

25 May 2022

Hon David Parker, Attorney-General

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

Purpose

1. We have considered whether the Water Services Entities 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 updates the advice that we provided to you on 24 November 2021. This advice has been prepared in relation to the latest version of the Bill (PCO 23531/16.18). This version of the Bill has been provided to Cabinet Office for Cabinet's consideration on Monday 30 May 2022.
3. Our conclusion remains as advised in November 2021. 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 ss 14, 19 and 21 of the Bill of Rights Act. Our analysis is set out below.

The Bill

4. The Bill establishes 4 publicly-owned water services entities that will provide safe, reliable and efficient water services in place of local authorities. The Bill seeks to implement the Government's decisions on what is commonly known as "the Three Waters Reform", a Government commitment to reforming New Zealand's drinking water and wastewater system, and upgrading water infrastructure to create jobs across the country.
5. The Bill provides the essential provisions around the water services entities' membership, functions, operations and processes, and includes transitional provisions that will govern how the entities operate, and are staffed, during the transitional period before the Act comes into full effect on 1 July 2024.
6. The water services entities are a new public service delivery model. Each entity will be a body corporate, co-owned by the territorial authorities in its service area. Ownership is tangibly expressed by way of shares. The entities are not council-controlled or local government organisations for the purposes of the Local Government Act 2002.
7. Water services entities will have a 2-tier governance arrangement comprising of a regional representative group, comprised of an equal number of territorial authority representatives and mana whenua representatives; and corporate governance by an independent, competency-based, professional board
8. The Bill provides for the creation of constitutions for each water service entity, requirements to issue statements of strategic and performance expectations, and other measures to ensure reporting and accountability.

9. The Bill provides a general obligation to give effect to the principles of te Tiriti o Waitangi, and sets out the relationship between the Bill and Treaty settlements.

Consistency of the Bill with the Bill of Rights Act

Section 14 – Freedom of expression

10. 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.¹
11. There are a vast number of provisions in the Bill which *prima facie* engage the right to freedom of expression by requiring water services entities, boards, and/or regional representative groups (collectively, referred to here as “water services bodies”) to provide, and sometimes publish, certain information. A summary of these provisions is set out in Appendix 1.
12. These provisions can be broadly split into two categories:
 - a. those that require the water services bodies to prepare and publish various documents; and
 - b. those that require the water services bodies to provide information on request.
13. Where a provision is found to limit a particular right or freedom, it may nevertheless be consistent with the Bill of Rights Act if it can be considered a reasonable limit that is demonstrably justified in terms of s 5 of that Act.
14. We consider that any limits contained within the Bill are justified under s 5 of the Bill of Rights Act because:
 - a. The objective of ensuring water services bodies, who deliver an important public service, are subject to a robust level of scrutiny and transparency and to promote accountability to the regions they serve, is sufficiently important to justify some limitation on s 14;
 - b. Requiring water services bodies to provide and/or publish information to the public and to monitoring/oversight bodies is rationally connected to that objective;
 - c. The provisions impair s 14 no more than is reasonably necessary and is in due proportion to the importance of the objective, noting that they only require the provision of certain information relating to the water services bodies’ functions that is relevant to that specific objective, and the information that may be required is of limited expressive value; and that many of these provisions are broadly similar to existing legislation and requirements on other publicly owned entities, such as Crown entities and local authorities.

¹ See, for example, *Slaight Communications v Davidson* 59 DLR (4th) 416; *Wooley v Maynard* 430 US 705 (1977).

Secondary legislation

15. We note that cl 206 empowers regulations to be made which provide for transitional and savings provisions concerning the Bill coming into force. These regulations may include transitional reporting obligations that apply to local government organisations or water services entities. A local government organisation may be subject to a non-compliance direction by the chief executive of the department if they fail to comply with these regulations.²
16. This empowering provision does not, in itself, limit the right to freedom of expression; and is accordingly consistent with the Bill of Rights Act. However, secondary legislation made under this empowering provision may limit the right to freedom of expression. We note for completeness that secondary legislation must be consistent with the Bill of Rights Act, otherwise there is a risk it will be ultra vires.

