (14 January 2014) <www.health.govt.nz>.

¹⁴⁶ New Zealand Public Health and Disability Act 2000, s 29(1) and sch 3 cl 10(1); Crown Entities Act 2004, s 36(1).

¹⁴⁷ New Zealand Public Health and Disability Act, s 29(4). However, the Crown Entities Act 2004 disqualifies undischarged bankrupts, those prohibited from involvement in companies under various acts, those subject to property or personal orders, MPs and those who have been imprisoned for two or more years: s 30.

¹⁴⁸ New Zealand Public Health and Disability Act, s 3(1)(c).

¹⁴⁹ Sections 22 and 23.

¹⁵⁰ Ministry of Health, above n 144, at 6-7.

¹⁵¹ Crown Entities Act, ss 7(1)(a) and 103.

requirements as part of a “whole of government approach” where necessary to “secure economies or efficiencies” or manage financial risks.¹⁵²

DHBs remain somewhat controversial. Elected representatives’ suitability to the complex work board members must undertake is frequently questioned.¹⁵³ Elected members need not, and often do not, have previous governance or financial experience.¹⁵⁴ Furthermore, DHBs allocating funding may affect lives, placing added stress on inexperienced members perhaps already struggling with complex medical terminology.¹⁵⁵ Members seeking re-election may be distracted from the DHB’s main business by headline-grabbing issues such as fluoride,¹⁵⁶ and often underestimate the time required for DHB matters weekly.¹⁵⁷ Some commentators have also advocated for smaller boards to increase decision-making efficiency, while others criticise board members’ lack of understanding of DHBs’ statutory obligations.¹⁵⁸

Given the significance of healthcare provision and DHB budgets, central government has again sought to retain much control, although the intervention regime is far less complex than for local government.

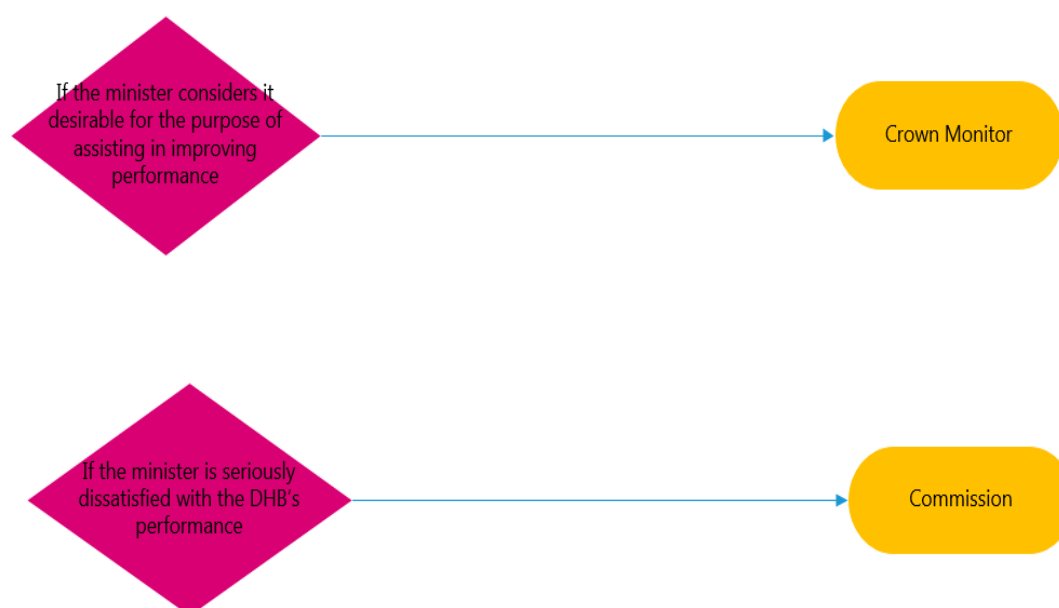


Diagram 2: Ministerial intervention powers for DHBs

¹⁵² Crown Entities Act, s 107.

¹⁵³ Birchfield and Mueller, above n 142, at 30.

¹⁵⁴ For example, only three of Whanganui DHB’s eleven members have any financial or clinical administrative experience: Whanganui DHB “Board Members” (<www.wdwb.org.nz>).

¹⁵⁵ Birchfield and Mueller, above n 142, at 30.

¹⁵⁶ At 30.

¹⁵⁷ At 30.

¹⁵⁸ At 30.

The minister may appoint a Crown monitor, where considered desirable for improving the DHB's performance. There need be no particular problem requiring resolution, as for the Part 10 local government powers; the option is available whenever improvement might be possible. Crown monitors are similar to, but distinct from, local government Crown observers. Crown monitors observe board decisions and processes and advise the Minister on any issues, but must also aid the DHB in understanding government policies and wishes so that board decisions can "appropriately reflect" them, illustrating the greater control central government has over DHBs.¹⁵⁹ Monitors may attend any DHB meeting and access any Board documentation.¹⁶⁰

Alternatively, the Minister can sack the board and appoint a commission; he/she need only be seriously dissatisfied with the board's performance and give written notice.¹⁶¹ The commission acquires all the DHB's powers, duties and functions and the Minister may dismiss commissioners at will.¹⁶² Again, there need not be a particular problem, or any prescribed level of severity and the legislation does not reference consultation for any proposed action.

The Minister can also sack the chairperson/deputy if notice is given and the individual and DHB consulted.¹⁶³ While separate from the statute's other intervention options, this power could still influence decision-making, although the chair has no particular additional powers and no casting vote.¹⁶⁴

Under the Crown Entities Act 2004, the Minister may request any information pertaining to the DHB's operations.¹⁶⁵ Ministers may also issue directions regarding eligibility for funded services or provision of specified services where considered "necessary and expedient".¹⁶⁶ These are in addition to the more general powers to direct crown agents to effect government policy.¹⁶⁷

B Interventions in practice

At present, only one DHB has been replaced by a commission, three have received Crown monitors and two have had their chairs sacked. However, these intervention powers have been

¹⁵⁹ New Zealand Public Health and Disability Act, s 30(3).

¹⁶⁰ Section 30.

¹⁶¹ Section 31(1).

¹⁶² Sections 31(2) and (4).

¹⁶³ Schedule 3, cl 13.

¹⁶⁴ Schedule 3, cl 29(2).

¹⁶⁵ Crown Entities Act, s 133.

¹⁶⁶ New Zealand Public Health and Disability Act, ss 32(2) and 33(1).

¹⁶⁷ Crown Entities Act, ss 103, 114 and 115.

used even more inconsistently than for local government, apparently driven by politics rather than concern for communities' interests.

I Commissions

The only DHB to be replaced by a commission is Hawke's Bay's. In February 2008, then-Health Minister, David Cunliffe, considered a \$7.7 million deficit, deteriorating relationships between the board, himself and staff and the Board's attacking him in the media "to advance the personal agenda of Board members" sufficient grounds for dismissal.¹⁶⁸ He accused members of driving away clinicians and bullying staff.¹⁶⁹ The Board had a week to respond but failed to sway the Minister. In Parliament, Cunliffe's biggest concern was not the magnitude of the budget blowout, but the Board's lack of a credible plan to address the problem.¹⁷⁰ He felt a Commission was necessary, despite the Board proposing a Crown monitor instead.¹⁷¹

Initial problems had arisen over contracts worth up to \$50 million entered into despite a government-appointed DHB member's, Peter Hausmann's, significant conflicts of interest.¹⁷² The Director-General of Health compiled a report on the DHB's governance issues, but its release was delayed by the Board successfully gaining an injunction.¹⁷³ Cunliffe opted not to wait two weeks for the report's release, and appointed a commission.¹⁷⁴ The report itself recommended only a Crown monitor, to provide some external input regarding the handling of conflicts of interest, both Hausmann's and in general.¹⁷⁵ It also identified conflicts between the Board and management, with "a perception...that the Board had overreached its governance role into operational areas".¹⁷⁶

The dismissal was roundly criticised as "an alarming abuse of political power" against "democratically elected representatives."¹⁷⁷ Former Board chair, Kevin Atkinson, considered

¹⁶⁸ "Health Minister fires Hawke's Bay DHB" (online ed, Dominion Post, Wellington, 27 February 2008); Letter from David Cunliffe (Minister of Health) to the chairman of the Hawke's Bay DHB regarding dissatisfaction with the Board's performance (20 February 2008). The actual figure for the deficit was reported differently by different sources. In Parliament, Cunliffe suggested it was either \$8 million, \$11 million or \$12.7 million: (4 March 2008) 645 NZPD 14530. This was despite using the \$7.7 million figure in his letter to the DHB of 20 February 2008. The most widely quoted figure has been used here.

¹⁶⁹ (4 March 2008) 645 NZPD 14530.

¹⁷⁰ (4 March 2008) 645 NZPD 14530.

¹⁷¹ Letter from Kevin Atkinson (Chairman of Hawkes Bay DHB) to David Cunliffe (Minister for Health) regarding the minister's dissatisfaction with the Board's performance (26 February 2008).

¹⁷² Ian Wilson, David Clarke and Michael Wigley *Conflicts of interest and other matters at the Hawke's Bay District Health Board* (Report for the Director-General of Health, 14 March 2008) at [1.2].

¹⁷³ (4 March 2008) 645 NZPD 14530.

¹⁷⁴ (4 March 2008) 645 NZPD 14530.

¹⁷⁵ Wilson, Clarke and Wigley, above n 172, at [1.20] and [1.21].

¹⁷⁶ At [1.28].

¹⁷⁷ "Health Minister fires Hawke's Bay DHB" (online ed, Dominion Post, Wellington, 27 February 2008).

Cunliffe's decision a reaction to the Board's refusing "to endorse... political cronyism and chicanery" and insistence on pursuing the judicial review case.¹⁷⁸ The deficit was blamed on underfunding.¹⁷⁹ Atkinson asserted that some comments had been incorrectly attributed to him and he had not criticised Cunliffe.¹⁸⁰ Meanwhile, Cunliffe used parliamentary privilege to call the DHB "a nasty little nest of self-perpetuating, provincial elites who have been propping each other up".¹⁸¹

The affair prompted an urgent parliamentary debate. Heather Roy argued that Hawke's Bay had one of the country's best DHBs and that the deficit was only 2.5% of its annual funding.¹⁸² Ten other DHBs had more significant deficits than Hawke's Bay.¹⁸³ She believed Cunliffe had been blinded by his belief that the Board had been publicly criticising him, something MPs should be accustomed to, and protested his sacking the Board after only 72 days in office.¹⁸⁴ He responded that the vast majority of the Board had been there since at least 2001.¹⁸⁵ Five local mayors also showed support for the Board and its chair in a joint letter to the Minister.¹⁸⁶ However, journalists privy to communications between key DHB figures reported "a torrid story of an organisation in chaos with fault residing on all sides".¹⁸⁷

Ultimately, the sacked DHB sought a judicial review of Cunliffe's decision to dismiss them, citing a wide range of grounds, including unreasonableness, irrelevant considerations including the employment relationship between the Board and Chief Executive, improperly conducted surveys of clinicians' opinions and failure to consider "objective measures of Board performance".¹⁸⁸ Cunliffe was accused of breaching natural justice, predetermining the matter

¹⁷⁸ "Health Minister fires Hawke's Bay DHB", above n 177.

¹⁷⁹ Letter from Kevin Atkinson to David Cunliffe, above n 171.

¹⁸⁰ (4 March 2008) 645 NZPD 14530; Letter from Kevin Atkinson to David Cunliffe, above n 171.

¹⁸¹ Synopsis of Submissions on Behalf of Plaintiffs in the matter of *Hawke's Bay Regional Council v the Minister of Health* CIV 2008-441-145.

¹⁸² (4 March 2008) 645 NZPD 14530. Ministry of Health, above n 144, at 2.

¹⁸³ (4 March 2008) 645 NZPD 14530.

¹⁸⁴ (4 March 2008) 645 NZPD 14530.

¹⁸⁵ (4 March 2008) 645 NZPD 14530.

¹⁸⁶ (4 March 2008) 645 NZPD 14530; "Mayors: We stand by sacked board" (online ed, Hawke's Bay Today, 18 March 2008).

