

# **INITIAL ADVICE**

## **The Local Government Act 2002**

### **Implications for Community Boards**

**A summary of changes to community board powers,  
functions and processes introduced by the LGA 2002**

Prepared by  
*Local Government New Zealand*  
Wellington  
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## Introduction

The Local Government Act 2002 (LGA2002) represents an important milestone in the development of local government in New Zealand. The shift to a general empowering framework acknowledged the gradual shift of decision making away from the national stage to localities and the communities that comprise them. Along with the new purpose and "powers" of local authorities has come an enhanced imperative to provide opportunities for citizens and communities to be involved in decision making. It is a development that has provided new opportunities for community boards as well.

The new Local Government Act affects community boards in a number of ways. These cover relatively minor, but important, changes to the role of boards and their composition, to more extensive changes to the way in which they can be established and disestablished. The relevant provisions are summarized in the following text.<sup>1</sup>

## Legal Status

The Act clarifies a question that has often been raised about the legal status of community boards. This has been addressed in the LGA2002 which states that community boards are "unincorporated bodies" and therefore not a local authority or a committee of a local authority.

This definition reflects the practice of councils since community boards were first established and the description of boards as unincorporated bodies is unlikely to have any practical effects.

## New Purpose

The purpose of community boards is set out in Section 52, which states that the role of a community board is to:

- a) Represent and act as an advocate for the interests of the community
- b) Consider and report on any matter referred to it by the territorial local authority and any issues of interest to the community board
- c) Make an annual submission to the territorial local authority on expenditure in the local authority
- d) Maintain an overview of services provided by the territorial authority within the community
- e) Communicate with community organisations and special interest groups in the community
- f) Undertake any other responsibilities delegated by the local authority.

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<sup>1</sup> In preparing this memo we would like to acknowledge the advice prepared by Peter Mitchell, the Legal Services Manager at Christchurch city Council, from which we have liberally drawn.

The changes made by the LGA 2002 are the addition of (a) to "represent and act as an advocate for the interests of the community". This change largely reflects what has become common practice and understanding about the role of community boards. (There is still however uncertainty about whether or not "being an advocate for a community" entitles a community board to take a public position in conflict with a position held by its parent council. We understand that this issue is currently being reviewed by the Office of the Auditor General and the conclusions of that review will be incorporated into the final version of these guidelines.)

Also changed is the wording of sub-section (d) which now refers to any council services delivered within the community. The previous wording specified a range of services. The new wording is consistent with an empowering approach and broadens the scope of a community board to comment on any council service, not just the previously prescribed list.

### **Powers**

In addition to the functions specified in Section 52, the new LGA 2002 has given local authorities wide powers to delegate matters to community boards. In addition the Act also places a legal requirement on councils to consider what responsibilities should be delegated to boards.

The legislation states that a council "*must consider whether or not to delegate to a community board if the delegation would enable the community board to best achieve its role*" (Schedule 7, Cl.32(7)). The Act does not specify how frequently this should occur. In our view it would be both practical and reasonable to expect a council to consider this question when agreeing its delegations immediately after a triennial election. This would occur during the adoption of a council's Governance Statement. Such Statements must include a description of delegations made by the council.

A community board can only exercise powers that are delegated by the local authority or are prescribed by Order in Council. There are also some things that councils cannot delegate to a community board, such as the power to buy, sell or lease property, or hire and fire staff.

### **Procedural Changes**

The Act continues the requirement that the local authority must provide the necessary administrative and other facilities to its community boards. "necessary" should be understood in the context of "necessary to fulfill a board's statutory purpose as set out in section 52 as well as any powers delegated to it by its local authority. Likewise, the local authority must pay the expenses of the board from the general revenue<sup>2</sup> of the district, although the local authority may fix a limit on such expenditure.

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<sup>2</sup> The phrase 'general revenue' is not defined in the Act, but was defined in the previous Act to mean any money owed to the local authority from rates of any kind, charges, fees or any other source.

A new provision is the requirement on chief executives to provide advice to community boards. This is specified in Part 4 section 42(2) which reads:

*"A chief executive ..... is responsible to his or her local authority for ....providing advice to members of the local authority and to its community boards, if any...."*

We can't estimate the significance of this addition to the duties of a chief executive, as we don't have information on how advice was previously provided to boards. It is important to note that this provision does not mean that a chief executive, in person, is required to advise community boards. Rather it places an onus on the chief executive to ensure that community boards have access to appropriate professional advice. In the end it is the CEO who determines the level of appropriateness.