Section 21 – Freedom from unreasonable search and seizure

17. As set out in Appendix 1, cls 170-173 of the Bill empower a monitor to compel water services entities to provide information in certain circumstances; and non-compliance with a request may be subject to a Court order directing the entity to comply, or a civil pecuniary penalty not exceeding \$50,000.
18. Section 21 of the Bill of Rights Act affirms that everyone has the right to be secure against unreasonable search or seizure, whether of the person, property, or correspondence or otherwise.
19. There are two limbs to the section 21 right. First, section 21 is applicable only in respect of those activities that constitute a “search or seizure”. Secondly, where certain actions do constitute a search or seizure, section 21 protects only against those searches or seizures that are “unreasonable” in the circumstances.
20. We consider that the power to compel information in these circumstances constitutes a search for the purposes of s 21 of the Bill of Rights Act.³
21. The next question is whether this search power is reasonable. In assessing this, we have considered the place of the search, the degree of intrusiveness into privacy, and reasons why it is necessary.⁴ We consider that this search power is reasonable, and therefore consistent with s 21 of the Bill of Rights Act. This is because:
 - a. The search powers contribute to the important objective of ensuring the Crown Monitor can undertake its role, which is to act as a steward to provide oversight of the water services system from a whole of government perspective⁵;
 - b. The search powers are exercised by written notice, rather than physical entry on to the premises, which is less of an intrusion into a person’s expectation of privacy; and

² As specified in cl 13 of schedule 1 of the Bill.

³ *New Zealand Stock Exchange v Commissioner of Inland Revenue* [1992] 3 NZLR 1 (PCP).

⁴ *Hamed v R* [2011] NZSC 101, [2012] 2 NZLR 305 at [172] per Blanchard J.

⁵ As specified in cl 169 of the Bill.

- c. A publicly owned entity which provides regulated services to the public has less of an expectation of privacy than an ordinary citizen.

Section 19 – Freedom from discrimination

22. Section 19(1) of the Bill of Rights Act affirms that everyone has the right to freedom from discrimination on the grounds set out in s 21 of the Human Rights Act 1993 (the Human Rights Act). For the purposes of this advice, prohibited grounds of discrimination under s 21 of the Human Rights Act include: race, ethnic or national origins, and disability.
23. Discrimination under s 19 of the Bill of Rights Act arises where:⁶
- a. there is differential treatment or effects as between persons or groups in analogous or comparable situations on the basis of a prohibited ground of discrimination; and
 - b. that treatment has a discriminatory impact (i.e. it imposes a material disadvantage on the person or group differentiated against).
24. The differential treatment analysis takes a purposive and untechnical approach to avoid artificially ruling out discrimination.⁷ Not all differential treatment will be discriminatory.⁸ Once differential treatment on prohibited grounds is identified, the question of whether disadvantage arises is a factual determination.⁹

Does the Bill differentiate on the basis of race or ethnic origins?

25. Clause 27 of the Bill provides for the establishment and membership of a regional representative group. It provides that the regional representative group must include an equal number of territorial authority representatives and mana whenua representatives. The method of appointing mana whenua representatives is provided in clause 33.
26. Clause 45 of the Bill provides for the establishment and membership of regional advisory panels. It provides that a regional advisory panel must include an equal number of territorial authority and mana whenua panel members. The method of appointing mana whenua panel members is set out in cl 51.
27. Clauses 38 sets out the requirements for membership of a board appointment committee. Members appointed must, collectively, have knowledge of, and experience and expertise in relation to; the principles of te Tiriti o Waitangi / the Treaty of Waitangi, and perspectives of mana whenua, mātauranga, tikanga and te ao Māori. Clause 57 sets out the requirements for membership of a water services entity's board, which specify that members appointed must, collectively, have knowledge of, and experience and expertise in relation to; the principles of te Tiriti o Waitangi / the Treaty of Waitangi and perspectives of mana whenua, mātauranga, tikanga, and te ao Māori.

⁶ *Ministry of Health v Atkinson* [2012] NZCA 184, [2012] 3 NZLR 456 CA at [55].

