

3 December 2019

Hon David Parker, Attorney-General

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

### **Purpose**

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1. We have considered whether the Water Services Regulator 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. We have not yet received a final version of the Bill. This advice has been prepared in relation to the latest version of the Bill (PCO 22478/4.0). 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 19 (freedom from discrimination). Our analysis is set out below.

### **The Bill**

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4. The Bill creates the Water Services Regulator as a new Crown agent to oversee, administer and enforce the drinking water regulatory system. The Bill provides for the Regulator's objectives, functions, operating principles and governance arrangements.
5. The Regulator will:
  - a. provide clear leadership for drinking water regulation, through a new, dedicated, centralised regulator;
  - b. significantly strengthen compliance, monitoring, and enforcement relating to drinking water regulation, and equip the new regulator with the powers and resources needed to build capability, support suppliers of all kinds to meet their regulatory obligations, and take a tougher, more consistent approach to enforcement where needed;
  - c. manage risks to drinking water safety and ensure source waters are protected;
  - d. ensure more people can access water that is safe to drink, by requiring all suppliers (except individual domestic self-suppliers) to be part of the regulatory system, and to provide safe drinking water on a consistent basis;
  - e. lift the environmental performance and transparency of wastewater and stormwater networks; and,
  - f. improve national-level leadership, oversight, and support relating to wastewater and stormwater.

## Consistency of the Bill with the Bill of Rights Act

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### Section 19 - Freedom from Discrimination

6. Section 19 of the Bill of Rights Act affirms that everyone has the right to freedom from discrimination on the grounds set out in the Human Rights Act 1993 ('the Human Rights Act').
7. The key questions in assessing whether there is a limit on the right to freedom from discrimination are:<sup>1</sup>
  - a. does the legislation draw a distinction on one of the prohibited grounds of discrimination under s 21 of the Human Rights Act and, if so,
  - b. does the distinction involve disadvantage to one or more classes of individuals?
8. A distinction will arise if the legislation treats two comparable groups of people differently on one or more of the prohibited grounds of discrimination. Whether disadvantage arises is a factual determination.<sup>2</sup>
9. Clause 14 of the Bill provides for the establishment of a Māori advisory group to advise the water services regulator on Māori interests and knowledge as they relate to the objectives, functions and operating principles of the regulator (clause 17(1)). The Group's role will include developing and maintaining a framework for the regulator that provides advice and guidance on how to interpret, protect and promote Te Mana o Te Wai as well as provide advice on how to enable mātauranga Māori, tikanga Māori and kaitiakitanga to be exercised (clause 17(2)).
10. At first glance, it could appear that the creation of such an advisory group constitutes discrimination on the basis of ethnicity. However, for the reasons that follow we do not consider that this is the case.
11. First, the establishment of a Māori advisory group does not result in a disadvantage to any class of people. The role of the advisory group is not to provide a specific advantage to Māori, but to ensure that the regulator is advised on tikanga Māori, mātauranga Māori, kaitiakitanga and Te Mana o te Wai, which are relevant considerations in its area of operation. There is a general public interest in ensuring that the regulator is appropriately advised of all relevant considerations in its decisionmaking.
12. Second, the operation of Crown entities engages the broader right of Māori to active participation within the Māori-Crown partnership, which arises from the Treaty of Waitangi. The Treaty creates a basis for civil government, on the basis of protections and acknowledgement of Māori rights and interests within New Zealand's shared citizenry.<sup>3</sup> We also note the Court of Appeal's decision in *New Zealand Maori Council v Attorney-General*, where the Court said that "[t]he duty of the Crown is not merely passive but extends to active protection of Māori people in the use of their lands and waters to the fullest extent."<sup>4</sup>

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<sup>1</sup> See, for example, *McAlister v Air New Zealand* [2009] NZSC 78, [2010] 1 NZLR 153; *Ministry of Health v Atkinson* [2012] NZCA 184, [2012] 3 NZLR 456; and *Child Poverty Action Group Inc v Attorney-General* [2013] NZCA 402, [2013] 3 NZLR 729.

<sup>2</sup> See, for example *McAlister v Air New Zealand* above n 1 at [40] per Elias CJ, Blanchard and Wilson JJ.

<sup>3</sup> Cabinet Office Circular CO (19) 5.

<sup>4</sup> [1987] 1 NZLR 647, 664.

13. The Cabinet Manual states that “in some situations, autonomous Māori institutions have a role within the wider constitutional and political system. In other circumstances, the model provided by the Treaty of Waitangi of two parties negotiating and agreeing with one another is appropriate.”<sup>5</sup> Measures designed to afford Māori their right to partnership are not disadvantageous to any comparable group. We consider that appointing a Māori advisory group to a crown entity intended to regulate water services is an appropriate recognition of the Māori-Crown relationship.
14. For these reasons we consider that the Bill does not engage the right to freedom from discrimination under s 19 of the Bill of Rights Act.

## **Conclusion**

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15. 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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<sup>5</sup> Cabinet Manual 2017, p. 2