The Act has also changed the nature of a community board chair's right to use casting votes. There is currently some ambiguity about the exact meaning of this section of the LGA2002 (Schedule 7 Section 24). Boards can expect their chief executives to provide advice on these matters.

The new Act also spells out the procedures to be used for the election of community board chairs. Regarding the election of board chairpeople after each triennial election, the new Act has made what was an alternative voting system in the Local Government Act 1974 mandatory for the election of chairpersons under the Local Government Act 2002.

The new Act provides that the election of the chairperson must be determined by a system of voting that requires that:

- (a) The person to be elected receives the vote of the majority of the members of the Board present and voting; and
- (b) If more than one round of voting is required, the least successful candidate in a round of voting may not be a candidate in the next round of meetings.

Clearly this will only apply where there are more than 2 candidates for the position of chairperson of the Board.

This type of voting system has been used in the past for the election of some community board chairpersons. It must also be used for the election of the deputy chairperson of the Board and chairperson of Board committees.

### **Electoral Matters**

As with the LGA 1974, a community board is an elected body that represents a particular community (where the term 'community' means a community constituted under Schedule 6 of the Act). A community board must be established whenever a community is created - whether by reorganisation scheme or resolution of the council<sup>3</sup>.

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<sup>3</sup> A resolution of this kind must follow either a request to establish a community from the electors who would live within the proposed community, or following a review of representation arrangements. Schedule 6 of the Act provides more detail on establishing a community.

## **Subdividing Communities**

The act also allows for communities to be subdivided for electoral purposes which would allow for members to be elected by the electors of each subdivision. If subdivisions are used then each subdivision must elect at least one community board member.

## **Membership**

The Act continues the former provisions in that each community board is to consist of no fewer than 4 members, no more than 12 members, and must include at least 4 elected members. Boards may include appointed members.

**Please note** that the Act does change the ratio of appointed to elected members. The new provisions state that the number of appointed members must be "less than half the total number of members". (Total number of members includes both elected and appointed members.) This will allow more flexibility than is currently provided.

However, the local authority may only appoint to a community board people who are members of the local authority, and if there are wards, members who represent the ward in which the community is located. Council staff can continue to stand for and be elected to a community board, but not to a council.

## **Standing for Council and Community Board**

Community board members may stand for both a community board and councils, but if elected to both are deemed to have vacated the community board position and to have been elected to the council only.

What happens then depends on whether the election is run under the first past the post electoral system or the single transferable voting system electoral system. If the election is under the FPP system the Electoral Officer gives an emended declaration declaring the highest polling unelected candidate at the election in the ward (at which the person elected as a Councillor was also elected as a member of the community board) to be elected with the Electoral Officer ignoring any unelected candidate for community board was also elected as a Councillor.

If the STV system is used then the Electoral Officer must determine the unelected candidate who would have been declared to be elected (again at the election in the ward at which the person who is elected as a Councillor was also elected as a community board member) if the person as a Councillor had not stood at that election, and must treat all persons who are elected as Councillors as if they had never stood for election as members of the community board.

If a situation arises where there is no other candidate who may lawfully be declared to be elected by the Elected Officer, than an extraordinary vacancy in the office of the member of the community board is to be treated as having occurred on the date of the Electoral Officer's declaration, and in that situation a by-election must be held.

If, at any by-election for council, a community board member is declared to be elected as a Councillor, then that community board member must be treated as having vacated office as a member of the community board, and extraordinary vacancy is created and a by-election is held to fill that community board vacancy.

### **Extraordinary Vacancies**

Regarding extraordinary vacancies on community boards, if the vacancy occurs more than 12 months before the next triennial general election, then the vacancy must be filled by a by-election.

If the vacancy occurs less than 12 months before the next triennial general election, then the community board, at its next meeting, may determine that the vacancy will be filled by appointment, or that the vacancy will not be filled. If the vacancy is to be filled by appointment, the board must give public notice of its resolutions and the process or criteria by which the person named in the resolution was selected for appointment. The board must then pass a resolution at a subsequent meeting confirming the appointment, and the date the person is treated as having been elected to fill the vacancy.

If a by-election is held and the vacancy is unable to be filled, then the board may (instead of having a further by-election) resolve that the vacancy will be filled by appointment.

### **The Representation Review**

The LGA 2002 was also a vehicle for making a number of changes to the Local Electoral Act, in particular the creation of the Representation Review, which is to be undertaken at least once every 6 years and replaces the existing triennial review. Section 19H(2) of the Local Electoral Act (LEA) allows a council to undertake its first representation review in 2003 or leave it until 2006.