¹⁸⁷ John Armstrong "Cabinet's Action Man cops sacking backlash" (online, New Zealand Herald, Auckland, 1 March 2008).

¹⁸⁸ Synopsis of Submissions on Behalf of Plaintiffs in the matter of *Hawke's Bay Regional Council v the Minister of Health* CIV 2008-441-145 at [66], [84], [87] and [88].

and of bias by allowing Hausmann far greater opportunities to address criticism than the Board was afforded.¹⁸⁹ The court documents also attack Cunliffe for interfering with democracy.¹⁹⁰

The judicial review case was never heard. The new National government in December 2008 reinstated the sacked DHB members, but negotiated with local councils to retain Commissioner Sir John Anderson on the Board.¹⁹¹

2 *Crown Monitors*

Capital and Coast DHB received a Crown monitor in December 2007, after debt reached \$47.5 million and problems emerged with maternity and child oncological care, tensions between staff and management and preventable deaths of patients on waiting lists.¹⁹² Health Minister David Cunliffe also replaced the chairperson.¹⁹³ National, in opposition, criticised this approach as unlikely to be effective but has continued the Crown monitoring into its third term of office.¹⁹⁴

Whanganui DHB received two Crown monitors in April 2008 to address business and governance difficulties.¹⁹⁵ Several “scathing reports” had criticised the board’s performance, particularly regarding the appointment of obstetrician Roman Hasil who subsequently improperly performed thirty-two sterilisations after insufficient board monitoring.¹⁹⁶ Concerns were also raised over a \$7 million deficit, staff shortages and the loss of 166 patient referrals to specialists.¹⁹⁷

A Crown monitor was appointed to Southern DHB in May 2010, when it was formed by merging Southland and Otago DHBs.¹⁹⁸ The two former DHBs had experienced deficits for

¹⁸⁹ Affidavit of Kevin Henry Atkinson in the matter of *Hawke’s Bay Regional Council v the Minister of Health* CIV 2008-441-145. Synopsis of Submissions on Behalf of Plaintiffs in the matter of *Hawke’s Bay Regional Council v the Minister of Health* CIV 2008-441-145 at [106].

¹⁹⁰ Synopsis of Submissions on Behalf of Plaintiffs in the matter of *Hawke’s Bay Regional Council v the Minister of Health* CIV 2008-441-145.

¹⁹¹ “Sacked Hawke’s Bay DHB members reinstated” (online ed, *Dominion Post*, Wellington, 11 December 2008).

¹⁹² Aaron van Delden “Govt still watching Capital & Coast DHB” (online, NewsWire.co.nz, 21 July 2010); “Temporary CCDHB leader revealed” (online ed, *Dominion Post*, Wellington, 5 September 2013); Office of the Auditor-General *Health sector: Results of the 2010/11 audits* (March 2012) at [2.10]; “Government sends in monitor and fresh chief to aid troubled health board” (online ed, *New Zealand Herald*, 14 December 2007).

¹⁹³ “Government sends in monitor and fresh chief to aid troubled health board”, above n 193.

¹⁹⁴ “Government sends in monitor and fresh chief to aid troubled health board”, above n 193.

¹⁹⁵ David Cunliffe “New appointments to Whanganui DHB” (press release, 23 April 2008).

¹⁹⁶ “Two Crown monitors to oversee Whanganui DHB” (online ed, *New Zealand Herald*, 23 April 2008); “New monitors appointed at Wanganui” (24 April 2008) <www.tvnz.co.nz>.

¹⁹⁷ Health Committee 2007/08 *Financial review of the Whanganui District Health Board* (8 April 2009) at 2; “Call for re-think of district health board system” (online ed, *Dominion Post*, 2 March 2008).

¹⁹⁸ “Minister names head of new Southern DHB” (30 March 2010) <www.radionz.co.nz>.

ten to fifteen years, with annual shortfalls of around \$10 million and looming capital works costs.¹⁹⁹ In July 2013, Dr Jan White became the next Crown monitor, with the intention that she will remain in office until the Board ceases to be in deficit.²⁰⁰

Other DHBs have previously agreed to board advisors being appointed to perform a similar function to Crown monitors but circumvent the legislation.²⁰¹

3 *Sacking DHB chairs*

Otago DHB chairman, Richard Thomson, was sacked in February 2009 by then-Health Minister Tony Ryall after the DHB's chief information officer defrauded it of \$16.9 million.²⁰² This was despite the fraud starting before Thomson's term and three former ministers and Otago healthcare professionals supporting his continued tenure.²⁰³ Labour labelled the move "nonsensical" since Thomson had "helped catch the crook",²⁰⁴ while Thomson felt National was deliberately attacking a known Labour supporter.²⁰⁵ By comparison, Mary Hackett survived calls for her dismissal as Bay of Plenty DHB's chairperson in 2002 after collecting \$1,125 fees for meetings she did not attend and subsequently lying about it.²⁰⁶

4 *Critiquing the regime's application*

As for local government, the Minister has very significant discretion to intervene. Indeed, this regime is even more forgiving of ministers, lacking definitive thresholds, while the absence of a requirement that there be a particular problem the intervention should address means a general sense of unease with the DHB's progress is sufficient. Thus, a DHB may be performing comparatively well, but if improvement is possible, a Crown monitor might be appointed.

Such significant discretion may again cause DHB processes to stagnate as Board members second-guess decisions to keep the Minister happy. However, this is arguably less significant than for local government since the Minister need not use intervention processes to coerce DHBs into doing as he/she wishes; the regime is designed to ensure that his/her policies are

¹⁹⁹ Health Committee 2010/11 *Financial review of the Southern District Health Board* (30 May 2012) at 2

²⁰⁰ Tony Ryall "Southern DHB crown monitor appointment" (press release, 29 July 2013); Eileen Goodwin "New Crown monitor for health board" (online ed, *Otago Daily Times*, 30 July 2013).

²⁰¹ Cunliffe, above n 195.

²⁰² "Sacked DHB chairman hits out at health minister" (online ed, *New Zealand Herald*, Auckland, 17 February 2009).

²⁰³ Liane Topham-Kindly "DHB chair sacking a 'fait accompli'" (3 Feb 2009) <www.nzdoctor.co.nz>.

²⁰⁴ "Otago DHB chairman sacked by Minister" (17 February 2009) <www.tvnz.co.nz>; "Thomson sacking wrong" (17 February 2009) <www.clarecurran.org.nz>.

²⁰⁵ Clo Francis "Minister sacks Otago DHB boss" (online ed, *Dominion Post*, Wellington, 2 March 2009).

²⁰⁶ New Zealand National Party "Minister Won't Sack Dishonest Board Chair" (press release, 23 July 2002).

followed anyway. Furthermore, ministerial intervention powers have rarely been exercised. Since the first DHB elections in 2001, only one commission and three Crown monitors have been appointed, although those Crown monitors have been in place for a very long time.

However, heightened discretion may allow ministers to exercise their intervention powers inappropriately for political gain. The contrast between the Hawke's Bay and Capital & Coast DHBs' experiences is stark. The former had amassed only a fraction of Capital & Coast's debt, and had maintained public confidence while Capital & Coast was much maligned.²⁰⁷ Cunliffe argued that the differing responses were because the issues for Capital and Coast were "at the clinical and management level" while those for Hawke's Bay were at the "governance level".²⁰⁸ However, it seems unlikely management issues alone would cause such a significant debt. Political motivations better explain the disparity. Should a Minister exercise their powers for an improper purpose, the decision can be challenged under judicial review. However, Ministers may avoid scrutiny, as Board members may be concerned for their present or future appointments.

It is perhaps arguable that the significant discretion afforded the Minister is entirely appropriate since DHBs are not and should not be 'as democratic' as local councils, given the complexity of their work and their closer relationship with the Crown, emphasised by their being partially appointed. Elected members merely ensure greater public participation than other consultation processes and their overriding obligations are to the Minister and to implement government policy.²⁰⁹ Since they are elected to implement government policy, with a nod to community concerns, it is arguably appropriate for the Minister to dismiss them if seriously dissatisfied.

Applying Bovens' three perspectives, the democratic element is once again problematic. While ministerial decisions can be traced back to a democratic mandate, through their position as an elected MP appointed to the role by a democratically-elected Government formed from the majority party/coalition in the House, the DHB also has democratic legitimacy through its elected members. The principle of subsidiarity also mandates that decisions be made as locally as possible. Local decisions should be made by officials elected by the local electorate rather than a mix of local and non-local people. However, DHBs also have appointed members and are restricted to primarily implementing ministerial policy and so arguably have a lesser

²⁰⁷ Tony Ryall "DHB Sacking: "Appalling Political Manipulation"" (press release, 27 February 2008).

²⁰⁸ (21 February 2008) 645 NZPD 14474.

²⁰⁹ Robin Gauld "Delivering democracy? An analysis of New Zealand's District Health Board elections, 2001 and 2004" (2005) 29 *Aust Health Rev* 345 at 345-346.

democratic mandate than the Minister. Thus, the democratic aspect is perhaps not as troubling as for local government.

Furthermore, as for local council elections, voter turnout for DHB elections is very low, around 40%.²¹⁰ Thirty percent of people polled had no interest in DHB elections whatsoever.²¹¹ In addition, there are serious questions about the quality of elected candidates. Despite the complex management minefield that is sitting on a DHB, less than seven percent of voters reportedly look for management or financial experience in candidates (61% look for experience in healthcare).²¹² Thus perhaps it is preferable to allow the Minister significant discretion to intervene.

Regarding the constitutional perspective and the desire to minimise concentrations of power, the ministerial intervention scheme for DHBs scores poorly. Ministers still exert very significant control and can easily sack elected members and replace them with commissioners they appoint.

In terms of the learning perspective, there is capacity for assisting DHBs in improving performance through Ministry monitoring or the appointment of a Crown monitor. The absence of an obligation on the Minister to consult with DHBs before acting denies them an opportunity for dialogue and improvement. However, since there is no specific statutory provision regarding consultation, as there is for local government, a court might imply natural justice requirements.

C Other accountability mechanisms

DHBs are subject to strategic directions from the Minister. The Minister may direct all DHBs “for the purpose of supporting government policy on improving... effectiveness and efficiency”.²¹³ Like local councils, DHBs must produce district annual plans including goals, expectations as to performance and financial matters.²¹⁴ However, the Minister must approve plans before they are released. These plans must also abide by Planning Regulations.²¹⁵ In addition, a five to ten year plan must be produced through community consultation and

²¹⁰ At 348.

²¹¹ At 348-349.

²¹² At 349.

²¹³ New Zealand Public Health and Disability Act, s 33B(1).

²¹⁴ Sections 38 and 42.

²¹⁵ Section 92(1); Ministry of Health 2011/12 *Operational Policy Framework* (Ministry of Health, Wellington, 2004) at [3.3].

approved by the Minister.²¹⁶ DHBs must also report regularly on whether they are meeting these plans.²¹⁷ The Crown Funding Agreement between DHBs and the Crown also provides another way for the Minister to monitor DHBs, this time in an output-focused manner.²¹⁸ DHBs must also produce an Annual Report under the Crown Entities Act 2004, which enables Parliamentary select committees to undertake financial reviews.²¹⁹

Since 2009, the National Health Board has been responsible for monitoring DHBs as well as providing funding and planning services.²²⁰ The Board is appointed by the minister and has a dedicated business unit within the Ministry of Health.²²¹ Like local councils, DHBs are subject to Ombudsman inquiries and regular audits by the Auditor-General.²²²

DHBs are also obligated to set up advisory committees on community and public health, disability support and hospital matters.²²³ Public membership of such committees can allow for further participation and consultation.

D Summary

The Health Minister has very significant discretion to appoint either a Crown monitor or commission, which in Hawke's Bay DHB's case was utilised with questionable motivations. DHBs are partially elected and must implement ministerial policy so have far less 'democratic legitimacy' than local councils, making such interventions perhaps less of an affront to democracy. Power remains heavily concentrated in central government.

