MINISTRY OF JUSTICE
Tāhū o te Ture

LEGAL ADVICE

LPA 01 01 24

14 July 2020

Hon David Parker, Attorney-General

Consistency with the New Zealand Bill of Rights Act 1990: Water Services Bill

Purpose

1. We have considered whether the Water Services Bill ('the Bill') is consistent with the rights and freedoms affirmed in the New Zealand Bill of Rights Act 1990 ('the Bill of Rights Act').

2. This advice has been prepared in relation to the latest version of the Bill (PCO 21854/6.20). We will provide you with further advice if the final version includes amendments that affect the conclusions in this advice.

3. We have concluded that the Bill appears to be consistent with the rights and freedoms affirmed in the Bill of Rights Act. In reaching that conclusion, we have considered the consistency of the Bill with s 14 (freedom of expression), s 21 (right to be secure from unreasonable search or seizure), and s 25 (minimum standards of criminal procedure). Our analysis is set out below.

The Bill

4. The Bill creates a new comprehensive drinking water regulatory regime in response to the Government Inquiry into the Havelock North Drinking-water Outbreak and the Government's Three Waters Review. One of the main aims of the Bill is to provide safe drinking water to consumers. These regulatory functions will be administered by a new Crown entity, Taumata Arowai – the Water Services Regulator.[1]

5. The Bill revokes Part 2A of the Health Act 1956 (relating to drinking water) and replaces it in this stand-alone enactment, establishes new national-level reporting and monitoring functions for wastewater and stormwater, and makes minor amendments to the Local Government Act 2002 and the Resource Management Act 1991. In doing so, the Bill:

   a. imposes a duty on drinking water suppliers to provide safe drinking water, have a drinking water safety plan, and comply with legislative requirements (such as drinking water standards);

   b. provides a source water risk management framework which enables risks to source water to be properly identified, managed, and monitored;

   c. contains powers enabling Taumata Arowai to declare and manage drinking water emergencies;

   d. contains a framework to enable authorisations and occupational regulation of drinking water suppliers;

[1] A separate bill, Taumata Arowai – the Water Services Regulator Bill (introduced 11 December 2019), is currently before Parliament.

e. creates a new consumer complaints framework; and

f. provides for broad powers for monitoring, compliance, enforcement and offences, including new and existing powers from the Health Act 1956.

Consistency of the Bill with the Bill of Rights Act

Section 21 - Right to be secure from unreasonable search or seizure

6. Section 21 of the Bill of Rights Act affirms the right of everyone to be secure against unreasonable search and seizure, whether of the person, property, correspondence or otherwise. The right protects a number of values including personal privacy, dignity, and property. The touchstone of the section is the protection of reasonable expectations of privacy.[2] A search or seizure which is unreasonable in terms of s 21 cannot be justified in terms of s 5 of the Bill of Rights Act.[3]

7. A request for information or documents constitutes a search for the purposes of s 21. The Bill substantially re-enacts some existing powers and also creates new information gathering powers to compel the provision of information or documents. We consider these powers could constitute a search under s 21 of the Bill of Rights Act. We note that information gathering powers *prima facie* also engage the right to freedom of expression under s 14. However, as the information or documents are compelled primarily for the purposes of enforcement of the regulatory regime, we have considered them through the lens of s 21 for the purposes of this advice.

Clause 107 – Power to obtain information

8. Clause 107 substantially re-enacts an existing power[4] for a compliance officer[5] to inspect, at all reasonable times, all records and documents in the possession or control of a drinking water supplier that are required to be kept under the Bill. The information and documents the regulator will be able to inspect appear necessary for the effective administration and enforcement of the drinking water regulatory framework introduced by the Bill. Accordingly, the inspection power supports the efficient functioning of the regime.

9. The power to inspect is in addition to the power to request records under clause 37(2). However, we consider that such a power is not unreasonable. Such records are the drinking water supplier's records, which we consider does not raise an expectation of personal privacy. There are also relevant safeguards in place, such as the requirement that a compliance officer provide a person with an inventory of all documents taken (if so directed) within 10 working days, and that the protections in Subpart 5 of Part 4 of the Search and Surveillance Act 2012 in relation to confidentiality and privilege apply.