In addition to providing councils with the power to establish Maori wards and have a mix of elections "at large" and with wards at the same time, the Act requires councils to undertake a review of whether or not there should be community boards and if so, the nature of any community board - that is its boundaries, whether to have sub-divisions and the nature of its membership.

### **Guiding Principles**

The Local Government Commission has published a guide imaginatively entitled "Guidelines to Assist Local Authorities in Undertaking Representation Review" which explain the key factors to be taken into account when councils determine their representation proposals. These principles are outlined in Part 4 of the LEA. The three factors are:

- Community of interest
- Effective representation
- Fair representation

## Community of Interest

While "community of interest" is not defined in the legislation the Commission has recommended that it be understood as "the area to which one feels a sense of belonging and to which one looks for social, service and economic support". A sense of belonging can be created by geographic features and even the roading network. In some communities the over-riding characteristic might be the role of the tangata whenua or the relation to necessary goods and service e.g. the catchment of a school or major shopping centre

In identifying a community of interest the Commission suggests the following characteristics:

A sense of community identity and belonging

- Similarities in the demographic, socio economic and/or ethnic characteristics.
- Similarities in economic activities.
- Dependence on shared facilities such as schools, recreation/cultural facilities and retail outlets.
- Physical and topographical features.
- The history of the area.
- Transport and communication links.

It should be noted that communities of interest may change over time, as demographics alter, changes to the physical landscape occur etc. The importance of the representation review is to ensure that electoral boundaries reflect as well as possible current communities of interest. Communities of interest **must** be defined by as a single geographic area.

## Effective Representation

"Effective representation" must be understood in the context of each "community of interest". Local authorities must consider, given the nature of the communities of interest in their districts/regions, how "effective representation" of those communities is to be provided.

Councils have a number of choices. They may use any of the following to provide effective representation:

- The introduction of wards.
- The use of an at-large system without wards.
- A combination of members elected by wards and at-large.

(Please note that regional councils do not have the same range of choices and must use constituencies.)

In addition to the way in which councillors are elected territorial councils must consider whether or not to establish communities. Where communities are established, in order to provide effective representation, councils can have the members of the community

board elected "at-large", by sub-divisions of the community, or by wards where there are two or more wards within a community.

In coming to a decision about whether or not to establish a "community" a council should look at the degree to which its area is made up of "distinct geographic communities" whose interests may best be served by separate representation. Where a district is relatively homogenous, e.g. it has a relatively compact geographic area, a decision not to have communities and even to have "at-large" elections may be warranted.

Councils must also consider these types of questions when determining whether or not to subdivide communities for electoral purposes. Please note that in accordance with Section 19W of the LEA 2002 community boundaries and the boundaries of subdivisions of communities must coincide with the boundaries of current meshblock areas as defined by Statistics NZ and used for parliamentary electoral purposes.

### **Fair Representation**

Guidance on determining the membership of wards and sub-divisions of communities is contained in section 19V of the LEA 2002. This establishes the basic principle of "population equality" as the primary driver for determining "fair representation". That principle requires that:

*"the population of each ward or constituency or subdivision, divided by the number of members to be elected by that ward or constituency or subdivision, produces a figure no more than 10% greater or smaller than the population of the district or region or community divided by the total number of elected members..(S19V(2)).*

While equality of representation has been emphasised in the LEA there are two grounds for departing from that formula, these are "to provide effective representation for communities of interest within island communities or isolated communities" (LG Commission p.11.).

### **Process for Undertaking Representation Reviews**

The legislation does not specify an exact process for undertaking representation reviews, although it spells out the principles that must be considered, criteria as well as the process of consultation. The Local Government Commission's Guidelines propose a specific model as a standard template. This is summarized below:

#### **Step 1: Identify communities of interest**

As an initial step councils must determine whether there are specific communities of interest within their districts or cities. (See above for the criteria to be used when making this determination.)

#### **Step 2: Determine Effective Representation for Identified Communities of Interest**

In this step of the process councils must consider whether or not separate representation is needed for each of the communities of interest, or whether or not grouping communities of interest together is a more effective option.

This must include a consideration of whether or not communities and community boards are required to provide effective and representation for those communities of interest. If, having decided to establish a community and therefore community board, a council must consider whether or not subdivisions are needed to provide effective representation of the specific community, as well as its nature and structure.

If communities are to be established, and if it is to be subdivided, the councils must further consider the number of subdivisions (reflecting the communities of interest), boundaries and names of the subdivisions.

