



NEW ZEALAND
LAW SOCIETY

NZLS EST 1869

FOOD SAFETY LAW REFORM BILL

15/09/2016

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1. Summary

- 1.1 The New Zealand Law Society welcomes the opportunity to comment on the Food Safety Law Reform Bill (Bill).
- 1.2 The Law Society makes submissions on two aspects of the Bill:
- 1.2.1 Clause 30 introduces a new section 292A into the Food Act 2014, giving the Chief Executive the power to require the provision of information from persons other than operators of food businesses in circumstances involving urgency and serious risk of illness or injury to consumers. The Law Society makes a suggestion regarding the drafting of this provision to ensure it captures all confidentiality obligations.
- 1.2.2 Policy documents that were precursors to the Bill recognised a need to reform the design of delegated legislation under the food safety Acts because of a lack of clarity and coherence in this area. The Law Society identifies concerns about the use of tertiary legislation proposed in the Bill and recommends a comprehensive review of the use of such notices in food safety legislation.

2. New section 292A of the Food Act 2014

- 2.1 Clause 30 of the Bill contains a key reform: a new section 292A that gives the Chief Executive the power to require information from persons other than operators of food businesses. The Inquiry into the WPC80 Incident, which is essentially the genesis of the Bill, noted the difficulty that the Ministry for Primary Industries had in getting access to laboratory test results in an AgResearch report on which Fonterra's advice about contamination was based.¹ It took over 48 hours to get the information and the delay could have made a significant difference to the manner in which MPI responded. The problem was the need to overcome confidentiality restrictions. The Inquiry recommended a statutory power that can compel disclosure from third parties providing services to food businesses and override any conflicting obligations, such as confidentiality requirements. MPI and Cabinet agreed.²
- 2.2 For this reason, new section 292A(7) in clause 30 of the Bill states:

*No person is excused from compliance with a requirement to provide information under this section by reason only that compliance with that requirement would **constitute breach of any contract or agreement.***

[Emphasis added]

1 Government Inquiry into the Whey Protein Concentrate Contamination Incident *The WPC80 Incident: Causes and Responses* (November 2014) at 71.

2 MPI Public Discussion Paper No: 2015/08 *Policy Proposals for inclusion in the Food Safety Law Reform Bill* (March 2015) at 36-38; Cabinet Economic Growth and Infrastructure Committee paper, *Food Safety Law Reform Bill: final policy approvals* (15 July 2015) at [39] to [44].

- 2.3 The short point is that confidentiality obligations do not only arise by virtue of contracts or agreements. Confidentiality obligations can arise by deed and can also be imposed by equity simply if someone receives confidential information in circumstances where the recipient ought to realise that the information is confidential.³
- 2.4 The new section 292A(7) accordingly does not reflect all the ways in which confidentiality obligations arise. The proposed subsection also contains a redundancy, in that a "contract" is a legally enforceable "agreement".
- 2.5 The Law Society accordingly suggests that the select committee may wish to consider the following amendment to the proposed subsection:

No person is excused from compliance with a requirement to provide information under this section by reason only that compliance with that requirement would constitute breach of any ~~contract or agreement~~, deed or equitable obligation of confidence.

3. Legislative design

- 3.1 Policy documents that were precursors to the Bill recognised a need to reform the design of delegated legislation under the food safety Acts because of a lack of clarity and coherence in the area.⁴ The Inquiry into the WPC80 Incident referred in both of its reports to problems with the way in which delegated legislation has been used, particularly under the Animal Products Act 1999.⁵ The intention for the Bill was accordingly that it would amend regulation and notice-making provisions in the Food Act, the Animal Products Act and the Wine Act 2003 to provide guidance and direction on when a regulation or a notice is the appropriate instrument to use, and to ensure that drafting was consistent with legislative best practice.⁶
- 3.2 While the Law Society supports the goal of improving the design of delegated legislation concerning the food safety system, the Law Society has concerns about the implementation of the intended reforms in the Bill. As the Bill is currently drafted, the Law Society considers that the goals of the intended reforms have not been achieved.
- 3.3 The MPI Public Discussion Paper noted the proliferation of requirements being set at notice level and that appropriate use of notices usually involves one-off situations or

3 See, for example, the survey of the case law authorities in *Hunt v A* [2008] 1 NZLR 368 (CA) at [67] to [102]. For completeness, the Law Society notes that obligations of confidence could also arise by statute or court order but (understandably) it does not appear that it is the policy intent of the Bill to override those types of confidentiality obligations.