IV Boards of Trustees

Boards of trustees operate very differently from local authorities and DHBs, controlling one school among thousands. However, they are entirely elected and their widely-used intervention regime offers an interesting comparator. The regime is the most discretionary so far, but Ministry of Education practice has been to use it sparingly; the result is a more effective intervention regime than might otherwise be anticipated.

²¹⁶ French, Old and Healy, above n 142, at 34.

²¹⁷ At 35.

²¹⁸ New Zealand Public Health and Disability Act, s 10; Ministry of Health *2011/12 Operational Policy Framework*, above n 215, at [3.5].

²¹⁹ At [3.7]; Crown Entities Act 2004 ss 150-157.

²²⁰ Ministry of Health "Accountability and funding" (<www.health.govt.nz>). Jacqueline Cumming et al *New Zealand Health System Review* (Asia Pacific Observatory on Health Systems and Policies, Wellington, 2014) at 16.

²²¹ National Health Board "About us" (<www.nhb.health.govt.nz>).

²²² French, Old and Healy, above n 142, at 35.

²²³ New Zealand Public Health and Disability Act, ss34-36.

A *The statutory regime*

All New Zealand state and state-integrated schools require boards of trustees.²²⁴ Boards of trustees are responsible for governance, the principal for day-to-day management.²²⁵ Trustees have a three year term of office.²²⁶ Boards of trustees determine “the school’s strategic and policy direction”, oversee financial, staff and curriculum management and monitor progress against set targets.²²⁷ Boards of trustees have “complete discretion” in management, but must act to ensure every student can “attain his or her highest possible standard in educational achievement”.²²⁸

School boards of trustees comprise three to seven parent representatives, the school’s principal as chief executive and a staff representative.²²⁹ Parent representatives are elected by parents and adult students but need not themselves be parents or students.²³⁰ Trustees may also be co-opted by the Board and schools with full-time students in year 9 or above require a student representative.²³¹

Boards of trustees constitute a special class of Crown entity, subject only to certain specified provisions of the Crown Entities Act 2004, primarily regarding financial matters.²³² Of note, while Ministers may direct DHBs to effect government policy, boards of trustees are exempt, although may be instructed to give effect to a ‘whole of government approach’.²³³

Boards of trustees have yet another different intervention regime, refined in October 2001.²³⁴

²²⁴ Education Act 1989, s 93.

²²⁵ *Hobday v Timaru Girls High School Board of Trustees* Employment Court, Christchurch, CED 16/94.

²²⁶ Education Act, s 105.

²²⁷ Ministry of Education “Boards of trustees” <www.minedu.govt.nz>.

²²⁸ Education Act, s 75.

²²⁹ Section 94.

²³⁰ Sections 96 and 103.

²³¹ Section 94.

²³² Crown Entities Act, s 7 and sch 3.

²³³ Schedule 3.

²³⁴ Ministry of Education *Interventions: Guide for Schools* (Ministry of Education, Wellington, July 2013) at [1].

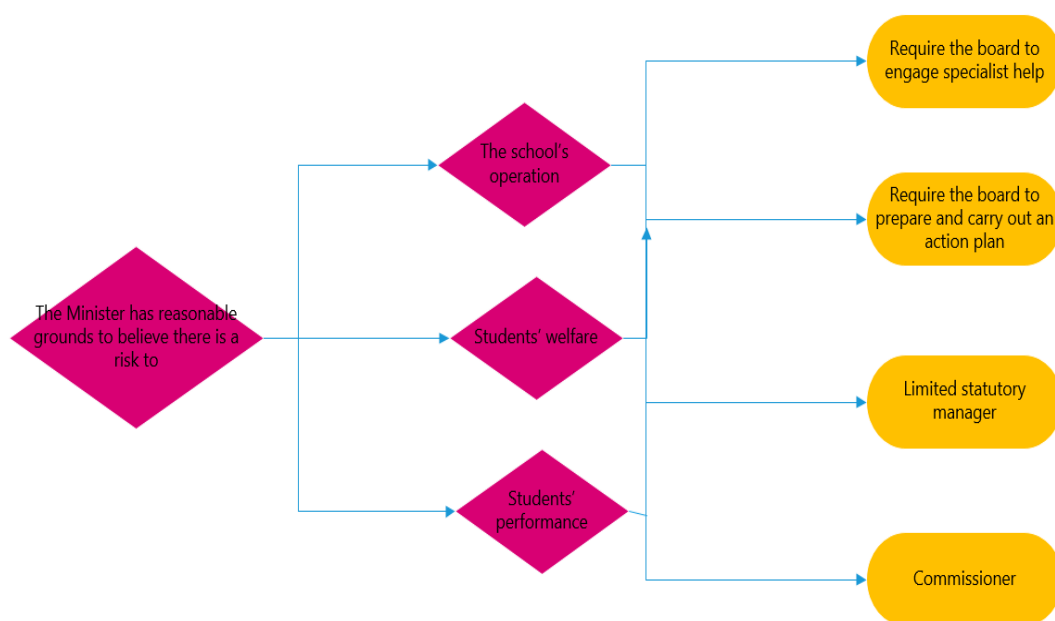


Diagram 3: Ministerial intervention powers for boards of trustees

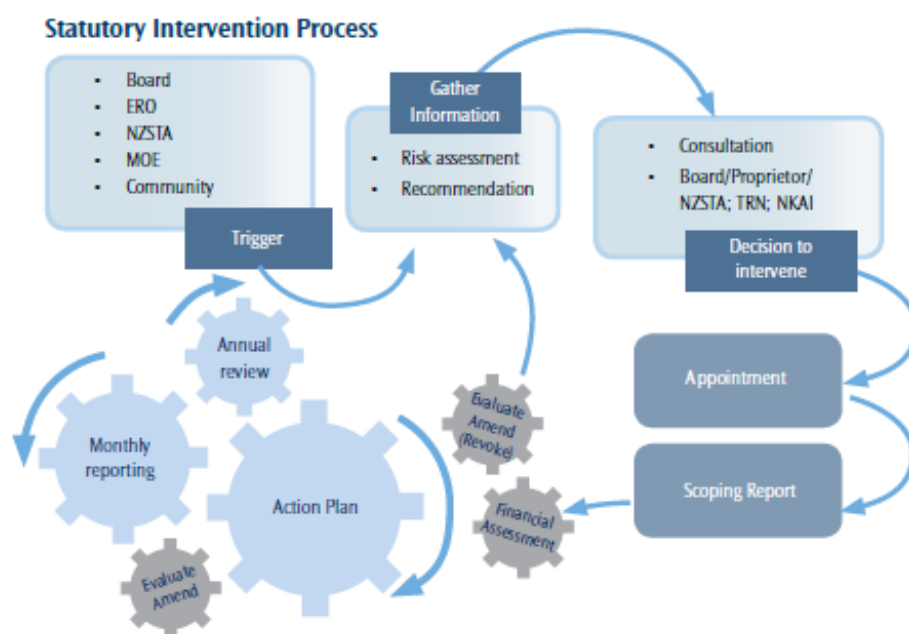


Diagram 4: “Statutory Intervention Process”

From Ministry of Education *Review of Statutory Interventions in State Schools and State Integrated Schools: Final Report and Recommendations to the Minister of Education* (November 2014) at 6.

Note that the Secretary of Education can also permit interventions, although he/she can only dissolve a board where it has not met in three months, no member remains who can conduct meetings, fewer than three trustees have been elected or there are problems with the election

process.²³⁵ The Secretary can also require the board of trustees to provide information which the Minister can only do under the Crown Entities Act 2004.²³⁶ These powers are unlimited.

Interventions in boards of trustees do resemble a menu and may, except for the commission, be utilised concurrently.²³⁷ If the Minister reasonably believes a risk to the school's operation, students' welfare or performance exists, he/she may select any option he/she wishes. This provides significant discretion since this threshold is easily met and there is no specified standard of evidence of a problem's existence. A risk to students' performance in particular seems a low standard since a vast number of seemingly innocuous things might impact some students' performance to an unspecified degree, for example a favourite teacher leaving. However, the legislative regime also states that the Minister should not intervene "more than necessary."²³⁸

There is no requirement regarding consultation before the minister intervenes. The wide range of options is more akin to those for local government than DHBs. However, mandating specialist assistance or the creation of an action plan are unique to this regime, ensuring that the board of trustees gets help but its decision-making authority is not affected. For the former, the Minister must identify the individuals or entity the board should engage for assistance.²³⁹ A limited statutory manager is similar to a local government Crown manager, in that they take only the powers or duties the minister vests in them, leaving other functions with the board of trustees. As for DHBs, appointing a commission dissolves the board entirely. Any statutory appointees must work independently of the Ministry, asking only for "general consultative advice".²⁴⁰ The Minister must review all interventions annually.²⁴¹

Given New Zealand has 2,532 schools, Ministry of Education policy is well-defined, setting out extensively how and when interventions will occur once it is made aware of the issue by Education Review Office reports, the media, public or parental concern.²⁴² Its documentation emphasises that the "level of evidence-based identified risk will determine the level of intervention applied" and that it will intervene "no more than is necessary" while "promptly

²³⁵ Education Act, s 78N.

²³⁶ Section 78I; Crown Entities Act, s 133.

²³⁷ Ministry of Education, *Interventions: Guide for Schools*, above n 234, at [7].

²³⁸ Education Act, s 78I(4).

²³⁹ Section 78J.

²⁴⁰ Ministry of Education, *Interventions: Guide for Schools*, above n 234, at [35].

²⁴¹ Education Act, s 78R.

²⁴² Ministry of Education "Number of Schools" (<www.educationcounts.govt.nz>); Ministry of Education, *Interventions: Guide for Schools*, above n 234, at [11].

and effectively” addressing risks and preventing future problems.²⁴³ Risks to schools’ operation may include financial, personnel and asset management, inadequate communication with parents and “poor community relations”.²⁴⁴ Student welfare issues might include health and safety problems, “high suspension, exclusion and expulsion rates”.²⁴⁵ Student performance matters could include staffing problems, low achievement generally and amongst particular groups as well as problems with the curriculum and assessment.²⁴⁶

B Interventions in practice

The Ministry reports that 2.8% of schools (69) are subject to statutory interventions at any one point in time.²⁴⁷ Current intervention numbers are shown below:²⁴⁸

Education Region	78K Specialist Advisor	78L Action Plan	78M Limited Statutory Manager	78N(1)(2) Commissioner	78N(3) Commissioner	Total
Auckland	2		9	1	1	13
Bay of Plenty/Rotorua/Taupo	2		5			7
Canterbury			3	1		4
Hawkes Bay/Gisborne		1	4			5
Nelson/Marlborough/West Coast					1	1
Otago/Southland	1			1	4	6
Tai Tokerau	1		1	6	2	10
Taranaki/Whanganui/Manawatu			3	3		6
Waikato			12	1		13
Wellington	1		3	1		5
Total	7	1	40	14	8	70

Table 1: “Number of Statutory Interventions, by region as at 31/10/2014”

From Ministry of Education *Review of Statutory Interventions in State Schools and State Integrated Schools: Final Report and Recommendations to the Minister of Education* (November 2014) at 6.

Research into individual statutory interventions is hindered by the paucity of information, since many are not especially newsworthy. There are also minimal cases where judicial review is

²⁴³ Ministry of Education, *Interventions: Guide for Schools*, above n 234, at [6].

²⁴⁴ At [13].

²⁴⁵ At [14].

²⁴⁶ At [15].

²⁴⁷ Ministry of Education *Review of Statutory Interventions in State Schools and State Integrated Schools: Final Report and Recommendations to the Minister of Education* (November 2014) at 6. One school has two separate interventions.

²⁴⁸ At 6. Note that s 78N(1)(2) commissioners are those appointed by the Minister; s 78N(3) commissioners are appointed by the Secretary should one of the specific criteria be met.

even threatened and it is often avoided by out of court settlements. However, from the information available, it appears that particularly the more serious intervention powers are used discerningly, with Ministry guidance adding a significant gloss to the statutory regime.