### **Step 3: Farness of Representation for Electors of Electoral Subdivisions**

This process reflects the formula expressed above in the discussion on "fair representation". Different options for the membership of community boards must be considered and for each option the ratio of population per members must be determined, using the +/- 10% formula, unless circumstances suggest an exception.

**Please note**, when carrying out their representation reviews the Local Electoral Act makes it mandatory for councils to consider whether or not community boards are required in order to enhance local governance and representation. As part of its representation review a council must (S19J(2)) consider the following:

- Will the proposal promote the good local government of the parent district /city and the community area concerned?
- Would the community have the resources necessary to enable it to carry out its responsibilities, duties and powers?
- Would the community encompass an area that is appropriate for the efficient and effective exercise of its responsibilities, duties and powers?
- Would the community contain a sufficiently distinct community of interest or sufficiently distinct communities of interests?
- Would the community be able to meet the decision-making requirements of section 76 of the Local Government Act 2002, to the extent that they are applicable?

All aspects of a local authority's representation proposals are subject to rights of appeal and/or objection. It is important that the above issues are given full consideration in the representation reviews if the risk of an appeal is to be minimized.

Community boards can be established by three mechanisms:

- A request to a territorial local authority to establish a community at any time, in accordance with Schedule 6 of the LGA 2002.
- A Local Government Commission reorganisation scheme, and
- A representation review.

The LGA 2002 prescribes the threshold necessary for an application to constitute a community and therefore a community board (Schedule 6, Cl. 3). This varies according to the population of the area concerned. In all cases the area must be continuous and

within the boundaries of a single territorial local authority. Where the population is more than 1500 persons the application must be supported by at least 10% of electors – normally in the form of a petition. Where the population is less than 1500 an application can be made by a resolution of a public meeting, as long as it has the support of at least 100 electors present at the public meeting.

Boards can be dis-established by two mechanisms:

- A representation review, and
- A Local Government reorganisation scheme.

Any board, when faced with a proposal in a representation review to change its circumstances, such as a boundary change, or its dis-establishment is entitled to make a submission to the representation review. If it continues to disagree with its Council's final resolution it can then appeal to the Local Government Commission. If boards feel strongly that the representation review has failed to properly explain and address their role they also have recourse to public advocacy and, apart from preparing their own submissions and arguments for change, can encourage other local agencies to make submissions in support. Information that might be helpful in preparing a submission or public campaign can be found on the Community Boards website which can be accessed through [www.lgnz.co.nz](http://www.lgnz.co.nz)

Please note that the former practice by which community board members could resolve to dis-establish their community board is no longer lawful.

### **Consultation**

Councils are required to prepare a report outlining their proposals for representation. If changes to the representation system are recommended these proposals must explain the rationale for these changes. This report is then subject to consultation using a process similar to the special consultative process outline in the LGA 2002. The specific requirements governing the manner in which consultation will occur are outlined in Sections 19L to 19R of the LEA 2002.

Councils are required to consider submissions on their proposals with an open mind, after which they must notify any changes to the proposal and show why the changes were made.

Community boards have a right to make submissions on proposals contained in representation reviews, including proposals that directly impact on their future. Questions have arisen with regard to community boards' access to professional advice when preparing their submissions. The legislation is quite clear that it is the chief executive's responsibility to ensure that community boards receive appropriate advice. This responsibility extends to situations where a community board may wish to comment on its parent council's representation review – even where the community board holds a view contrary to that favoured by the local authority. Boards have no right to external advice in these matters and can expect independent professional assistance from their own, which is the councils, administration in preparing their submissions.

In order to meet the requirements of the legislation councils must consider whether there is a need for community boards, irrespective of whether they exist or not. The Local Government Commission is also able to establish community boards if objectors are able to convince them that such measures are necessary to achieve the principles of the legislation, in particular "effective representation" for "communities of interest".

Objectors to proposals in a representation review who continue to be unhappy with a council's amended representation resolution may lodge a written objection at the principal office of the local authority. The local authority must forward any objections to the Local Government Commission, which may hold any enquiries it considers appropriate and then make a binding determination.

### **Useful Resources**

*Guidelines to Assist Local Authorities in Undertaking Representation Reviews*, published by the Local Government Commission, Department of Internal Affairs, Wellington.

*Representation Arrangements under the Local Electoral Act 2001 – Good Practice for local authorities*, published by the Society of Local Government Managers, Box 5538, Wellington.

*LG Knowhow Guide to Decision Making*, available from *Local Government New Zealand*, Box 1214, Wellington.