

## ***Health (Drinking Water) Amendment Bill***

16 May 2006

Attorney-General

### LEGAL ADVICE

#### CONSISTENCY WITH THE NEW ZEALAND BILL OF RIGHTS ACT 1990: HEALTH (DRINKING WATER) AMENDMENT BILL

1. We have considered whether the Health (Drinking Water) Amendment Bill (PCO 3459/14) (the "Bill") is consistent with the New Zealand Bill of Rights Act 1990. We understand that the Bill is likely to be considered by the Cabinet Legislation Committee at its meeting on Thursday, 18 May 2006.
2. Our view is that the Bill appears to be consistent with the rights and freedoms affirmed in the Bill of Rights Act. In reaching this conclusion we considered potential issues of inconsistency with sections 17, 21, and 25(c) of the Bill of Rights Act.
3. The Bill proposes to establish a regime to ensure best practice for the delivery and management of drinking-water supplies to protect the health and safety of people and communities. For example, the Bill:
  - requires certain drinking-water suppliers and water carriers to have a public health risk management plan;
  - requires drinking-water suppliers to comply with drinking water standards;
  - establishes a monitoring function to be carried out by drinking-water assessors and designated officers (such as a Medical Officer of Health) to ensure compliance with the regime; and
  - provides for the appropriate management of drinking water emergencies.

Some of these measures are already in place (such as the drinking-water supplier register), or are being complied with on a voluntary basis (the current drinking-water standards).

### **SUMMARY OF THE BILL OF RIGHTS ACT ISSUES**

4. Below is a summary of how the issues of inconsistency arise with sections 17, 21 and 25(c) of the Bill of Rights Act. A more detailed analysis of these issues follows this summary.
5. The Bill sets out powers a designated officer<sup>[1]</sup> can exercise where the Minister has declared a drinking water emergency, including the ability to close any public place and cancel any public event if that place does not have an adequate supply of safe drinking water. These powers give rise to an issue under section 17 of the Bill of Rights Act (the right to freedom of association).

6. The Bill empowers drinking-water assessors and designated officers to enter and inspect premises for compliance with the drinking-water regime. In addition the Bill gives drinking-water assessors and designated officers the power to compel the production of documents and information. These powers give rise to an issue under section 21 of the Bill of Rights Act (the right to be free from unreasonable search and seizure).
7. The Bill contains several strict liability offences which give rise to an issue under section 25(c) of the Bill of Rights Act (right to be presumed innocent until proved guilty).
8. Where an issue arises, a provision may nevertheless be consistent with the Bill of Rights Act if it can be considered a reasonable limit that is justifiable in terms of section 5 of that Act.<sup>[2]</sup> In assessing whether or not a limitation is justifiable the enquiry is essentially twofold:
  - does the provision serves an important and significant objective; and
  - is there a rational and proportionate connection between the provision and that objective.
9. We have reached the conclusion that, upon consideration of these issues under section 5 of the Bill of Rights Act, the Bill appears to be consistent with the rights and freedoms affirmed in the Bill of Rights Act.

## **SECTION 17: RIGHT TO FREEDOM OF ASSOCIATION**

10. Clause 7: new section 69ZZD (Special powers of designated officer during drinking water emergency) sets out powers a designated officer can exercise if the Minister has declared a drinking water emergency (clause 7: new section 69ZZA – Minister may declare drinking-water emergency). These powers include the ability to close any public place<sup>[3]</sup> and cancel any public event where that place does not have an adequate supply of safe drinking water.<sup>[4]</sup>
11. These powers give rise to an issue under section 17 of the Bill of Rights Act (the right to freedom of association) because they inhibit the ability for people to congregate and associate in public places.
12. We note that a Minister cannot declare a drinking-water emergency unless he or she believes on reasonable grounds that there is **significant risk of harm** to people arising in any way from the drinking water being supplied to them. Further, people are still free to congregate and associate in places where there is an adequate supply of safe drinking water. In view of these factors, we consider that the powers to close public places and cancel public events because of an inadequate safe drinking-water supply are justifiable under section 5 of the Bill of Rights Act.

## **SECTION 21: RIGHT TO BE SECURE AGAINST UNREASONABLE SEARCH AND SEIZURE**

13. Section 21 of the Bill of Rights Act provides:

Everyone has the right to be secure against unreasonable search or seizure, whether of the person, property, correspondence or otherwise.