1 Commissions

Twenty-two schools currently have commissioners.²⁴⁹

Commissioners were appointed to Te Kura Kaupapa Maori o Whangaroa in Matauri Bay, Northland, in June 2014 and the board dismissed after only a year in office due to problems running board elections, including a failure to publicly advertise, tension over the principal's dismissal a year earlier and subsequent parental backlash, staff being locked out and a plunging roll (down from 103 to 36).²⁵⁰ The board of trustees claimed it had been blindsided and likened the intervention "to the imposition of Marshall [sic] Law", subsequently initiating judicial review.²⁵¹ However, an out-of-court settlement meant this was abandoned, with the commissioner being replaced, former trustees standing in a new election and a working group established to review intervention processes.²⁵²

Moerewa School, also in Northland, received a commission in April 2012 after the school refused to close its senior classes (Years 11 to 13).²⁵³ It retained these students without Ministry approval and continued to post substandard NCEA results, with accusations of students copying Wikipedia and work containing multiple handwritings.²⁵⁴ However, the former board chair said students had only returned for a farewell powhiri and the school had wide community support.²⁵⁵ The Board was granted a new constitution in March 2014, heralding a return to elected representation.²⁵⁶

Isla Bank School, in Southland, was appointed a commission in November 2014, after all but two trustees resigned and parents complained that they were being ignored. However, the

²⁴⁹ At 6.

²⁵⁰ Peter de Graaf "School trustees pledge to fight" (online ed, *The Northern Advocate*, Whangarei, 17 June 2014).

²⁵¹ Dean Nathan "Kura Kaupapa Maori o Whangaroa board review" (Maori Television News, 14 December 2014, <www.maoritelevision.com>).

²⁵² Nathan, above n 251.

²⁵³ ERO *Moerewa School Education Review* (25 February 2013).

²⁵⁴ 3News "Anger over Moerewa School sacking" (25 April 2012, <www.3news.co.nz>); (3 May 2012) 679 NZPD 1943.

²⁵⁵ ONE news "Students forced to find new school after classes shut down" (26 April 2012, <www.tvnz.co.nz>); Willi Jackson "Moerewa decision sets kids up to fail" (online ed, *Maukau Courier*, 27 April 2012).

²⁵⁶ "Alternative Constitution for the Board of Trustees of Moerewa School (2103) (13 March 2014) 29 *New Zealand Gazette* 23.

commissioner, Paul Ferris, believes the intervention will last only “between six and nine months” as there is nothing “seriously broken”.²⁵⁷

Masterton’s Makoura College received a commission in 2008, after the board resigned amid attempts to close the school, which were widely resisted by the community.²⁵⁸ 7510 people signed a petition to save one of only two secular state schools in the city and the only school serving low socio-economic areas.²⁵⁹ The school’s roll had declined from 425 in 2002 to 220 in 2008, alongside significant staff vacancies.²⁶⁰ A limited statutory manager in 2005 had already attempted to resolve employment and human resources problems, and a financial adviser was subsequently brought in.²⁶¹ NCEA pass rates were around 20% lower than nationally.²⁶² Supporters of the school’s continued existence advocated the commissioner’s appointment to address the community’s lack of confidence in the board.²⁶³ Since the commissioner’s appointment, the roll has increased significantly, as have NCEA pass rates.²⁶⁴

2 *Limited Statutory Managers*

Forty schools currently have limited statutory managers.²⁶⁵

Ngaruawahia High School received two limited statutory managers in April 2013 and credits them with preventing its closure.²⁶⁶ The managers addressed high truancy rates, plunging rolls and \$170,000 debt, recouping the deficit, increasing attendance rates twenty percent and tripling Year 9 enrolments.²⁶⁷

The decile ten Chelsea Primary School, in Chatswood, received a limited statutory manager after a very poor ERO report highlighted an inadequate complaints system and “poor relationships” between board members as preventing progress.²⁶⁸

²⁵⁷ Evan Harding “‘Nothing that can’t be fixed’ at school” (online ed, *Southland Times*, 25 November 2014).

²⁵⁸ “Notice of Dissolution of the Board of Trustees of Makoura College (243) and Appointment of a Commissioner” (28 August 2008) 133 *New Zealand Gazette* 3485.

²⁵⁹ Piers Fuller “Makoura College defies the odds” (online ed, *Dominion Post*, Wellington, 22 September 2010).

²⁶⁰ Nathan Crombie “Hometown educator to lead Makoura fight-back” (online ed, *Wairarapa Times-Age*, 27 November 2008).

²⁶¹ Tanya Katterns “The school on the wrong side of the tracks” (online ed, *Dominion Post*, 9 November 2010).

²⁶² Claire Hills “Close or be Closed: To What Extent Can School Closures and Mergers be Contested and Negotiated?” (PhD thesis, Massey University, 2013) at 113.

²⁶³ At 112 and 114.

²⁶⁴ Fuller, above n 259.

²⁶⁵ Ministry of Education, *Review of Statutory Interventions*, above n 247, at 6.

²⁶⁶ Libby Wilson “Schools get over troubles” (online ed, *Waikato Times*, 1 January 2015).

²⁶⁷ Wilson, above n 266.

²⁶⁸ Katasha McCullough “Statutory manager takes over top primary school” (online ed, *New Zealand Herald*, Auckland, 20 May 2012); Maryke Penman “Ministry acts on school” (online ed, *North Shore Times*, 24 May 2012).

Christchurch's Linwood College sought a statutory manager in September 2014 to take over all employment matters to address staffing issues.²⁶⁹ Control had only returned to the board in June 2012 after issues moving the school post-earthquakes meant it was sacked in March 2011.²⁷⁰

3 *Critiquing the regime's application*

Regarding Bovens' democratic perspective, there is once again tension between the board of trustees' more local democracy and the Minister's democratic pedigree through national elections. Indeed, a school community is even more localised than a council's constituency, heightening the issue of subsidiarity. Because schools are such small communities, their characteristics and interests may well be radically different from that of the general population, so cannot be represented by a nationally elected minister; a local council's electorate is more likely to be statistically similar to the national population. Furthermore, there may be questions over what rights parents have to some level of control over their child's education and whether this is interfered with should a minister replace a board the parents have elected.

Since boards of trustees are elected and operate independently, if a commission is appointed perhaps elected members should not necessarily be removed from office. For local councils, where a commission is appointed, representatives remain in office but are powerless to act, enabling them to return to their roles proper should the commission resolve matters efficiently. However, perhaps that this is not the case for boards of trustees reflects their position as Crown entities, as opposed to separate bodies like councils. Furthermore, trustees may have a better understanding of a school's special characteristics such as for Kura Kaupapa Maori. The Ministry has recently suggested the development of separate protocols for these schools.²⁷¹

Individualised democratic boards of trustees have been controversial since their introduction with the 'Tomorrow's Schools' reforms and the Education Act 1989.²⁷² Previously, schools were managed by "unresponsive, non-participatory, inflexible and inefficient" local education councils overseen by the Department of Education.²⁷³ Indeed, democratisation of school boards is an international trend.²⁷⁴ However, the level of devolution, an extreme seen nowhere else in

²⁶⁹ Radio New Zealand "School requests statutory management (9 September 2014, <www.radionz.co.nz>).

²⁷⁰ "Linwood College to get statutory manager" (online ed, *Dominion Post*, Wellington, 9 September 2014).

²⁷¹ Ministry of Education, *Review of Statutory Interventions*, above n 247, at 21.

²⁷² Sally Varnham "'Tomorrow's Schools' today – legal issues in New Zealand education" (2001) 13 *Education and the Law* 77 at 78.

²⁷³ At 78.

²⁷⁴ Steven Austen, Pam Swepson and Teresa Marchant "Governance and school boards in non-state schools in Australia" (2001) 26 *Management in Education* 73 at 78.

the world, was accused of implementing a more commercial outlook, with schools dependent on keeping ‘customers’ happy and sending their children to the school.²⁷⁵ Others advocate for a system of everyone voting for a district education board, like a DHB, eliminating redundancies inherent in overlapping board functions.²⁷⁶ There is also concern to somehow represent the interests of local taxpayers without school-age children, since they cannot vote for boards of trustees (although they can stand for election).²⁷⁷ However, it is questionable whether ministerial intervention powers help address these issues.

Boards of trustees may also not adequately represent their own school community.²⁷⁸ While no research exists as to which parents tend to sit on boards of trustees, it would appear anecdotally to be primarily those from higher socio-economic groups, perhaps due to greater understanding of the system, time or sway among other parents. This may lead to inherent bias away from students from less affluent backgrounds.

Many parents also do not vote in board of trustees’ elections and fewer still will stand, problematic since 12,785 parent representatives are needed nationwide.²⁷⁹ There is a high turnover rate and those standing may lack the knowledge or capacity required to be effective trustees.²⁸⁰ Indeed, fifteen percent of boards of trustees are estimated to be performing poorly.²⁸¹ Such problems have also led to a decline in parental trust in both schools and staff.²⁸²

Regarding the constitutional perspective and the risk of the centralisation of power, this is minimised by commissioners and statutory appointees being independent of the Ministry/Minister. There is thus no scope to exercise direct control over the school, even once an intervention has occurred. However, the commissioner would still be appointed by the Minister leaving room for more subtle control.

²⁷⁵ PPTA Executive “Tomorrow’s Schools: Yesterday’s Mistake?” (paper presented to the PPTA Annual Conference, Wellington, October 2012) at 2.

²⁷⁶ Cathy Wylie “What Can New Zealand Learn from Edmonton?” (New Zealand Council for Educational Research, 2007) at 13; Jody O’Callaghan “Tomorrow’s Schools ‘lost a decade’” (online ed, *Dominion Post*, Wellington, 4 December 2012); Cathy Wylie “Chapter 11: getting more from school self-management” in John Langley (ed) *Tomorrow’s Schools 20 years on...* (Cognition Institute, 2009) at 137; PPTA Executive, above n 275, at 10.

²⁷⁷ Larry Booi “School boards, school councils and democracy” (2000) 80 *ATA Magazine* 49.

²⁷⁸ At 49.

²⁷⁹ PPTA Executive, above n 275, at 9; Stuart Middleton “Is the Board of Trustees Model Working?” *Education Review* (August 2013); Lucy Townend “School trustee boards shrinking” (online ed, *Manawatu Standard*, 7 February 2015).

²⁸⁰ New Zealand School Trustees Association *School Governance: Board of Trustees Stocktake* (July 2008) at 23.

²⁸¹ Middleton, above n 279.

²⁸² Cathy Wylie “*Tomorrow’s Schools* after 20 years: can a system of self-managing schools live up to its initial aims?” (2009) 19 *New Zealand Review of Education* 19 at 13.