Clause 108 – Power to require name and address

10. Clause 108 provides a new power for a compliance officer to require a person to provide their name and residential address if the officer finds the person committing an offence,

[2] *Hamed v R* [2011] NZSC 101, [2012] 2 NZLR 305 at [161], per Blanchard J.
[3] Ibid.
[4] Health Act 1956, s 69ZP(1)(b).
[5] Taumata Arowai may appoint compliance officers who may be an employee of: Taumata Arowai, a government department, the State services, or any other person who Taumata Arowai is satisfied is suitably qualified and trained, and/or belongs to a class of persons who are suitably qualified and trained.

or in circumstances that lead the officer to reasonably suspect the person has committed an offence.

11. We note that an ability to identify an individual suspected to have committed or committing an offence is an important tool to support the new infringement offence regime.[6] The power to require information may only be exercised by a compliance officer who finds the person committing an offence or who reasonably suspects that the person has committed an offence. The information, while personal, is factual in nature and, in the context of the detection of regulatory offences, we do not consider that the power to require this type of information raises privacy concerns.[7]

Clause 109 – Power to question drinking water supplier

12. Clause 109 substantially re-enacts an existing power[8] for a compliance officer to direct a drinking water supplier to answer any questions for the purpose of ensuring that legislative requirements and/or a drinking water safety plan have been, are being, or will be complied with, and investigating anything that might have, or might potentially have, contaminated drinking water and poses a risk to human life or public health.

13. The Bill provides that the privilege and confidentiality provisions in Subpart 5 of Part 4 of the Search and Surveillance Act 2012 apply to anything done under clause 109, as they do in other provisions of the Bill. This includes privilege against self-incrimination. We consider that this power ensures any enquiries can be undertaken by the regulator in a timely and efficient manner, as it may need information which is in the possession/knowledge of the drinking water supplier. Given the protection against self-incrimination, we consider that this power is proportionate and reasonable in this context.

Clause 110 – Power to enter without search warrant

14. Presently under the Health Act 1956,[9] a drinking water assessor (or designated officer) may exercise warrantless powers of entry and inspection, provided that they comply with certain restrictions set out in exercising such powers; and that they must obtain a warrant if they enter a dwelling house. The Bill amends the power for a compliance officer to exercise a warrantless power of entry, only if the officer believes, on reasonable grounds, that entry is required in relation to a serious risk to public health (clause 110).

15. In assessing whether the power in clause 110 is reasonable, we have considered the place of the search, the degree of intrusiveness into privacy, and the reasons why it is necessary. Overall, we consider clause 110 does not authorise an unreasonable search or seizure contrary to s 21 of the Bill of Rights Act because:

    a. the purpose of the entry is to ascertain whether there is a serious risk to public health;

    b. the threshold for entry is belief, on reasonable grounds, that entry is required in relation to a serious risk, i.e. it requires evidence of a serious risk;

[6] Clause 143 of Part 3 subpart 8 of the Bill provides that an infringement offence means an offence against subpart 10 or declared by regulations to be an infringement offence.
[7] We also note that cl 108(2) requires a compliance officer, when asking a person to provide their name and address, to tell the person the reason for the requirement to provide these details and warn the person that it is an offence to fail to do so, unless the person has a reasonable excuse.
[8] Health Act 1956, s 69ZP(1)(c).
[9] Health Act 1956, s 69ZP(1)(a).

c. the places that may be entered are limited to any area where infrastructure and processes are used to collect, treat, or transmit drinking water for supply to customers, including the point of supply, any end-point treatment device, or any backflow prevention device;

d. a warrantless power of entry can only be exercised after a compliance officer has made reasonable efforts to contact the owner, occupier, or person in charge of the place;

e. a compliance officer must, when exercising compliance powers under the Bill, produce their identity card for inspection on request (cl 98);

f. a compliance officer must not enter a home exercising a warrantless power of entry without the consent of the occupier (but can enter if they obtain a warrant);

g. while there is an ability to exercise a warrantless power of entry at a marae or a building associated with a marae, we consider, in these particular circumstances, this power is reasonable. We note that it is unusual to have a warrantless power of entry to a marae because of the high expectation of privacy that citizens place on these places. A marae that supplies its own drinking water may be subject to the same legislative requirements as other drinking water suppliers, if it meets the definitions in the Bill and is not exempted.10 If such power is exercised, the same protections above apply as for other premises, and in addition, the kawa of the marae must be taken into account, so far as practicable in the circumstances. We presume that compliance officers cannot enter any part of the marae that is being used as a dwelling without consent in relation to exercising a warrantless power;

h. if a compliance officer enters any place and is unable, despite reasonable efforts, to find any person in charge, they must leave a written notice complying with the requirements in clause 111, including the date and time of entry, and the officer's contact information.