14. Section 21 provides the right to be secure against unreasonable search and seizure. 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". Second, where certain actions do constitute a search or seizure, section 21 protects only against those searches or seizures that are "unreasonable" in the circumstances. Further, the requirement to produce documents under statutory authority constitutes a search for the purposes of section 21 of the Bill of Rights Act.<sup>[5]</sup>

15. Clause 7: new section 69ZP (Powers of drinking-water assessors and designated officers) provides entry, search, inspection, and seizure powers for drinking-water assessors and designated officers. In addition, a drinking-water assessor and designated officer can compel the supply of information under this clause. These powers constitute search and seizure powers in terms of section 21 of the Bill of Rights Act, and have been considered for consistency with the Bill of Rights Act.

## Inspection Powers

16. Clause 7: new section 69ZP(1)(a) (Powers of drinking-water assessors and designated officers) empowers drinking-water assessors and designated officers to enter and inspect, without a warrant, any premises (other than a dwelling-house) used by a drinking-water supplier to determine compliance with the drinking-water regime. Proposed new section 69ZP also confers powers to compel the production of information and documents.
17. The Explanatory Note clearly identifies that the underlying objective of the drinking-water regime is to "protect the health and safety of people and communities by promoting the provision of adequate supplies of safe and wholesome drinking water from drinking-water supplies." This objective is apparent from the Bill itself. Protecting the health and wellbeing of the public is an important and significant objective.
18. We note that the Bill contains the following safeguards and limitations that impact on these inspection powers:
  - a. The purposes for which the inspection powers may be exercised are limited and explicitly set out;<sup>[6]</sup>
  - b. The manner in which the powers can be exercised by drinking-water assessors and designated officers is concisely stated and limited, for example:
    - an inspection of premises under new section 69ZP(1)(a) can only take place if the drinking-water assessor or designated officer has exhausted other avenues of collecting the necessary information;<sup>[7]</sup>
    - the powers under the section must not be exercised without the written approval of a Medical Officer of Health;<sup>[8]</sup>
    - any inspection under the section must take place at a "reasonable time";<sup>[9]</sup>
    - evidence of authority and identity must be produced upon entry and any subsequent request;<sup>[10]</sup>
    - any person assisting a drinking-water assessor and designated officer can only act under their supervision or in accordance with instructions issued by the drinking-water assessor and designated officer;<sup>[11]</sup>

- an inventory of things seized must be provided;[\[12\]](#) and
- a search warrant is required before entering a dwelling-house used by a drinking-water supplier.[\[13\]](#)

c. Safeguards are included to provide protection for the parties in question, for example, no person is required to give an answer or information tending to incriminate that person, and each person must be informed of this right before the powers are exercised.[\[14\]](#) Further, the powers to compel production of information, documents and records are limited to information, documents and records that are relevant to the drinking-water regime established by the Bill and compliance with that regime.

19. In light of these restrictions and safeguards, we have formed the view that these powers are reasonable and justified limitations to section 21 of the Bill of Rights Act.
20. For completeness, we note that clause 7: new section 69ZD (Duty to keep records and make them available) requires specific parties to keep records, and under sub-clause 69ZD(4) to make them available to a drinking-water assessor, designated officer, or the Director-General on request. In light of the objective above, and the context of a regulatory regime we consider that this is consistent with the Bill of Rights Act.

#### **SECTION 25(c): PRESUMPTION OF INNOCENCE**

21. Section 25(c) of the Bill of Rights Act provides 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. 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.[\[15\]](#)
22. Offences give rise to an issue of inconsistency with section 25(c) where, once the prosecution has proven the defendant committed the act in question, the defendant must prove the defence (or disprove a presumption) on the balance of probabilities to escape liability. In other criminal proceedings a defendant must merely raise a defence in an effort to create reasonable doubt. Where a defendant is unable to prove a defence or excuse, then she or he could be convicted even though reasonable doubt exists as to her or his guilt.
23. The Bill contains a range of offences for failing to comply with the drinking-water regime including clause 7: new section 69ZZQ (Offence to supply or transport water if not registered) and new section 69ZZR (Offences against sections in this Part). These offences are strict liability offences by virtue of clause 7: new section 69ZZS (Strict liability and defence to offences). In addition, proposed new section 69ZZX (Liability of principal for acts of agents) provides that a principal can be liable in the same manner and to the same extent as if he or she had personally committed the offence. Both proposed new sections 69ZZS and 69ZZX set out a defence that a defendant may utilise if they are prosecuted. All of these clauses give rise to an issue under section 25(c) of the Bill of Rights Act because a defendant may be required to prove something to escape liability.
24. The Ministry of Health has advised us that proposed new section 69ZZQ (Offence to supply or transport water if not registered) is aimed at ensuring that drinking-water suppliers, including carriers, have an appropriate incentive for participating in the nation-wide