As noted above, the minister has significant discretion. Minor events could negatively impact the performance of a limited number of students and thus pave the way for anything from an action plan to the Board's dismissal. The Ministry also has a very wide range of matters it would consider intervening to address.²⁸³ However, its documentation and practice suggest that it is discerning when utilising each intervention option and tries to go no further than is needed to rectify the particular issue as is required by statute.²⁸⁴ The Ministry also offers professional advice and development, small amounts of additional funding to allow this and “low-level support and advice” before seeking intervention, as illustrated below.²⁸⁵

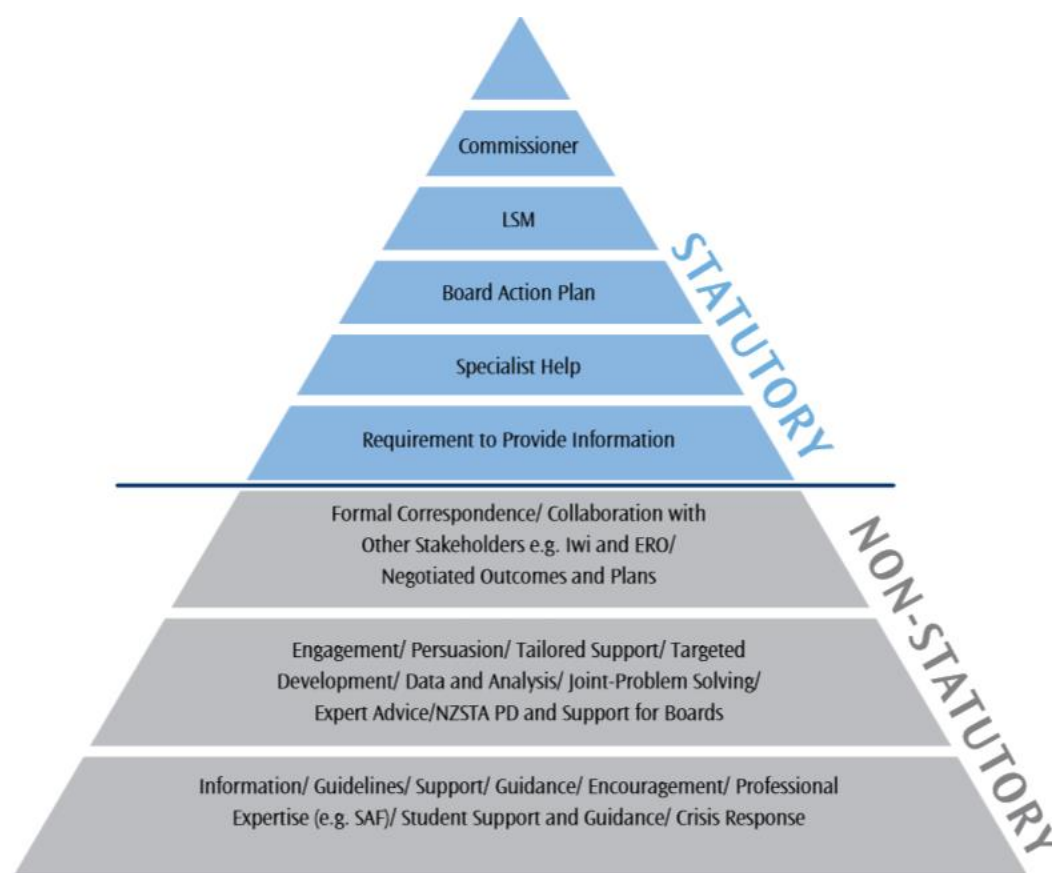


Diagram 5: Ministry of Education's “support, collaboration and intervention framework”

From Ministry of Education *Review of Statutory Interventions in State Schools and State Integrated Schools: Final Report and Recommendations to the Minister of Education* (November 2014) at 7.

²⁸³ Ministry of Education, *Interventions: Guide for Schools*, above n 234, at [13]-[15].

²⁸⁴ Education Act, s 78I(4); Ministry of Education, *Interventions: Guide for Schools*, above n 234, at [6].

Attorney-General v Daniels [2003] 2 NZLR 742 at [77]. Cf the Canadian position, where under similar legislation, courts have found ministers justified in their interventions even when less invasive options were available: Darryl Hunter and Rod Dolmage “Fiduciary Duty and School Board Takeovers in Canada since 1981: Fumbling Toward a Framework?” (2013) 22 *Education & Law Journal* 153 at 158.

²⁸⁵ Ministry of Education, *Interventions: Guide for Schools*, above n 234, at [16]. Ministry of Education, *Review of Statutory Interventions*, above n 247, at 7.

Thus, the Ministry has, or rather chooses to have, little coercive power over both boards and appointees, leaving independent boards of trustees to better advocate and lobby for students' interests in a way that the 'less democratic' DHBs cannot.²⁸⁶ However, boards may be conscious of the fact that once interventions have started, they generally last a long time. A sample of fifty schools which have had commissions revealed twenty-one lasted for over two years.²⁸⁷

Considering the learning perspective, there is significant scope for the Ministry to work with troubled schools to improve outcomes. The Ministry also has reporting, review and evaluation systems to improve the efficacy of interventions.²⁸⁸ However, more could still be done, with the Ministry's review of statutory interventions reporting that 96% of respondents wanted a more "transparent framework for determining and reporting risk in schools" to allow schools to better determine their intervention risks, followed up by early warning meetings.²⁸⁹ Furthermore, 79% also wanted an annual review of intervention procedures, while many thought that specific interventions should be reviewed every three to six months, not annually.²⁹⁰

The specialist advice and action plan options for boards of trustees are arguably superior to CRTs or Crown observers for local government, or Crown monitors for DHBs. Both leave control firmly with the board and allow them better to learn to address problems (although there is potential for abuse given the Ministry determines which experts should be hired). Any specialist advisor is not responsible to the Minister as Crown observers or monitors are.²⁹¹ While the action plan must be approved by the Education Secretary, it is produced by the board. These options do not represent close ministerial scrutiny, reducing the risk of board processes stagnating for fear of ministerial action. There is less scope for the Ministry to subtly impose its will, as a Crown observer may do through access to meetings and key figures. However, this perhaps removes some of the incentive to improve.

The option of a limited statutory manager before a commission is an important one for safeguarding the board's autonomy as far as possible, as with the Crown manager option for

²⁸⁶ Booi, above n 277.

²⁸⁷ Ministry of Education "Schools with Commissioners as at 3 June 2013" (Obtained under Official Information Act 1982 Request to the Ministry of Education).

²⁸⁸ Ministry of Education, *Review of Statutory Interventions*, above n 247, at 16.

²⁸⁹ At 17.

²⁹⁰ At 17-18.

²⁹¹ Ministry of Education "Key information on Section 78K Statutory Interventions" (3 September 2008, <www.minedu.govt.nz>).

local government. It gives the board of trustees the opportunity to learn from mistakes, before all power is confiscated. The Ministry does appear to be making good use of the limited statutory managers option, there being twice as many of these in place than commissions.²⁹²

As for the other two examples thus far, there is no requirement that the minister consult anybody before intervening, which again is troubling. However, documents published by the Ministry indicate that it “will begin by scoping the identified and related issues”, through work with the board of trustees, senior management, ERO and teachers’ union field officers.²⁹³ They conclude that “experience has shown that a board that has been included” in the processes of identifying risks and intervention options “will be more likely to work co-operatively with the intervention”, although “consultation may be brief or limited” where “swift action is needed”.²⁹⁴ This appears a useful gloss on the statutory framework and one which a judicial review applicant may claim to have relied upon. Such attempts to work with boards of trustees rather than against them also appear in the context of notification, with the Ministry noting that “common courtesy for optimum success of the intervention requires additional methods of notification” to mere inclusion in the *Gazette*.²⁹⁵ Furthermore, the Ministry recommends that commissioners establish a “representative community advisory group to provide a parent community perspective.”²⁹⁶ However, this is at the commissioner’s discretion.²⁹⁷

C Other accountability mechanisms

Every school requires a charter prepared by the board of trustees, and each charter must be approved by the Minister (the Ministry will prepare a charter for the school if one is not completed within six months).²⁹⁸ Boards of trustees prepare annual plans to identify any deviation from the objectives the charter contains.²⁹⁹ The Ministry also prepares National Educational Guidelines, “which are deemed to be included in every school charter.”³⁰⁰

The Education Review Office acts either at the Minister’s direction or of its own volition to review schools’ performance using its “extensive powers of entry, inspection and obtaining

²⁹² Ministry of Education, *Review of Statutory Interventions*, above n 247, at 6.

²⁹³ Ministry of Education, *Interventions: Guide for Schools*, above n 234, at [19].

²⁹⁴ At [23].

²⁹⁵ At [29].

²⁹⁶ At [39].

²⁹⁷ Ministry of Education “Key information on Section 78N(1) Statutory Interventions” (9 December 2013, <www.minedu.govt.nz>).

²⁹⁸ Education Act, ss 61 and 63A.

²⁹⁹ Section 87(3).

³⁰⁰ Varnham, above n 272, at 78-79.

information.”³⁰¹ Schools are also subject to investigations by the Ombudsman, Auditor-General and “international review”, for example through OECD statistics.³⁰²

D Summary

Interventions in boards of trustees, including requiring specialist assistance, appointing a limited statutory manager or commission, are permissible where the minister reasonably believes there to be a risk to the school’s operation or student welfare or performance, a wide discretion, but one exercised selectively. There are no appointed board members, unlike for DHBs.

V Tertiary Institutions

Tertiary institutions may not appear an intuitive comparator; they often do not serve defined areas like councils, DHBs or even schools. However, like these bodies, they are governed by (mostly) democratically-elected councils, with a similar ministerial intervention regime. Indeed, the Crown observer option for local government originated in the regime discussed below. As a partially elected, partially appointed body, they can inform discussion on DHBs’ experiences.

A The statutory regime

Tertiary institutions are governed by councils, which must prepare the relevant plans to seek funding, ensure the institution is managed accordingly and determine the “institution’s long-term strategic direction.”³⁰³ The council must strive for excellence in education and research, encourage participation of the communities it services and ensure financial responsibility.³⁰⁴

Until February 2015, councils comprised between twelve and twenty members, including four ministerial appointees, the chief executive, between one and three elected staff representatives and between one and three elected student representatives.³⁰⁵ Depending on the institution’s programmes, another member might be appointed through consultation with a relevant union.³⁰⁶ However, the Education Amendment Act 2015 reduced councils to between eight and twelve members, with three ministerial representatives for councils numbering below ten, and

³⁰¹ *Attorney-General v Daniels*, above n 284, at [75].

³⁰² At [78].

³⁰³ Education Act, ss 165 and 180.

³⁰⁴ Section 181.

³⁰⁵ Section 171.

³⁰⁶ Section 171(2)(f).

four otherwise.³⁰⁷ Provisions for staff and student representatives were also removed.³⁰⁸ The council still should reflect New Zealand's "ethnic and socio-economic diversity" and a gender balance.³⁰⁹ Members hold office for four years.³¹⁰ The council elects its own chairperson and deputy.³¹¹

Since 2009, polytechnics have a different council arrangement, with four ministerial appointees and four "members appointed by the council in accordance with its statutes" which may allow for democratic representation.³¹² The Minister may also appoint the chair and deputy chair.³¹³

Tertiary institutions constitute their own category of Crown entity, but unlike for boards of trustees, it is the institution, not the council, which is the Crown entity.³¹⁴ Tertiary institutions are subject to even fewer of the Crown Entities Act provisions than boards of trustees, avoiding provisions on ministerial requests for information and ministerial directions, including "whole of government" approaches.³¹⁵

The intervention framework is once again different for tertiary institutions. Whether a tertiary institution is at risk is determined against a set of criteria promulgated by the Secretary in the *Gazette*.³¹⁶ Organisational criteria include the council failing in its statutory obligations and having inadequate systems to support financial and educational performance. Financial risks include where tertiary institutions cannot pay debts as they fall due. Educational criteria include where the institution fails to meet performance commitments or, for a polytechnic, where NZQA lacks confidence in its assessment capabilities.³¹⁷

The Tertiary Education Commission's chief executive may request information from an institution where "he or she has reasonable grounds to believe that an institution may be at risk".³¹⁸ The information requested may be specific information on an institution's operation, finances or management or "reports at specified intervals".³¹⁹

³⁰⁷ Education Amendment Act 2015, s 6.

³⁰⁸ Section 6.

³⁰⁹ Section 171(4).

³¹⁰ Section 173.

³¹¹ Section 177.

³¹² Sections 222AA and 222AB.

³¹³ Section 222AG.

³¹⁴ Crown Entities Act, s 7.

³¹⁵ Schedule 4.

³¹⁶ Education Act, s 195A.

³¹⁷ "Risk Assessment Criteria for Tertiary Education Institutions" (22 December 2011) 200 *New Zealand Gazette* 5730.

³¹⁸ Education Act, s 195B.

³¹⁹ Section 195B.

