

22 September 2022

Hon David Parker, Attorney-General

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

### **Purpose**

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1. We have considered whether the Water Services Legislation 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 24540/7.7). 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 ss 9 (right not to be subjected to disproportionately severe treatment or punishment), 14 (freedom of expression), 21 (freedom from unreasonable search and seizure), and 25(c) (right to be presumed innocent). Our analysis is set out below.

### **The Bill**

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4. This Bill is part of the package of legislation required 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, wastewater, and stormwater systems and upgrade water infrastructure.
5. The Bill is the second in a suite of Bills that will reform the three waters services. The first Bill (the Water Services Entities Bill (WSE Bill)) is before the Finance and Expenditure Committee and is anticipated to pass before the end of the year. The WSE Bill establishes four publicly-owned water services entities and sets up the ownership, governance, and accountability arrangements of these entities.
6. This Bill contains the detailed powers and functions the entities will require to deliver three waters services, including the pricing and charging mechanisms, as well as providing for the transfer of assets, liabilities, powers, and functions to the new entities. It also will make detailed consequential amendments to other legislation. Once this bill is in place, the entities will be able to deliver water services, commencing on 1 July 2024.
7. The Bill amends the Water Services Entities Act 2022 (the principal Act).

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

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### Section 9 – right not to be subjected to disproportionately severe treatment or punishment

8. Section 9 of the Bill of Rights Act affirms that everyone has the right not to be subjected to disproportionately severe treatment or punishment.
9. Clause 12 of the Bill inserts new sections into Part 9 of the principal Act. New section 311 provides that any water services charge or fee that has become payable to a water services entity is a statutory debt and is recoverable by the water services entity in any court of competent jurisdiction. Section 312 then provides for an increasing penalty regime that applies following the continued failure of a person to pay water services charges and fees.
10. The section does not provide for a maximum amount by which the debt may increase. The imposition of a penalty that can, theoretically, increase without limitation could potentially amount to disproportionately severe treatment or punishment in some cases.
11. Whether s 9 applies to a financial penalty, rather than interference with bodily integrity alone, is not entirely clear. Section 9 appears in the subpart of the Bill of Rights Act entitled “life and security of the person”, and the other sections in that subpart all deal with interferences with bodily integrity.<sup>1</sup> While it has not received detailed judicial consideration, the Court of Appeal in *Lyall v Solicitor-General* appears to have proceeded on the assumption that s 9 was applicable to property for forfeiture.<sup>2</sup> On this basis, s 9 could arguably apply to financial penalties.
12. In the event that a fine can fall within s 9, we consider that section 312 does not amount to disproportionately severe treatment or punishment. The existence of a mechanism to impose an increasing penalty does not mean that an additional penalty will always be imposed. Additionally, section 313 provides several grounds under which the penalty may be waived. These include a genuine dispute as to the person’s liability or ability to pay the debt, or if there is “some other good reason” for waiving the penalty.

### Section 14 – Freedom of expression

13. 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>3</sup>
14. There are a 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

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<sup>1</sup> See ss 8-11 Bill of Rights Act.

<sup>2</sup> *Lyall v Solicitor-General* (1997) 15 CRNZ 1 (CA), 6-7 and 9.

<sup>3</sup> See, for example, *Slaight Communications v Davidson* 59 DLR (4th) 416; *Wooley v Maynard* 430 US 705 (1977).

groups (collectively, referred to here as “water services bodies”) to provide, and sometimes publish, certain information.

15. 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.
16. 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; and
  - c. the provisions impair s 14 no more than is reasonably necessary and are 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.

### *Secondary legislation*

17. We note that new section 456 empowers regulations to be made for several purposes, including providing for disclosure requirements. These may include requirements relating to the type of information that must be provided and the frequency of reporting.
18. The 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**

19. 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.
20. 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.
21. Several new sections in the Bill engage the section 21 right:

- a. Sections 208 and 374-375 create powers for water service entities or their officers, employees, or agents to access land or buildings, including without a search warrant (s 358).
  - b. Section 354 empowers a compliance officer to take a sample of any material, substance, or thing for analysis. The Bill clarifies that this power does not extend to bodily samples.
  - c. Sections 355-357 empower a compliance officer to require certain information for the purposes of performing or exercising their functions or powers.
22. We consider that these powers in these circumstances would constitute a search or seizure for the purposes of s 21 of the Bill of Rights Act.<sup>4</sup> The next question is whether these powers are reasonable. In assessing this, we have considered the place of the search, the degree of intrusiveness into privacy, the type of seizure, and the reasons why these powers might be necessary.<sup>5</sup>
23. We consider that the search powers in ss 208, 355-357, and 374-375 are 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 Director of Monitoring and Enforcement can undertake their role, which is to ensure compliance with the principal Act;<sup>6</sup>
  - b. the process for issuing a search warrant is set out in the Bill (ss 360-365);
  - c. the warrantless search powers are limited to where a compliance officer believes, on reasonable grounds, that the exercise of such power is required in respect of a serious risk relating to water services;
  - d. in such cases, the compliance officer is restricted from entering certain kinds of land or buildings (including, for example, a home, a marae, an urupā, a Māori reservation, or a defence area) without the consent of an occupier;
  - e. the information a compliance office can require is of limited expressive value; and
  - f. a publicly owned entity which provides regulated services to the public has less of an expectation of privacy than an ordinary citizen.
24. The seizure power in s 354 contributes to ensuring compliance with the principal Act and implementing the protective elements of the infrastructure framework for the three waters system. The seizure is related to a highly regulated service and is required to collect biological information necessary for the management and enforcement of that service.