registration system. This participation has as its fundamental aim that of optimising safety of the water supply, through the intermediate strategies of: consumer information and accountability, oversight by the Ministry of Health, and training and continual upgrading.

25. The offences under proposed new section 69ZZR (Offences against sections in this Part) relate to various failures to comply with the drinking-water regime. According to advice from the Ministry of Health, the risks of failing to take remedial action if drinking water standards are breached, is that what may be a relatively minor problem occurring on breach of a standard may become major if not attended to and addressed as promptly as possible. Many public health risks are cumulative and synergistic in effect; hence if a standard breach is not remedied when the drinking-water supplier becomes aware of the breach both the financial and public health costs are likely to be much more significant than if early action is taken.
26. Proposed new section 69ZZX (Liability of principal for acts of agents) ensures that those parties who have ultimate accountability are able to be held responsible. This is particularly important given the widespread variety of different ownership and operating structural options.
27. In our view, these clauses have significant and important objectives. The information that can exonerate the defendant (the reasons why the defendant has deliberately not complied with their obligations under the drinking-water regime) is information that is particularly in the realm of the defendant. In addition, the penalty levels set out in clause 7: new section 69ZZV (Penalties) are graduated to reflect the nature of harm that may occur where different obligations are breached (and we note that new section 69ZZO which carries by far the highest penalty of all the offences is not a strict liability offence). Therefore, given the potential for harm to public safety and wellbeing if the drinking-water regime is not complied, we consider that the offences exhibit a rational and proportionate connection with the objective.
28. For the reasons outlined above we consider that the objectives of these provisions justify the limitation on the presumption of innocence under section 25(c) of the Bill of Rights.

## CONCLUSION

29. Overall, we have formed the view that the Health (Drinking Water) Amendment Bill appears to be consistent with the Bill of Rights Act. In reaching this conclusion, we have given particular emphasis to the purpose of this legislation, and the need to create a workable drinking-water regime.

Jeff Orr  
Chief Legal Counsel  
Office of Legal Counsel

Stuart Beresford  
Principal Adviser  
Bill of Rights/Human Rights Team

## Footnotes

1 The Bill defines "designated officer" to include a person designated as a Medical Officer of Health, a Health Protection Officer, or as "an officer who has functions, duties, or powers under this Act" (clause 7, new section 69G – Interpretation)

2 In applying section 5, the Ministry of Justice has regard to the guidelines set out by the Court of Appeal in *Ministry of Transport (MOT) v Noort* [1993] 3 NZLR 260; *Moonen v Film and Literature Board of Review* [2000] 2 NZLR 9; *Moonen v Film and Literature Board of Review* [2002] 2 NZLR 754; and the Supreme Court of Canada's decision in *R v Oakes* (1986) 26 DLR (4<sup>th</sup>)

3 Clause 7: new section 69ZZD(2)(g)

4 Clause 7: new section 69ZZD(2)(h)

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

6 Clause 7: new section 69ZL – Functions of drinking-water assessors, and proposed new section 69ZN – Functions of designated officers.

7 Clause 7: new section 69ZR(1)(a).

8 Clause 7: new section 69ZR(1)(b).

9 Clause 7: new section 69ZP(1)(a), (1)(b) and (2).

10 Clause 7: new section 69ZU – Drinking-water assessors and designated officers must produce identification.

11 Clause 7: new section 69ZQ – Ancillary Powers.

12 Clause 7: new section 69ZV – Inventory of things seized to be provided.

13 Clause 7: new section 69ZR(1)(c), new section 69ZS – Requirement for a warrant to enter dwelling house, and new section 69ZT – Standard conditions applying where warrant executed.

14 Clause 7: new section 69ZR(4)

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

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