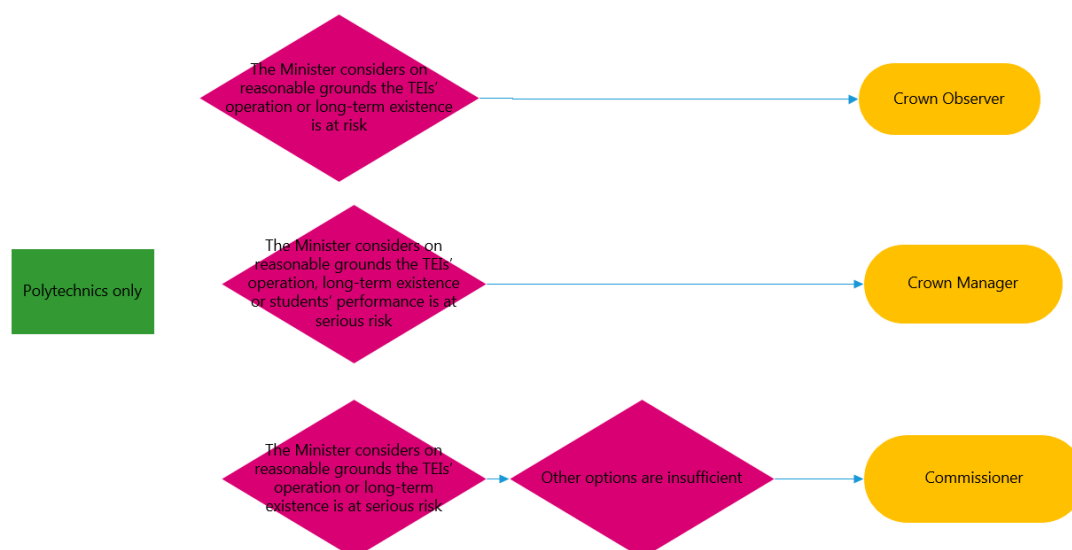


Diagram 6: Ministerial intervention powers for tertiary institution councils

The Minister's options are limited to appointing a Crown observer or dismissing the council and appointing a commissioner. A Crown observer is available where the Minister identifies, with reasonable grounds, a risk to an institution's operation or long-term existence.³²⁰ This provision inspired the LGA provisions on Crown observers, who may attend any meetings, offer advice and report to the Minister.³²¹ Dissolution of the council and appointment of a commissioner may only occur where the Minister considers on reasonable grounds there to be "a serious risk to the operation or long-term viability of the institution" and other methods of risk reduction are insufficient.³²² A "serious risk" is circularly defined as where the institution cannot pay its debts and the criteria published in the *Gazette* identify a serious level of risk.³²³

The major difference with the other regimes examined thus far is that the Minister must consult before intervention action is taken.³²⁴ For Crown observers, the council must be allowed to comment; for commissioners, "any other interested parties" must be consulted, which may well include all staff, students, and members of the community the institution serves. Alongside a Commissioner, the Minister must also appoint an advisory committee of up to five people, whose composition "reasonably reflects the community".³²⁵

³²⁰ Section 195C(1).

³²¹ Section 195C(4).

³²² Section 195D(1).

³²³ Section 195D(2).

³²⁴ Section 195C(2).

³²⁵ Section 195F.

Polytechnics may be subject to further interventions. The Tertiary Education Commission's chief executive may require a polytechnic to obtain specialist assistance where he/she reasonably believes students' educational performance or the polytechnic is at risk.³²⁶ He/she may also require the polytechnic to prepare a performance improvement plan.³²⁷

Alternatively, the minister, where he/she reasonably believes "that there is a serious risk to the operation or long-term viability of a polytechnic, or that the education performance of the students at a polytechnic is at risk", may appoint a Crown manager.³²⁸ Notice and time for the council to respond are required.³²⁹ The Crown manager may perform any functions included in their notice of appointment. The minister may also remove any member of a polytechnic council for any just cause, including misconduct, breach of duty or "inability to perform the functions of office".³³⁰

B Interventions in practice

Thus far, only polytechnics have experienced the intervention regime.

Wanganui Regional Community Polytechnic received a Crown manager in December 2000, after accruing an operating loss of around \$2 million the year before.³³¹ The Crown manager was to address the Polytechnic's financial performance, in conjunction with a significant bailout.

Northland Polytechnic received a Crown observer in early 2002 to address its financial issues, including a \$3.7 million deficit.³³² This was later upgraded to a Crown manager when the Government gave the institution a \$5.5 million loan.³³³

1 Critiquing the regime's application

The reduced range of intervention options for most tertiary institutions, compared to those for local government, boards of trustees or even polytechnics, raises questions. However, perhaps there is no need for them. Polytechnics tend to have more problems, hence the increased

³²⁶ Section 222A.

³²⁷ Section 222B.

³²⁸ Section 222C.

³²⁹ Section 222C(2).

³³⁰ Section 222AJ.

³³¹ Steve Maharey "Maharey announces package for Wanganui Polytechnic" (press release, 8 December 2000).

³³² Steve Maharey "Government provides financial support to Northland Polytechnic" (press release, 23 December 2002); "\$5.5m bail-out loan to pay college debts" (online ed, *New Zealand Herald*, Auckland, 26 December 2002).

³³³ Maharey, above n 332.

options. The regime for tertiary institutions is the only one requiring consultation before the minister acts. The restrictions on appointing a commission also assist in protecting the council from ministerial coercion. However, coercion is still possible; Otago Polytechnic lost funding when it refused a Crown manager and requested a crown observer instead.³³⁴

From a democratic perspective, once again tension exists between representatives elected by the institution's community, although this community is not as geographically defined as for the previous examples, and a Minister gaining power in national elections. However, as with DHBs, some council members are ministerial appointees and thus gain democratic legitimacy indirectly through him/her, making the minister comparatively more directly connected to the people and thus he/she should arguably have greater control. However, these non-elected members represent less than half of the council. The requirement to consult before acting also returns a modicum of local democratic legitimacy as does requiring a representative advisory committee, although this is not elected.

A polytechnic council's democratic legitimacy is minimal, it being half staffed by ministerial appointees and having no requirement for democratic representation. Furthermore, even if elected, members may not actually be representative since some polytechnics serve multiple diverse communities such as University College of Learning's Palmerston North, Wanganui and Masterton campuses.³³⁵ Universities also will have large catchment areas. Furthermore, when a polytechnic starts up, presumably only the ministerial appointees will be in place immediately to pass the statutes and determine how the rest of the council is selected. In light of this dubious democratic legitimacy, perhaps the minister should have ultimate authority. There is also no provision for student or staff representation, perhaps due to most students attending for a short duration.³³⁶

Constitutionally, ministers' abilities to replace the council with appointees, or at least influence its decision-making through the presence of a Crown observer, are again concerning. However, the minister arguably already influences councils through his/her appointees, although they do not have a majority. Thus, the Minister may acquire some power by dismissing the council.

From the learning perspective, the availability of criteria identifying when institutions are at risk beforehand encourages self-reflection. The Minister's consultation obligations allow a

³³⁴ TEU "Govt pulls plug on Otago Design School" (7 May 2009, <www.teu.ac.nz>).

³³⁵ (10 December 2009) 659 NZPD 8463.

³³⁶ (10 December 2009) 659 NZPD 8463.

dialogue between actor and forum. Appointing a Crown observer also allows for greater learning and perhaps aversion of a commission, although there could be a greater range of options as for polytechnics. Indeed, concern has been raised about the government's lack of ability to intervene in tertiary institutions, given that it is their primary funder.³³⁷

C Other accountability mechanisms

The Tertiary Education Commission is to “give effect to the tertiary education strategy” through providing guidance, determining and allocating funding and advising the Minister on policy implementation and sector performance.³³⁸ The Minister may also delegate any Education Act functions and powers to the Commission but may not direct it to deny a particular organisation funding.³³⁹ Plans must be submitted to the Commission detailing how the tertiary institution will meet the “Government’s current and medium-term priorities as described in the tertiary education strategy” as well as more general descriptions of its activities and goals.³⁴⁰ These form some of the criteria the Commission must apply to determine how to allocate funding, ensuring the Government has a significant role in the proposal even though a more independent body does the actual allocating.³⁴¹

Tertiary institutions are also subject to investigations by the Ombudsman and Auditor-General.³⁴²

D Summary

The minister may intervene in tertiary institutions through a Crown observer or commission. Polytechnics may also be appointed a Crown manager or specialist assistance. Councils’ high proportion of ministerial appointees (especially for polytechnics) undermine their direct democratic legitimacy and perhaps better justify ministerial intervention. However, these intervention schemes are rarely used.

The intervention schemes examined can be summarised as follows:

³³⁷ Jonathan Boston “The Ownership, Governance, and Accountability of tertiary institutions in New Zealand” (1997) 6 *New Zealand Annual Review of Education* 5 at 16.

³³⁸ Education Act, s 159F(1).

³³⁹ Sections 159I, 159J and 159L.

³⁴⁰ Sections 159P and 159T.

³⁴¹ Section 159Y.

³⁴² Sections 131(2), 176 and sch 4.

	Local Government	DHBs	Boards of Trustees	Tertiary Institutions
Requiring information	Minister can require information	Minister can require information (Crown Entities Act)	Secretary can require information; Minister can under Crown Entities Act	TEC chief executive can require information
Requiring a self-written, minister-approved action plan			Require the board to carry out an action plan	
Review by a minister appointed team	Crown Review Team			
Specialist help to observe and advise	Crown Observer	Crown Monitor	Specialist assistance	Crown Observer; specialist assistance (polytechnics only)
Appointee to take over limited functions	Crown Manager		Limited statutory manager	Crown Manager (polytechnics only)
Dissolution of the body and ministerial appointees take over all functions	Commission	Commission	Commission	Commission (with advisory committee)

Table 2: Summary of intervention regimes discussed

VI Suggested intervention principles

This part suggests principles for determining when different ministerial interventions are appropriate, which transcend these separate, but similar, regimes. They might thus be utilised whenever intervention in an elected subnational body is contemplated, applying to a greater or lesser extent depending on the body's democratic legitimacy and autonomy. Their purpose is to ensure democratic perspectives are recognised while enabling sub-national bodies to access support and learn for the future.

Ideally, legislation could harmonise these statutes, accounting for each body's democratic credentials, making all intervention options available, subject to easily-applied criteria. Legislation could for example increase DHBs' limited intervention options. Alternatively,

statutory intervention regimes might explicitly contain, within a section or schedule, such a list of principles as mandatory relevant considerations for decision-makers, rather than relying on judicial interpretation or voluntary use.

However, such legislation is highly unlikely given this is not a government priority. These principles might instead form a gloss on the current vague, highly discretionary statutory regimes. Much might be achieved through informal measures, such as ministerial or departmental policy. Even where intervention options are not provided for in legislation, central government often achieves the same results through informal arrangements, for example, Christchurch City Council gaining a Crown observer, before the LGA permitted one.

Such democracy-centric unifying principles may also rectify disparities in the current legislative regimes; for example, that partially-appointed tertiary councils must be consulted before intervention, but local councils need not be. There is also opportunity for greater cross-pollination, particularly from boards of trustees' experiences, given this regime is the most commonly used and thus most developed. This has already occurred on occasion, with tertiary education legislation inspiring the use of Crown observers for local government, but could be encouraged further.

Principles such as these may be useful both in avoiding judicial review and identifying where cases may succeed. Applicants might argue that such principles are relevant, or mandatory, considerations.³⁴³ Since only the LGA specifically disclaims consultation obligations, courts would be free to imply natural justice requirements into the other regimes.³⁴⁴ Irrationality would inevitably be argued. Despite losing traction, the *Wednesbury* test's high threshold, requiring something "so outrageous ...that no sensible person...could have arrived at it", remains influential as courts emphasise their traditional role as arbiters of process, not substance.³⁴⁵ If a right to local democracy in New Zealand could be demonstrated, the threshold for unreasonableness might be lowered, but this is far from clear.³⁴⁶ The nascent inconsistency or *Guinness* grounds may be applicable. The *Guinness* ground requires only a problem "of a nature and degree" requiring judicial intervention, although its status as a separate ground of

³⁴³ *CREEDNZ Inc v Governor-General* [1981] 1 NZLR 172 (CA) at 183, 202 and 211.

³⁴⁴ Local Government Act, s 258N.

³⁴⁵ *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1947] 2 All ER 680 at 683; Philip A Joseph *Constitutional & administrative law in New Zealand* (3rded, Thomson Brookers, Wellington, 2007) at 935-936.

³⁴⁶ *Wolf v Minister of Immigration* [2004] NZAR 414. See Part VII.

review is controversial.³⁴⁷ Inconsistency demands that like cases be treated alike and is, like all substantive grounds, treated warily by judges.³⁴⁸

A *Democracy*

The more democratic a body, the higher the thresholds should be for intervention as that body better represents the people its decisions affect than the nationally-elected minister does. Thus, ministers should be careful when intervening in local government. Boards of trustees are also fully elected and may better understand a school's unique character than the ministry, but the 'donations' they receive do not afford them the same autonomy as councils gain through rates. By contrast, tertiary institutions and DHBs have minister-appointed members, weakening the imperative to avoid intervention. However, this is not currently reflected in the statutes, particularly for boards of trustees versus tertiary institutions (see the two examples below).