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<sup>4</sup> *New Zealand Stock Exchange v Commissioner of Inland Revenue* [1992] 3 NZLR 1 (PCP).

<sup>5</sup> *Hamed v R* [2011] NZSC 101, [2012] 2 NZLR 305 at [172] per Blanchard J.

<sup>6</sup> As provided by ss 336-338 of the Bill.

25. We subsequently consider that this power is reasonable, and therefore consistent with s 21 of the Bill of Rights Act.

### **Section 25(c) - Right to be presumed innocent**

26. Section 25(c) of the Bill of Rights Act affirms the right of everyone charged with an offence to be presumed innocent until proven guilty according to law. The right to be presumed innocent requires the Crown to prove an accused person's guilt beyond reasonable doubt.
27. In order to give full recognition to this right, a fundamental principle of criminal law, the legal burden of proving every element of an offence to the required standard of proof, and the onus for disproving any potentially available defence, must remain on the prosecution.
28. Strict liability offences give rise to a prima facie issue of inconsistency with section 25(c) because a strict liability offence may be proved by a finding that certain facts occurred without proof of mens rea. The accused is then required to prove (on the balance of probabilities) a defence to avoid liability; whereas, in other criminal proceedings an accused must merely raise a defence in an effort to create reasonable doubt.
29. The Bill contains a number of strict liability offences, primarily relating to:
- a. misuse of the wastewater network (ss 380, 381, 384, and 385);
  - b. compliance with plans, rules, directions, and compliance orders (ss 393-398); and
  - c. water use restriction and water meters (ss 399 and 400).
30. Strict liability offences may nevertheless be justifiable limits on rights under section 5 of the Bill of Rights Act. They have been considered more justifiable where:
- a. the offence is in the nature of a public welfare regulatory offence;
  - b. the defendant is in the best position to justify their apparent failure to comply with the law, rather than requiring the Crown to prove the opposite; and
  - c. the penalty for the offence is proportionate to the importance of the Bill's objective.
31. The strict liability offences in the Bill operate as part of a complex scheme to regulate the provisions of the three waters services. The scheme therefore is of a public welfare nature, in that these measures will fulfil the purpose of the Bill, which is to establish and implement a comprehensive economic regulation and consumer and infrastructure protection framework for the three waters system.
32. Additionally, the Bill contains a complete defence regime (in new section 420) which will apply to the strict liability offences introduced by the Bill. These defences include, for example, that the commission of the offence was due to an accident or some other cause outside the defendant's control (section 420(2)(a)), and that the action or event giving rise to the offence was necessary to save or protect life or health, prevent serious

damage to property, or to avoid actual or likely damage to the environment (section 420(3)(a)).

33. It is a general principle that strict liability offences are associated with penalties at the lower end of the scale. While the strict liability offences in the Bill contain significant penalties (including, for example, a potential fine not exceeding \$500,000 for an individual or \$3,000,000 for a body corporate), none of them involve imprisonment. The offences are public welfare regulatory offences and are logically connected to the maintenance of the integrity of New Zealand's water infrastructure. This is an extremely important resource management system with a wide range of potential impacts that may arise through misuse, including significant public health and service delivery risks.
34. The Bill contributes to the comprehensive overhaul of the three waters service delivery system, including ensuring that the provision of these services is tightly and consistently regulated. The new offences and penalties in the Bill therefore need to reflect the nature of the standards relating to water service delivery and regulation post-amendment. Further, the alleged offender is in the best position to justify their apparent failure to comply with the law, rather than requiring the Crown to prove the opposite.
35. We consider that the strict liability offences created by the Bill can be justified under s 5 of the Bill of Rights Act. This is because:
  - a. the offences are public welfare regulatory offences with an extremely strong public welfare basis;
  - b. the Bill contains a comprehensive statutory defence regime; and
  - c. the alleged offender is in the best position to justify their apparent failure to comply with the law, rather than requiring the Crown to prove the opposite.
36. As such, we are satisfied that the strict liability offences set out above place a justifiable limit on the right to be presumed innocent until proven guilty.

## **Conclusion**

37. 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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