4 MPI Public Discussion Paper No: 2015/08 *Policy Proposals for inclusion in the Food Safety Law Reform Bill* (March 2015) at 14-16; Cabinet Economic Growth and Infrastructure Committee paper, *Food Safety Law Reform Bill: final policy approvals* (15 July 2015) at [74] to [80].

5 See, in particular, Government Inquiry into the Whey Protein Concentrate Contamination Incident *Report on New Zealand's Dairy Food Safety Regulatory System* (December 2013) at 31-32.

6 Cabinet Economic Growth and Infrastructure Committee paper, *Food Safety Law Reform Bill: final policy approvals* (15 July 2015) at [75] and [79].

where it is necessary to respond quickly to changing circumstances.⁷ However, the Cabinet paper records the Minister's view that one-off technical matters are not the only proper subject matter of notices (i.e. that notices are "the appropriate instrument in more circumstances than these") but does not clarify the other circumstances in which notices are considered to be appropriate. The Bill itself provides for the use of notices for a variety of different matters and introduces the concept of the issue of notices to "supplement" regulations made under the Act.⁸

- 3.4 As a matter of principle and legislative best practice, delegated legislation setting rules of general application should be contained in regulations. Regulations are subject to well established constitutional checks and balances. They are drafted by Parliamentary Counsel, approved by Cabinet, made by the Governor-General in Council, subject to review by Parliament's Regulations Review Committee (RRC), may be disallowed by Parliament or the RRC, and are publicised by notice in the *Gazette*. In particular, the oversight of the RRC and the Parliamentary Counsel Office provide important safeguards to ensure the drafting quality and legitimacy of the content of law contained in regulations.
- 3.5 By contrast, notices issued by the Chief Executive are subject to just two of those checks and balances: all notices must be "published" and some notices are stated to be disallowable instruments. Of these, the second is of questionable practical effect: the power of the House to disallow delegated legislation was introduced in 1989 but it has been used only once in that period – in 2013.⁹
- 3.6 For any given subject matter, the use of tertiary legislation should be justified by showing it to be unavoidable in the particular circumstances and necessary to the attainment of the statutory purpose and functioning of the statutory scheme. It is not apparent from the Bill or the Parliamentary materials whether the various notices that the Bill proposes to authorise are necessary and otherwise unavoidable as a law-making mechanism. The select committee should seek a clear articulation from officials of the design philosophy behind the use of delegated legislation in the Bill, the circumstances in which tertiary legislation is considered to be appropriate, and a specific justification for each provision in the Bill that authorises the use of tertiary legislation for law-making.
- 3.7 At present, the relationship in the Bill between statutory regulations and notices lacks coherence. By way of example, a potential justification for the authorisation of the issue of notices is that they may be necessary where a notice is a "one-off" and affects only one person or a small number of persons, or only one business enterprise. In this sense, notices represent person or enterprise-specific, low-level legislation that are not sufficiently important to merit consideration by Cabinet, PCO and the RRC. Yet the Bill turns this presumed justification on its head by authorising the making of statutory

7 MPI Public Discussion Paper No: 2015/08, Policy Proposals for inclusion in the Food Safety Law Reform Bill (March 2015) at 14-16

8 See for example clauses 6, 17, 20, 23.

9 See Joseph *Constitutional and Administrative Law in New Zealand* (4th ed, Thomson Reuters, Wellington, 2014) at [26.2].

regulations that affect single persons. For example, clause 23 proposes to insert in the Food Act 2014 a new section 133C, which reads:

- (1) The Governor-General may, by Order in Council made on the recommendation of the Minister, make regulations for all or any of the following purposes:
 - (a) specifying a person who trades in food as a person to whom this subpart applies:
 - (b) setting requirements that apply to that person in relation to –
 - (i) the content of procedures referred to in sections 133B(a); and
 - (ii) the conducting of simulations and other tests of those procedures; and
 - (iii) the implementation of those procedures to trace food and recall food:

...
- (3) The Chief Executive may, by notice under section 405, supplement regulations made under this section.

