

New Zealand Law Society

ENVIRONMENTAL PROTECTION AUTHORITY BILL

1. The New Zealand Law Society (Society) welcomes the opportunity to submit on the Environmental Protection Authority Bill (Bill). The Society does not wish to submit on the policy aspects of the Bill, nor the merits of the proposal to establish a new Environmental Protection Authority (EPA). However, the Society does wish to raise one point regarding the drafting of the Bill, as outlined below.

Clause 78 – Avoiding “public perception of undue political influence over regulatory decisions”

2. The explanatory note to the Bill (p2) explains that one of the reasons for establishing the new EPA is to ensure that *“public perception of undue political influence over regulatory decisions by Ministers can be dispelled”*
3. The Society considers that the Bill as drafted could do more to achieve this.
4. The legal route for political influence is section 103 of the Crown Entities Act 2004, which allows the Minister to direct a crown entity to give effect to Government policy. However Clause 78 of the Bill, which introduces new section 29A to the Resource Management Act 1991 (RMA), provides that *“The Minister may not give a direction under section 103 of the Crown Entities Act 2004 that relates to the exercise of the EPA's functions under section 42C(c).*
5. Section 42C of the RMA provides:
“The functions of the Environmental Protection Authority are -
 - “(a) to receive matters lodged under section 145:*
 - (b) to make recommendations to the Minister under section 146 or 149ZB in respect of a matter referred to in paragraph (a):*
 - (c) to make decisions under section 139 on applications for certificates of compliance for proposals or activities that are related to proposals of national significance:*
 - (d) to provide secretarial and support services to boards of inquiry appointed under section 149J:*

(e) to exercise any powers or perform any functions or duties delegated to it by the Minister under section 29(4);

(f) to exercise any other functions specified in this Act.”

6. Although section 29A constrains the Minister's powers of direction in relation to decisions under section 139 (because that is the function referred to in section 42C(c)), it still allows the Minister to direct the EPA to implement Government policy when undertaking a range of other statutory functions, including, for example, recommendations made to him or her under section 146 of the RMA.

7. Section 146 provides:

“(1) No later than 20 working days after receiving a matter lodged under section 145, the EPA must recommend to the Minister that he or she make a direction under section 147(1)(a), (b), or (c).

(2) The EPA may also recommend to the Minister that he or she exercise 1 or more of the following powers:

(a) if the EPA recommends that the Minister make a direction under section 147(1)(a) or (b),—

(i) to make a submission on the matter for the Crown:

(ii) to extend the 9-month period by which any board of inquiry appointed to determine the matter must report under section 149R(1) because special circumstances exist:

(b) if the EPA recommends that the Minister make a direction under section 147(1)(c),—

(i) to make a submission on the matter for the Crown:

(ii) to appoint a project co-ordinator for the matter to advise the local authority:

(iii) if there is more than 1 matter that relates to the same proposal, and more than 1 local authority, to direct the local authorities to hold a joint hearing on the matters:

(iv) if the local authority appoints 1 or more hearings commissioners for the matter, to appoint an additional commissioner for the matter.

- (3) *The EPA must serve a copy of its recommendation on the applicant and the local authority.*
- (4) *The 20-working day time frame specified in subsection (1) applies subject to section 149(5) and (6)."*

8. There is potential here for the Minister to oblige the EPA to give the Minister advice that implements Government policy, which potentially undermines the desired independence of the EPA as an expert statutory advisory agency at arm's length from the Minister.
9. Similar comments apply to functions delegated by the Minister under section 29(4) of the RMA. The Minister can require the delegate to give effect to Government policy.
10. This consequence would be avoided if the Minister were prohibited from making any direction under section 103 of the Crown Entities Act 2004 at all. It is difficult to see how a direction could ever be appropriate in the exercise of statutory functions, especially ones that lead to judicial or quasi-judicial processes. Questions of national interest can be addressed in the initial decision the Minister makes under section 142 of the RMA, but that is where it is appropriate for his or her involvement to end. More importantly, national policy can be taken account of in decisions of the EPA through promulgation of national policy statements under Part 5 of the RMA.

Recommendation

11. Clause 78 should be amended so that the proposed new section 29A simply prohibits the Minister from making a direction under section 103 of the Crown Entities Act 2004 at all.

Conclusion

12. The Society does not wish to appear in support of this submission. However, the Society is willing to meet with the Committee or officials advising it if the Committee considers that would be of assistance.



Jonathan Temm
President
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