16. For completeness, we note that clause 112 sets out the framework for obtaining a search warrant to enter and search a place, which aligns with the requirements of the Search and Surveillance Act 2012. We consider this framework to be reasonable in terms of s 21.

17. Overall, we consider that the limits imposed by the Bill on the right to be secure from unreasonable search or seizure are justified under s 5 of the Bill of Rights Act.

[10] For example, a marae wharekai (dining hall) or community hall that has its own river water supply does not constitute a 'domestic dwelling' (see cl 10 of the Bill). We also note that under cl 57(1), a marae on a rainwater tank supply could be exempted from compliance with the requirements in the Bill while Taumata Arowai works with its owners on how to meet regulatory requirements.

Section 25 – Minimum standards of criminal procedure

Strict liability offences

18. Section 25(c) of the Bill of Rights Act affirms the right to be presumed innocent until proven guilty according to law. The right to be presumed innocent requires that an individual must be proven guilty beyond reasonable doubt, and that the State must bear the burden of proof.[11]

19. The Bill contains a number of strict liability offences which have been carried over from existing legislation and others that are new offences. Strict liability offences *prima facie* limit s 25(c) of the Bill of Rights Act because the accused is required to prove a defence (on the balance of probabilities), or disprove a presumption, to avoid liability.

20. The offences in the Bill include supplying drinking water from an unregistered supply, providing false or misleading information, negligence in supply of unsafe drinking water, failure to keep and maintain records, and a failure to provide a sufficient quantity of drinking water. Clause 156 provides a general defence to most of the strict liability offences, but some offences have individual defences specified separately.[12]

21. Strict liability offences may nevertheless be consistent with the Bill of Rights Act if the limits can be demonstrably justified in a free and democratic society, as per section 5 of that Act. This section 5 inquiry may be approached as follows:[13]

    a. does the provision serve an objective sufficiently important to justify some limitation of the right or freedom?

    b. if so, then:

        i. is the limit rationally connected with the objective?

        ii. does the limit impair the right or freedom no more than is reasonably necessary for sufficient achievement of the objective?

        iii. is the limit in due proportion to the importance of the objective?

22. We consider that the strict liability offences in the Bill appear to be justified. In reaching this conclusion we have taken into account the nature and context of the conduct being regulated, the ability of the defendants to exonerate themselves, and the penalty levels.

23. Strict liability offences are more easily justifiable where they are in the category of 'public welfare regulatory offences'. In the context of regulated activities, people are expected to meet certain standards of care. The strict liability offences in the Bill arise in the context of ensuring the safety of drinking water. The regulation of a safe water supply is in the public interest, and failure to follow legislative requirements undermines the core purpose of the regulatory framework.

---

[11] *R v Wholesale Travel Group* (1992) 84 DLR (4th) 161, 188 citing *R v Oakes* [1986] 1 SCR 103.

[12] The individual defences are in: cl 162 (recklessness in supply of unsafe drinking water - without reasonable excuse); cl 164 (recklessness in failure to take immediate action when drinking water is unsafe – without reasonable excuse); cl 179 (intentionally hindering or obstructing Taumata Arowai); cl 180 (intentionally threatens or assaults an employee or agent of Taumata Arowai); and cl 181 (intent to deceive pretends to be an employee or agent of Taumata Arowai or authorised person).

[13] *Hansen v R* [2007] NZSC 7 [123].

24. The matters of justification and excuse (the defences) are more likely to be in the drinking water supplier's knowledge (or other person as appropriate). The Bill contains several defences to the strict liability offences. These defences are open-ended in nature and more likely to be in the defendant's knowledge – e.g. the breach was due to an act or omission of another person, was an accident, was due to some other cause outside the defendant's control, or the defendant took all reasonable precautions and exercised due diligence. The court can also take into account all relevant matters including the likelihood of the hazard or risk concerned, the degree of harm that might result from the hazard or risk, the person's knowledge, and the availability and suitability of ways to eliminate or minimise the risk.