³⁴⁷ *R v Panel on Take-overs and Mergers, ex parte Guinness plc* [1990] 1 QB 146 (CA) at 160. *Seataste Products Ltd v Director-General of Agriculture and Fisheries* [1995] 2 NZLR 449 at 461. Vs *Roach v Kidd* (High Court, Wellington, CP 715/91, 12 October 1992, McGechan J) as discussed in *Laws of New Zealand Administrative Law* (online ed) at [108].

³⁴⁸ *Thames Valley Electric Power Board v NZFP Pulp and Paper Ltd* [1994] 2 NZLR 641 (CA) at 654.

	Local Government	Boards of Trustees	Tertiary Institutions	DHBs
Crown Observer or equivalent	A significant problem (e.g. significant/persistent failure in statutory duties with probable/actual adverse consequences for residents) and the minister believes it necessary to monitor/address the problem	Reasonable grounds to believe there is a risk to the school's operation, students' welfare or performance	Reasonable grounds to believe there is a risk to the operation or long-term viability of the institution	The minister considers it desirable for assisting in improving performance
Commission	A significant problem exists + local government is impaired/public health endangered + the authority cannot act + other options do not work	Reasonable grounds to believe there is a risk to the school's operation, students' welfare or performance	Reasonable grounds to believe there is a serious risk to the operation or long-term viability of the institution	The minister is seriously dissatisfied with the DHB's performance

Table 3: Comparison of requirements for Crown observers and commissions

Both the LGA and NZ Public Health and Disabilities Act provisions on DHBs list increasing democratic representation among their purposes, suggesting it may be a mandatory relevant consideration.³⁴⁹ It may also be implied into the boards of trustees regime since increasing community participation was key to the relevant reforms. Their democratic identities are a vital component of these bodies' identities and it seems natural that ministers should have to consider the effects of removing them.

A more difficult argument might be that individuals have a right to local government democracy, engaging the lower threshold for finding unreasonableness used in *Wolf v Minister of Immigration*. The International Covenant on Civil and Political Rights grants the right to political participation.³⁵⁰ However, the Bill of Rights Act 1990 contains only a right to vote in

³⁴⁹ Local Government Act, s 10; New Zealand Public Health and Disability Act, s 3.

³⁵⁰ Human Rights Commission, above n 53, at 1.2.

national elections, not local ones. The Local Electoral Act s 20 is headed the right to vote, but the provision itself grants only a less emotive ‘entitlement’.³⁵¹

There is thus a strong case for democracy being a mandatory relevant consideration for ministers. However, in the absence of an explicit right to local democracy, it is unlikely to result in a lower threshold for unreasonableness.

B Subsidiarity

The principle of subsidiarity advocates for decisions being made as locally as possible, to account for local conditions. Central government must support local autonomy but also refrain from interfering in local government affairs.³⁵² The principle originated with Aristotle, and was further promulgated by the Catholic Church, which considered it an ethical obligation to avoid concentration of power, and economists arguing it promoted efficiency.³⁵³ It also enhances local participation, empowering those who will actually be affected by a decision.³⁵⁴ Subsidiarity is extensively used in European Union law to prevent the collective from interfering in member states’ affairs.³⁵⁵

New Zealand, by contrast, has not adopted the subsidiarity principle and indeed, given the limitations on local bodies’ powers, it may appear to have little sway.³⁵⁶ However, it was considered as a principle of local government by the Royal Commission on Auckland Governance, whose background papers cited statistical evidence from Italy on the greater efficacy of more localised government.³⁵⁷ The 180 submissions the Commission received on

³⁵¹ Bill of Rights Act 1990, s 12; Local Electoral Act 2001, s 20.

³⁵² Patrice Ranjault “On the Principle of Subsidiarity” (1992) 2 *Journal of European Social Policy* 49 at 49; Benjamin F Gussen “Subsidiarity as a constitutional principle in New Zealand (2014) 12 NZJPIL 123 at 124 and 129. See also Patrick McKinley Brennan “Subsidiarity in the Tradition of Catholic Social Doctrine” in Michelle Evans and Augusto Zimmerman (eds) *Global Perspectives on Subsidiarity* (Springer, New York, 2014) 29.

³⁵³ Gussen, above n 352, at 125. See also Brennan, above n 352; Aurelian Portuese “The Principle of Subsidiarity as a Principle of Economic Efficiency” (2011) 17 *Columbia Journal of European Law* 231 at 232.

³⁵⁴ Michelle Evans and Augusto Zimmerman “Chapter 1: The Global Relevance of Subsidiarity: An Overview” in Michelle Evans and Augusto Zimmerman (eds) *Global Perspectives on Subsidiarity* (Springer, New York, 2014) 1 at 2.

³⁵⁵ Klaus-Dirk Henke “Subsidiarity in the European Union” (2006) 41 *Intereconomics* 240 at 240; Mike Reid “Exploring the Rhetoric of Partnership: The Dynamics of Local Government Reform in New Zealand” in Jean Drage (ed) *Empowering Communities? Representation and Participation in New Zealand’s Local Government* (Victoria University Press, Wellington, 2002) 304 at 307.

³⁵⁶ Royal Commission on Auckland Governance *Report Volume 4: Research Papers* (Auckland, March 2009) at 401; Kevin Guerin *Subsidiarity: Implications for New Zealand* (New Zealand Treasury, Working Paper 02/03, March 2002) at 11-12.

³⁵⁷ Robert Putnam “The Prosperous Community: Social Capital and Public Life” (1993) 13 *The American Prospect* 35-42 cited in Royal Commission on Auckland Governance, *Report Volume 4: Research Papers*, above n 356, at 402; Royal Commission on Auckland Governance *Report Volume 1: Report* (Auckland, March 2009) at [3.86]-[3.97].

the matter would suggest that, politically at the very least, ministers would be wise to remember that these sub-national bodies are closer to the problems they must address than central government is and should not be displaced lightly.

C Scale of the problem

Whether the problem's scale warrants intervention should be carefully considered. Since the statutory thresholds for intervention are so easily met, they do not necessarily identify cases where ministers *should* intervene. Furthermore, entities' autonomy and democratic legitimacy should be recognised. The more democratic the body, the more deference it warrants.

At present, problems are treated inconsistently, particularly those involving local government and DHBs. ECan was appointed a commission despite trouble solely with its water consenting function, while Christchurch City Council's building consent problems warranted only a Crown manager. Arguably, water consenting was more central to ECan's functions than building consenting was to Christchurch City Council's, but both are vital and potentially disastrous if done poorly. Furthermore, appointing a Crown observer to Christchurch City Council was questionable, since disagreements between councillors and controversy over salaries are normal in a democracy. The contrast between the treatment of Hawke's Bay DHB and Capital & Coast is also startling. Debt was a major reason for appointing a commission and a Crown manager respectively, yet Capital & Coast's debt equated to 7.4% of its annual budget; Hawke's Bay's 1.8% received a harsher response.³⁵⁸

Of course, the scale of the entities concerned will impact what constitutes a problem. A \$1 million debt would mean little to a district council, would be a problem for a DHB but disastrous for a board of trustees. For local government, only Kaipara District Council's \$63 million debt (\$3474 per capita) has justified a commission's appointment.³⁵⁹ Waitomo District Council's major financial impropriety led only to an informal advisory panel. No major council has suffered intervention for financial impropriety, perhaps because larger budgets enable easier redistribution of funds. Alternatively, perhaps they can afford better advice.

Amongst DHBs, Hawke's Bay's \$7.7 million debt (\$50 per capita) resulted in a commission, while debts of \$47.5 million (\$178 per capita), \$7 million (\$112 per capita) and \$10 million (\$33 per capita) meant Crown monitors for Capital & Coast, Whanganui and Southern DHBs. Such disparities prevent discernment of any pattern from past performance and decision-

³⁵⁸ Ministry of Health, above n 144, at 2.

³⁵⁹ Per capita calculations made using the most relevant census data.

makers risk challenges based on unreasonableness or inconsistency. More data regarding acceptable debt levels for schools is needed to continue this exercise. For polytechnics also, the matter is fraught since few use their services (whereas everyone benefits from local council services and DHB healthcare). However, looking at the population bases served, Northland Polytechnic received a Crown observer with a \$3.7 million deficit (\$23 per capita) for example. The accepted debt levels naturally decrease with the size of the entity.

Regarding local governance issues, the Creech report's authors expressed concern that ECan's problems did not warrant intervention, despite its failure to perform RMA duties.³⁶⁰ Similarly, Rodney District Council members made meetings impossible before commissioners were appointed. This suggests a very high threshold for intervention, despite any significant problem impairing local government meeting current thresholds.³⁶¹ David Cunliffe required little evidence of governance concerns before dismissing Hawke's Bay DHB, citing only poor relations with himself and criticism by two clinicians. This is in contrast to the serious governance issues that led to commissions being appointed in the board of trustees examples considered. Isla Bank School Board of Trustees was dismissed after all but two members had resigned, Makoura College's board wanted the school shut down against the community's wishes and Moerewa School's board continued running NCEA level classes despite being told to desist. Thus, DHBs would appear to be the aberration here.

Management and governance issues should be distinguished, management being day-to-day operations below board level while governance involves board-level strategic planning.³⁶² Management issues will likely arise through actions of the board's appointed subordinates. Since these individuals do not have the same democratic legitimacy as the board, intervention should arguably require less prompting. However, since the board is only indirectly accountable, such issues should rarely justify its dismissal. Christchurch City Council's losing consenting accreditation and being appointed a Crown manager appears to be one end of the management spectrum. For governance, the board is directly responsible but caution is needed since it is performing functions granted it by voters.

It is suggested that interventions involving ministerial appointees actively influencing decision-making (Crown observer upwards) should be limited to situations where a body's failings are negatively affecting individuals outside of the electorate which voted for them, although

³⁶⁰ Creech, MartinJenkins, Hill and Morrison Low, above n 85, at 18.

³⁶¹ Evans, above n 104, at 60.

³⁶² New Zealand School Trustees Association "What is Governance?" (<www.nzsta.org.nz>).

‘negatively affecting’ could be interpreted broadly. Local government problems should be nationally important to justify intervention as leaving national issues to central government and local issues to local representatives partially alleviates democratic concerns. ECan’s troubles would meet this test, since Canterbury contains 70% of New Zealand’s fresh water, as would Kaipara District Council’s, since a \$63 million debt the council cannot service threatens the national purse. Rodney District Council’s inability to hold civilised meetings might be a national issue, bringing local government generally into disrepute. Such a test, although a somewhat inexact standard, ensures more consistent, rational and proportionate responses to issues and eliminates situations where interventions are wholly inappropriate. However, it might leave bigger councils, which act on a larger scale, more prone to intervention, allowing the Minister to obtain their powers by proxy, creating a new democratic concern.

For boards of trustees, the minister should contemplate active intervention where the wider community is negatively impacted. This might be due to the school racking up significant debt which it cannot pay or major communication breakdowns with the community. Anything harming student welfare could also be said to be impacting their community’s wellbeing so there would be no fear of major harm to students going unaddressed.

However, for DHBs and tertiary institutions, it should be remembered when this standard is applied that ministerial appointees make up a significant part of these boards and decisions they influence should not be confused with those coming from the people.

D Importance/centrality of the function

The importance of the function at issue may legitimise central government intervention. DHBs allocate healthcare resources, boards of trustees manage primary and secondary education. Both are vital; they were traditionally central government functions, whereas building consenting, issuing water permits, and tertiary education were not. Thus, central government might better justify intervening in DHBs and boards of trustees. Subsidiary functions these bodies perform, such as employment and budget management, might be less likely to legitimise government action.

Alternatively, subnational representatives are elected primarily for their views on healthcare, education, local government etc., not necessarily financial skills. Therefore, central government should avoid issues central to the community’s choices when it voted, and instead provide support on matters outside representatives’ expertise. Thus, arguments under this principle are finely balanced and may depend on the particular circumstances.

