

8 February 2018

Hon David Parker, Attorney-General

## **Consistency with the New Zealand Bill of Rights Act 1990: Health Practitioners Competence Assurance Amendment Bill**

### **Purpose**

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1. We have considered whether the Health Practitioners Competence Assurance Amendment 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 with the latest version of the Bill (PCO 14077/36.0). We will provide you with further advice if the final version of the Bill 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 25(c) (right to be presumed innocent), and s 27(3) (right to justice). Our analysis is set out below.

### **The Bill**

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4. The Bill amends the Health Practitioners Competence Assurance Act 2003 ('the Act') to implement changes to the regulation of health practitioners recommended by operational and strategic reviews of the Act, completed in 2009 and 2012 respectively. The changes are intended to clarify the Act's interpretation and improve its operation, in particular by:
  - a. requiring authorities (the bodies responsible for registration and oversight of practitioners in a particular health profession) to develop 'naming policies' governing how, and in what circumstances, the names of practitioners whose competence or conduct has been reviewed or investigated by the authority are to be published, to enhance public confidence and improve the quality of healthcare
  - b. requiring that informants and other professionally interested parties are notified of decisions about a practitioner's practice and competence, to provide better visibility of decisions about practitioner practice
  - c. requiring authorities to provide the Director-General of Health professional and basic personal information about registered health professionals, to assist with workforce planning and development
  - d. introducing regular performance reviews, to provide tangible evidence of responsible authorities' performance
  - e. requiring authorities to promote and facilitate interdisciplinary collaboration and co-operation, and

- f. requiring authorities to fund the general administration costs of the Health Practitioners Disciplinary Tribunal ('the Tribunal').

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

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### **Section 14 – Freedom of expression**

5. 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.<sup>1</sup>

#### *Naming policies*

6. Section 157(1) of the Act permits an authority to publish a practitioner's name and a summary of any finding, order or direction it has made under the Act in respect of that practitioner. Clause 30 of the Bill inserts new ss 157A to 157I, which require and govern authorities' adoption of a 'naming policy' in respect of the exercise of the s 157(1) power.
7. While cl 30 may encourage the publication of investigated practitioners' names under s 157, on balance we do not consider it engages the right to freedom of expression as the new ss 157A to 157I simply provide structure and guidance as to the exercise of an existing power.
8. However, even if cl 30 were considered to engage the right to freedom of expression, we consider the limit would be justified in light of the stated purposes of naming policies (providing transparency of decision-making, recognising the public interest in naming practitioners not meeting expected standards, and improving the safety and quality of healthcare) and the procedural safeguards around their development, application and review. The Bill's explicit requirements for naming policies to comply with the information privacy principles in s 6 of the Privacy Act 1993 and the general law, including natural justice rights, bolster this conclusion.

#### *Other amendments requiring information to be provided*

9. The Bill includes several amendments requiring information about health practitioners to be disclosed to particular individuals or bodies.
10. Clause 29 requires authorities to submit professional and basic personal information about registered health practitioners to the Director-General of Health, which is to be used only for the purposes of workplace planning and development. We consider any limitation cl 29 places on the freedom of expression is justified for the purpose of efficient and effective administration of the relevant profession and the regulatory regime.
11. New notification requirements throughout the Bill (relating to an authority's review or investigation of a health practitioner) variously apply in respect of the person who triggered the review or investigation, or professionally interested individuals or bodies. These notification requirements are broadly intended to provide better visibility of decisions about practitioner practice. To the extent they limit freedom of expression, we also consider those limits are justified in the context of the regulatory regime.

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<sup>1</sup> *RJR-MacDonald Inc. v Canada (Attorney General)* 1995 3 SCR 199.

### **Section 25(c) – right to be presumed innocent**

12. Section 25(c) of the Bill of Rights Act affirms that everyone who is charged with an offence has, in relation to the determination of the charge, the right to be presumed innocent until proved guilty according to law.
13. Clause 16 creates an offence with a ‘without reasonable excuse’ defence and cl 19 adds the defence to an existing offence. Both offences relate to contravention of Tribunal orders prohibiting publication of information. ‘Without reasonable excuse’ provisions were formerly considered to reverse the onus of proof (at least where the defendant was proceeded against summarily), thereby limiting a defendant’s right to be presumed innocent until proved guilty. However, since the repeal of s 67(8) of the Summary Proceedings Act 1957, offences of this nature can be interpreted consistently with the presumption of innocence. Accordingly, the prosecution must prove beyond a reasonable doubt that a defendant did not have a reasonable excuse once an evidential burden is met.<sup>2</sup>

### **Section 27(3) – right to bring civil proceedings**

14. Section 27(3) of the Bill of Rights Act affirms the right to bring civil proceedings against the Crown and have those proceedings heard in the same way as proceedings between individuals. It protects the procedural rights of those litigating against the Crown, but does not restrict the power of the legislature to determine what substantive rights the Crown or other parties are to have.<sup>3</sup>
15. Clause 30 also provides that, in naming health practitioners under their naming policies, authorities are protected by qualified privilege under the Defamation Act 1992. For the purposes of that Act, new s 157I requires publication to be treated as an official report made by a person holding an inquiry under Parliament’s authority.
16. We consider that qualified privilege is a matter of substantive rather than procedural law, and therefore that s 27(3) of the Bill of Rights Act is not engaged. We note further that cl 30 is designed, and arguably warranted, to ensure the workability of the new naming policies, and that qualified privilege can be rebutted as per s 19 of the Defamation Act.

### **Conclusion**

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17. 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>2</sup> *King v Police* [2016] NZHC 977 at [24].

<sup>3</sup> *Westco Lagan Ltd v Attorney-General* [2001] 1 NZLR 40 at [63].