⁷ *Atkinson v Minister of Health* [2010] HRRT 1 at [211] – [212]; *Air New Zealand v McAlister* [2009] NZSC 78, [2010] 1 NZLR 153 at [51], per Tipping J; and *Child Poverty Action Group v Attorney-General* [2008] NZHRRT 31 at [137].

⁸ *Ministry of Health v Atkinson*, above n 6, at [75].

⁹ See for example, *Child Poverty Action Group v Attorney-General*, above n 7c, at [179]; and *McAlister v Air New Zealand*, above n 7b, at [40] per Elias CJ, Blanchard and Wilson JJ.

28. Race and ethnic origins are prohibited grounds of discrimination under s 21 of the Human Rights Act.¹⁰ We have considered whether these clauses could be seen to draw distinctions between groups of people in a manner that amounts to discrimination on the basis of race or ethnic origins.

Are comparable groups treated differently on the basis of race or ethnic origin?

29. Clauses 27, 33, 38, 45, 51 and 57 of the Bill *prima facie* appear to treat Māori, or persons who identify as Māori, differently to persons who are non-Māori or do not identify as Māori.
30. Clauses 27 and 33 and 45 and 51 empower mana whenua to appoint an equal number of members on the regional representative group and the regional advisory panel respectively, whereas the other members of those groups are appointed by the territorial authority owners on the basis of popular election or skill, or as otherwise provided in the constitution (see cl 32 and 50). This provision can be seen to grant Māori differential treatment by providing mana whenua an additional, specific opportunity to appoint members of the regional representative group.
31. We are of the view that these clauses distinguish and grant differential treatment to Māori on these matters. However, to the extent that the distinctions and differential treatment reflect the status of Māori as kaitiaki of land and natural resources in the respective rōhe in which the water service entities are based, we do not consider that there is any other comparable group who may be materially disadvantaged.
32. Regarding cls 38 and 57, the requirements that members of the board appointment committee and the water service entities' boards collectively must have certain knowledge and experience in the principles of te Tiriti o Waitangi / the Treaty of Waitangi and te ao Māori, could be interpreted as treating Māori differently if a Māori person is more likely to have the required skills and knowledge than a non-Māori person.
33. However, as these clauses only impose the requirements around knowledge, experience and expertise in te ao Maori and te Tiriti/ the Treaty of Waitangi on a collective group of persons, we do not consider these provisions differentiate between separate groups on the basis of race or ethnic origin.
34. As a result, we conclude that the right to freedom from discrimination affirmed under s 19 of the Bill of Rights Act is not engaged by the Bill.

Does the differential treatment have a discriminatory impact?

35. For completeness, we have considered whether a disadvantage arises to any class of people. We do not consider that this is the case, for the following reasons.
36. The relevant provisions are not designed to provide specific advantage to Māori, but rather to achieve equity among New Zealand's population groups. Addressing inequity does not result in a disadvantage to those who are not currently disadvantaged. Given that water can be a taonga of particular significance and importance to Māori, the Bill seeks to provide an opportunity for mana whenua to contribute to the governance of the water service entities that serve and provide water services to their respective rōhe. This

¹⁰ Human Rights Act 1993, s 21(1)(f) and (g).

is a sufficiently important objective which can only be met through the provisions identified earlier.

37. Further, in respect of cls 38 and 57, the requirements for the board appointment committees and boards of water services entities to have collective knowledge and experience in te ao Māori does not prevent non-Māori from being appointed. Because the requirement applies collectively, we do not consider even an indirect disadvantage arises to non-Māori seeking appointment. Even if we had concluded otherwise, we would have considered the resultant limit on the freedom from discrimination to be justified. Without this collective knowledge, the committees and the boards would have difficulty performing their functions in a way that meets their obligations.