E Timing

Timing issues operate in various ways. If problems have existed for a prolonged period, it might justify greater intervention. If matters are escalating quickly, the minister must decide whether to act rapidly and thus undermine democratic legitimacy by skipping consultation.

Ministers should also consider how long the body has been in office. A major issue with David Cunliffe's approach to the Hawke's Bay DHB was that it had been in office only seven months. Cunliffe argued that many representatives had been there since 2001; however, ministers should be wary of removing boards without affording them sufficient time to address problems they have inherited.

F Complexity

A situation's complexity may operate against democracy. Democratic representation seeks to involve a community voice in important, broad-reaching decisions. However, this often means electing ordinary people based on their ability to represent constituents. While this is fine for setting high level aspirations, elected representatives may be ill-equipped to address any complex technical issues. This perhaps justifies DHBs and tertiary councils having ministerial appointees; however, local government and boards of trustees may face similar problems. The teaching profession has expressed concern that trustees are struggling with the technical requirements of the role.³⁶³

Thus, a minister contemplating intervention should examine whether the particular problem is within the abilities of elected, non-specialist representatives to resolve, or whether it requires specialist attention. If the latter, specialist assistance mechanisms like Crown observers might be preferable initially.

G Evidence/Transparency

All local government interventions, bar Christchurch's Crown observer, have been prefaced by a report into the problems, even when not statutorily required. This requirement was removed in 2012, and indeed, urgency may sometimes obviate a report (although the Creech report on ECan took only four weeks). However, where possible, a thorough report is surely prudent. Given the severe criticism the Creech report faced for authors' connections to the dairy

³⁶³ PPTA Executive, above n 275, at 9.

industry, a major recipient of ECan's water permits, an independent report, for example from the Auditor-General, is advisable.³⁶⁴

The other regimes examined do not mandate reports before interventions either, but again, a report could improve the process' transparency.³⁶⁵ The Ministry of Education's documentation regarding board of trustees interventions suggest that they will always complete a report assessing risks before deciding to intervene, and will consult ERO reports. For DHBs, a report by the Director-General of Health had been completed into Hawke's Bay DHB's alleged management issues but Health Minister David Cunliffe did not utilise it in deciding to dismiss the board as it was subject to an injunction. However, he could easily have waited at least to see whether the injunction could be successfully appealed. Intervention in Whanganui DHB took place after a scathing report.

Thus, the practice of requiring a full report on the situation before intervention is widespread but not universal and may go a long way towards convincing a court (and the voting public) that an intervention is necessary. However, decision-makers need to be aware that once completed, a report's findings might become mandatory relevant considerations.

H Consultation

Under the local government, DHB and board of trustees regimes, the Minister need not consult anyone, including affected bodies, before intervening, although he/she must give notice. Such an obligation only exists for tertiary institutions, where the Minister must consult the council and give it an opportunity to respond before acting. Yet consultation may partially alleviate democratic concerns and the Ministry of Education has found that involving boards of trustees early ensures they work cooperatively with appointees during the intervention. Furthermore, all previous local government interventions, aside from ECan's, gained councils' consent following significant consultation. At the very least, consultation lends credibility to ministerial actions. Consultation directly with the public, with other entities such as Local Government New Zealand (previously a requirement) or the local MP would also be advisable. Consultation also reduces the risk of overlooking any errors of fact.

Any appointees replacing elected officials should also undertake consultation, usually a requirement of their terms of reference. In Kaipara and Canterbury, this is reportedly going

³⁶⁴ (28 February 2013) 687 NZPD 8366.

³⁶⁵ Hunter and Dolmage, above n 284, at 180.

well and is an important legitimising factor.³⁶⁶ A community advisory group is recommended by the Ministry of Education where a commission takes over a school board and is a requirement of a commissioner entering a tertiary institute.

I Bipartisan support/ Apolitical decision-making

While political decision-making is inherent in being a minister, ministers exercising intervention powers risk challenge on grounds of pre-determination of an issue, bias or improper purpose if they remove elected bodies, for example, due to a clash of ideologies. These latter two grounds were to be argued in the judicial review of David Cunliffe's decision to remove the Hawke's Bay DHB and the available evidence (and inconsistency with other actions against DHBs) suggests he may have wished to act against those criticising him. Some commentators have argued the same regarding ECan, as National sought to evict a council prioritising environmental protection over development.³⁶⁷ The appointment of political allies to key roles on review teams and commissions may also be symptomatic. Thus, while Boddy notes increasingly legalistic relations between central and local government in the UK, in New Zealand politics is making its presence felt.³⁶⁸ This should be discouraged, since the majority of these boards have been democratically elected, so their members should not be removed lightly.

A good way of demonstrating that decisions are not improperly politically motivated is for them to receive cross-party support. The Rodney, Canterbury and Kaipara interventions required special legislation; statutes for Kaipara and Rodney passed virtually unanimously (Kaipara's by 112 to 9). For Rodney, then-Local Government Minister Sandra Lee (Labour) also consulted the electorate's National party representative in preparing the Bill.³⁶⁹ ECan's was far more controversial. While two out of three statutes is insufficient to confirm a trend, bipartisan support would circumvent many democratic and constitutional concerns about interfering in local government and protect against minor interventions. The public might object to all an area's local representatives being ousted on a Minister's whim, or even by 51% of national representatives. However, close to 100% of national representatives overriding 100% of local representatives appears somewhat more palatable.

³⁶⁶ Sylvia Nissen "Who's in and who's out? Inclusion and exclusion in Canterbury's freshwater governance" (2014) 70 *New Zealand Geographer* 33 at 44.

³⁶⁷ Green Party of Aotearoa New Zealand "Eugenie Sage speaks on the Third reading of Environment Canterbury Bill" (4 March 2013) <www.greens.org.nz>.

³⁶⁸ Martin Boddy, above n 130, at 135.

³⁶⁹ (4 December 2013) 695 NZPD 15278.

Boards of trustees are entirely democratically elected and so the same issues might arise around national representatives telling 100% of local representatives how to act. However, it would be impractical to determine formally whether there is cross-party support for the appointment of a commission as they happen reasonably frequently. That said, the opposition will undoubtedly make known their concerns if they oppose a move (as seen with Moerewa School and Te Kura Kaupapa Maori o Whangaroa which appeared frequently at Question Time) or offer ardent support for a commission's appointment (as the local National MP voiced when Makoura College was threatened with closure).

Tellingly, David Cunliffe's decision to sack the Hawke's Bay DHB generated a parliamentary debate and was roundly criticised by all opposition parties. DHBs are subject to far more government control than the other sub-national bodies examined so there may be less of a need for cross-party support.

J Minimising interventions

The LGA states specifically that commissioners should not be appointed where another option would be effective. A court might find this a sensible relevant, or even mandatory, consideration for other interventions also (although its specific inclusion for the commission provisions may mean its implicit exclusion in others). It is already a strict requirement of the intervention regime for boards of trustees and this might be an example of beneficial cross-pollination. To act otherwise would unnecessarily reduce local democracy and financially burden ratepayers. Only for ECan and Hawke's Bay DHB might this previously have been problematic. Only ECan's water consent processes were flawed and these powers alone could have been vested elsewhere. ECan's functions were once distributed amongst 33 different bodies; they could be partially separated again.³⁷⁰ Judging from other similar cases, a more appropriate approach for Hawke's Bay would have been to appoint a Crown monitor.

As part of minimising intervention, ministers need also be aware of the other mechanisms available for holding these bodies accountable. Ministerial intervention should not take place where an investigation by an independent body such as the Ombudsman or Auditor-General would suffice and better uphold principles of democracy and avoid centralisation of power.

³⁷⁰ Environment Canterbury "Your Council" <www.ecan.govt.nz>.

K Summary

This part has suggested a range of principles for decision-makers to consider regarding ministerial interventions, aimed at protecting both democracy and communities from poorly operating sub-national bodies. Such principles should be applied relative to the body's democratic mandate and incorporate matters specific to the situation at hand like the scale of the issue; the function in question including its importance and complexity, and of general application, for example, transparency and consultation.

VII Conclusions

Subnational democratic bodies fulfil important roles in public welfare, healthcare and education. Partially or entirely elected, they localise decision-making. However, ministerial intervention powers threaten this, their high levels of discretion encouraging replacement of local bodies with ministerial appointees.

Part II examined increased discretion in the local government intervention regime since the Local Government Act's 2012 amendments, and the increasing prevalence of interventions. These have deprived communities of a more direct form of democracy and risk concentrating powers with the minister.

Confusion over local government's constitutional position has perhaps encouraged encroachment on its powers. Local government is sometimes described as a "partner" in "a constitutional relationship" and represents an important check on central government.³⁷¹ However, unlike many states, New Zealand grants it no constitutional protection, despite the LGA arguably being one of our most important statutes.³⁷² Furthermore, Part II's case studies suggest local government exists very much at central government's whim. The Constitutional Advisory Panel has recommended "further conversation" on the central-local government

³⁷¹ George Jones and John Stewart "Local government: the past, the present and the future" (2012) 27 *Public Policy and Administration* 346 at 354; Michael Wearne *New Zealand National Integrity System Assessment Additional Paper: Fitness for Purpose – New Zealand Local Government: Securing integrity and good governance within a bipartite constitution* (Transparency International, Berlin, 2013) at 2; Ian Leigh *Law, Politics and Local Democracy* (Oxford University Press, New York, 2000) at 7-9.

³⁷² European Charter of Local Self-Government (opened for signature 15 October 1985, entered into force 1 September 1988), art 2; Matthew R S Palmer "Using Constitutional Realism to Identify the Complete Constitution: Lessons from an Unwritten Constitution" (2006) 54 *The American Journal of Comparative Law* 587 at 608.

relationship, to determine whether local government requires clear constitutional recognition.³⁷³ Hopefully, this prompts further research in the area.

While local authorities and DHBs are often uttered in the same breath (and in some regions, comprise the same people), they are very different creatures.³⁷⁴ DHBs' appointed members undermine their democratic legitimacy, as do the Minister's significant powers of oversight. This perhaps explains their very minimal thresholds for intervention. Whether this will change and healthcare functions become increasingly localised is open to speculation.³⁷⁵

Parts IV and V examined the very different arrangements for secondary and tertiary educational institutions. School boards of trustees take subsidiarity to the extreme, with decisions made at an institutional level. The Minister's discretion to intervene is even greater than for DHBs and local authorities, but Ministry policies ensure the system is used sparingly and effectively. Cross-pollination with other regimes is thus to be encouraged.

Tertiary institutions offer another comparator, although their intervention regime is rarely used and the different arrangements for polytechnics add unneeded complexity. Its greatest effect so far has been to inspire the Crown observer option for local government.

Having considered these four regimes' successes and difficulties, this paper advocated a set of principles to encourage better use of ministerial interventions. These are:

- Democracy
- Subsidiarity
- Scale of the problem
- Importance/centrality of the function
- Timing
- Complexity
- Evidence/Transparency
- Consultation
- Bipartisan support/Apolitical decision-making

³⁷³ Constitutional Advisory Panel *New Zealand's Constitution: A Report on a Conversation* (November 2013) at 69.

³⁷⁴ Wanganui District Council "Councillors" (<www.wanganui.govt.nz>); Whanganui DHB "Board Members" (<www.wdwb.org.nz>).

³⁷⁵ Dennis Shum "Role of District Health Board and Local Government" (LLM Seminar Paper, Victoria University of Wellington, 2010) at 11-18.

- Minimising interventions

Such principles might inform use of intervention powers beforehand, or allow retrospective analysis, through judicial review or otherwise. Alternatively, they may usefully clarify current legislation, through inclusion as mandatory considerations for decision-makers.

New Zealand's democratic subnational bodies are diverse, as are the accountability regimes which keep them in line. Ministers retain considerable influence over elected representatives, and are increasingly using it. This paper has thus promoted a set of principles to better harmonise these regimes and increase their utility as accountability mechanisms while limiting concentration of power with ministers. Without formal recognition of subnational democracy in our constitutional system, little else can be done.

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