25. We note that the penalty for the offences are at the high end of the scale in some instances (e.g. negligence in the supply of unsafe drinking water can result in a fine of up to $300,000 in the case of an individual and $1.5 million in the case of a body corporate). A term of imprisonment may be imposed only in relation to an offence involving recklessness in the supply of unsafe drinking water which exposes an individual to a serious risk of death, injury or illness (cl 162); and recklessness in a failure to take immediate action when drinking water is unsafe (cl 164). We consider this is proportionate to the importance of the Bill's objective which is to ensure the safety of drinking water, where any contamination may have serious public health outcomes.

26. For the above reasons, we consider the strict liability offences to be justified in terms of s 25(c) of the Bill of Rights Act.

Civil pecuniary penalties

27. We note the Bill introduces civil pecuniary penalties for:

    a. a contravention of an enforceable undertaking made by a drinking water supplier[14] (not exceeding $50,000 for an individual or $300,000 in any other case);[15] and

    b. a failure to comply with a direction made by Taumata Arowai that a person collect or provide information necessary for Taumata Arowai to monitor and report on the environmental performance of wastewater and stormwater networks and network operators.[16] The High Court must first be satisfied that the person has not complied with Taumata Arowai's direction and may make an order directing the person to comply with such direction and/or impose a civil pecuniary penalty not exceeding $50,000.

28. The maximum amount of the penalties could have serious financial effect, equivalent to or exceeding the fines that can be imposed for conduct that is characterised as criminal. As such, we have considered whether it could offend s 25 of the Bill of Rights Act.[17]

[14] No proceedings (whether criminal or civil) for a contravention or an alleged contravention of the Bill or regulations may be brought against a person who made an undertaking in relation to that contravention, while the undertaking is enforceable and there is no contravention of the undertaking, or a person who made, and has completely discharged, an enforceable undertaking in relation to that contravention (cl 133).

[15] Clause 131 of the Bill. Alternatively, or additionally, the High Court may direct the person to comply with the undertaking or make an order discharging the undertaking.

[16] Clause 138 of the Bill.

[17] In this respect we note the New Zealand Law Commission's 2014 observation that it is not yet clear whether the criminal procedural safeguards in the Bill of Rights Act, which apply to "offences", also apply to pecuniary penalties: NZLC R133: *Pecuniary Penalties*, para 6.5.

29. In our view, the conduct penalised in these provisions is appropriately characterised as civil rather than criminal. The provisions aim to deter non-compliance with the regulatory regime. While the penalties are potentially substantial, in our view they are proportionate to the importance of their objectives. Further, and significantly, no criminal stigma attaches to this type of penalty action. On this basis, we are satisfied that the civil pecuniary penalty provisions do not give rise to Bill of Rights Act concerns.

Section 14 – Freedom of Expression

30. Section 14 of the Bill of Rights Act affirms that everyone has the right to freedom of expression, including the freedom to seek, receive, and impart information and opinions of any kind in any form. The right has been interpreted as including the right not to be compelled to say certain things or to provide certain information.[18]

31. Several provisions of the Bill require the provision of information by drinking water suppliers. For example, it requires reports and plans to be provided to Taumata Arowai (e.g. a drinking water safety plan), it contains a duty to notify Taumata Arowai of a risk or hazard that relates to or affects the supply of drinking water, and it requires prescribed information to be provided to consumers in relation to complaints. Many provisions substantially re-enact existing obligations, whereas others are new.

32. To the extent that such provisions engage the right in s 14 (as to whether such information is truly 'expressive' in nature), we consider that the requirements to provide information are rationally connected to the regulator's functions. The regulator requires information to effectively manage the regime, and enable risks to be properly identified, managed and monitored, to ensure safe drinking water is provided to consumers. The requirements for information are, in our view, proportionate and limit the right to freedom of expression no more than is reasonably necessary.

33. Overall, we consider that the limits imposed by the Bill on the freedom of expression are justified under s 5 of the Bill of Rights Act.

Conclusion

34. We have concluded that the Bill appears to be consistent with the rights and freedoms affirmed in the Bill of Rights Act.

Jeff Orr
Chief Legal Counsel
Office of Legal Counsel

[18] See, for example, *Slaight Communications v Davidson* 59 DLR (4th) 416; *Wooley v Maynard* 430 US 705 (1977).