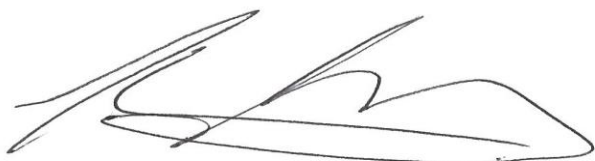
- 3.8 Other regulation-making powers (for example, under section 133F of the Food Act 2014 as also inserted by clause 23 of the Bill) similarly authorise statutory regulations that apply to specified persons who trade in food. Given that the Bill authorises regulations to be made with respect to single, specified persons, the justification for authorising notices that might apply to specified persons is not readily apparent. There is no particular point of distinction.
- 3.9 Of particular concern are the various provisions in the Bill, such as those found in section 113C(3) or section 133F(3), authorising the issue of notices by the Chief Executive to "supplement" regulations. Instead of addressing the policy concern about the proliferation of legal requirements being set at notice level under the current Acts, these provisions will have the tendency to exacerbate the problem. The provisions in question have the potential to operate as a form of Henry VIII clause, enabling the Chief Executive to supply and change rules of general application in respect of the food safety system by fiat, rather than going through the checks and balances of the regulation-making process. Faced with the choice of incorporating intended rules into regulations or leaving them for the subject of notices "supplementing" the regulations, the incentive created by the Bill is to leave matters to be dealt with by notice and avoid the oversight provided by PCO and the RRC. The Law Society does not consider that the controls on the issue of notices "supplementing" regulations provided for in clause 41 (introducing a new section 405 of the Food Act), clause 153 (introducing a new section 167 of the Animal Products Act) and clause 236 (introducing a new section 120 of the Wine Act) are sufficient to deal with this concern.
- 3.10 Given that the Bill does not appear to deliver adequately the reform needed to the legislative design of the Animal Products Act 1999, the Wine Act 2003 and the Food Act 2014, the Law Society submits that the select committee should broaden its inquiry to

examine the use of notices that can currently be issued under the principal Acts, to ensure that reform in this area is comprehensive and not confined to the provisions that are currently amended by the Bill.

3.11 In summary:

- 3.11.1 There is a need to reform the design of delegated legislation under the current food safety Acts because of a lack of clarity and coherence in the area.
- 3.11.2 The Bill does not provide the clarity and coherence required.
- 3.11.3 As a matter of principle, delegated legislation setting rules of general application should be contained in regulations because of the checks and balances involved in the regulation-making process.
- 3.11.4 The use of tertiary legislation should be justified by showing it to be unavoidable in particular circumstances and necessary to the attainment of the statutory purpose and functioning of the statutory scheme.
- 3.11.5 Clauses that generally authorise the issue of notices "supplementing" regulations are problematic because of the incentive they create to defer the content of rules of general application to be made in this manner, rather than being made through the regulation-making process and its attendant checks and balances.
- 3.11.6 The select committee should seek a clear articulation from officials of the design philosophy behind the use of delegated legislation in the Bill, the circumstances in which tertiary legislation is considered to be appropriate, and a specific justification for each provision in the Bill that authorises the use of tertiary legislation for law-making.
- 3.11.7 The select committee should broaden its inquiry to examine the use of all notices that are currently able to be issued under the Animal Products Act 1999, the Wine Act 2003 and the Food Act 2014 so as to ensure that reform of legislative design in this area is comprehensive.

3.12 The Law Society wishes to be heard.



Kathryn Beck

President

15 September 2016