Freedom from discrimination - disability

38. Clause 97 prohibits people from being a regional representative, a regional advisory panel member or a board member of a water services entity if the person is subject to a property order or some personal orders under the Protection of Personal and Property Rights Act 1988 (PPPRA). Property orders under the PPPRA provide for the management of property and care of adults who do not have the mental capacity to manage their own affairs or care for themselves.
39. Section 21(h) of the Human Rights Acts prohibits discrimination on the basis of disability, including psychiatric illness and intellectual disability. We have therefore considered whether cl 64 limits the right to freedom from discrimination on the basis of disability.
40. Individuals with a psychiatric illness or intellectual disability may be the subject of a property or personal order under the PPPRA. As such, the Bill draws a distinction on the basis of disability. The fact that this would disqualify the individual from being a member of a regional representative's group or board is clearly a disadvantage. As such, we consider cl 97 limits the right to freedom from discrimination.
41. However, as previously mentioned, where a provision is found to limit a particular right or freedom, it may nevertheless be consistent with the Bill of Rights Act if it can be considered a reasonable limit that is demonstrably justified under s 5.
42. We consider that this limit is justified because if individuals are unable to manage their own affairs or care for themselves such that they are subject to a legal order made under the PPPRA, it is inappropriate for them to be a member of a regional representative's group or board. Additionally, the PPPRA has a robust process and associated safeguards to ensure decisions about an individual's capacity are appropriate and justified under that Act.
43. For these reasons, we consider that any limits within the Bill on the right to freedom from discrimination are justified in terms of s 5 of the Bill of Rights Act.

Conclusion

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



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Appendix 1

As identified in paragraph 12, the various provisions that engage freedom of expression include:

- a. Clause 14: the water services entity must provide information to a regional representative group or a regional advisory panel .
- b. Clause 60: the board must give public notice of public board meetings.
- c. Clause 99: the water services entity must keep interests registers for board members , regional representatives and regional advisory panel members.
- d. Clauses 101-106: A board member, regional representative or regional advisory panel member must disclose the nature and extent of all interests that they may have relating to the water services entity.
- e. Clauses 107 & 108: A person with an interest, may take part in discussions where permission has been sought. Where permission has been granted to act despite a disclosure of an interest, this permission must be disclosed in annual report.
- f. Clause 114: a water services entity must provide information it holds if it is required by the regional representative group or a regional advisory panel for that group to help the group or panel perform its duties, functions or powers.
- g. Clauses 135 & 138: the regional representative group must issue, publish and review a Statement of Strategic and Performance Expectations for the water services entity.
- h. Clauses 141 & 142: the board must respond to a Te Mana o te Wai statement provided by mana whenua, and publish that response.
- i. Clauses 144 – 155, schedule 1¹¹, schedule 3¹²: the water services entity must prepare and publish a statement of intent, an asset management plan, and a funding and pricing plan, and an infrastructure strategy. There is also an obligation to report on how consumer and community input was considered and incorporated into these documents.
- j. Clauses 156-157, and schedule 1¹³: the water services entity must prepare and publish annual report.
- k. Clauses 170: the Monitor can compel a water services entity to provide information.
- l. Clauses 175(6)(b), 177(5)(b), 179(6)(c): the water services entity must comply with reasonable requests from ministerial bodies to provide relevant information.
- m. Clause 198: the water services entity or other relevant person must provide information requested by the reviewer.

¹¹ Schedule 1, clause 8

¹² Schedule 3, clauses 1, 4, 8,10, 14, 16, 20 and 22.

¹³ Schedule 1, clause 10

- n. Clause 203(4): the chief executive of the water services entity must provide a guidance document to each consumer forum.
- o. Clause 204: the chief executive of the water services entity must prepare a consumer engagement stocktake annually, and make this publicly available.
- p. Schedule 1, clause 5: during the establishment period, local government organisations must comply with any reasonable request by the entity for information that is necessary for preparing the allocation schedule for the entity.
- q. Schedule 1, clause 9: The board of a water services entity must, during the establishment period, provide a quarterly report to the chief executive of the Department.
- r. Schedule 1, clauses 11-12: a local government organisation and water services entity must comply with reasonable requests for information from certain entities during the establishment period. Non-compliance with a request made under clause 9 may be subject to a non-compliance direction, which can be enforced by the District Court.
- s. Schedule 1, clause 22: during the establishment period, local government organisations must provide the department with information about certain intended decisions.
- t. Schedule 4, clause 13: a person may not publish advertising that promotes or opposes a divestment proposal unless it contains a statement setting out the name and address of the person who initiated or instigated the publication of the advertising.