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# Water Services Bill

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*17/02/2021*

## Submission on the Water Services Bill

### **1 Introduction**

- 1.1 The New Zealand Law Society | Te Kāhui Ture o Aotearoa (**Law Society**) welcomes the opportunity to make a submission on the Water Services Bill (**Bill**).
- 1.2 The Bill proposes to replace Part 2A of the Health Act 1956 with a stand-alone Act which will comprehensively reform the drinking water regulatory system and improve the regulation and performance of wastewater and stormwater networks.
- 1.3 The Law Society's submission identifies several areas where the drafting could be amended to improve the clarity, certainty and practical workability of the Bill.
- 1.4 The Law Society does not wish to be heard.

### **2 Clause 2 – Commencement**

- 2.1 Clause 2(1) provides that the Act will commence on a date set by Order in Council or two years after Royal assent (whichever happens first). The Regulations Review Committee has repeatedly expressed concerns about the practice of handing the power of commencement to the Executive.<sup>1</sup> It has stated that if a fixed commencement date is not incorporated in a bill, the bill should incorporate a provision that it be brought into force automatically after a specified period of no more than one year following its enactment. Moreover, the Committee has stated that if a commencement date is to be set by Order in Council, the reason for this be included in any explanatory memorandum accompanying the bill and be considered by the select committee considering the bill. The Government has since accepted that reasons for setting a commencement date via Order in Council should be included in explanatory notes to Government bills.<sup>2</sup>
- 2.2 The Bill's explanatory note gives no explanation of the reason for commencement by Order in Council or the two-year period before automatic commencement takes place. Nor does it give any indication of how commencement dates may be staggered under clause 2(2).<sup>3</sup>
- 2.3 The Law Society recommends that the select committee seeks advice from officials so that it can assess whether the current commencement arrangements are justified.

### **3 Clause 3 – Purpose**

- 3.1 Clause 3(a) provides that a purpose of the Act is to provide “a drinking water framework that is consistent with internationally accepted best practice”. There is potential for uncertainty about what constitutes “internationally accepted best practice”. Given the

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<sup>1</sup> Regulations Review Committee “Investigation into the Commencement of Legislation by Order in Council” [1996] AJHR I16K at 7; Regulations Review Committee “Investigation into the Local Electoral Act Commencement Order 2001 and the Commencement of Legislation by Order in Council” [2002] AJHR I16L at 17; Regulations Review Committee “Activities of the Regulations Review Committee in 2014” (8 August 2014) at 15–16.

<sup>2</sup> “Government Response to the Report of the Regulations Review Committee: the Investigation into the Commencement of Legislation by Order in Council” [1997] AJHR A5.

<sup>3</sup> Compare the explanatory note for the Taumata Arowai—the Water Services Regulator Bill, which gave reasons why two clauses in that Bill had a delayed commencement.

central role of purpose provisions in interpretation, this could lead to interpretative difficulties.

- 3.2 International best practice is likely to change over time, which may lead to difficulties with interpreting the substantive provisions of the Bill. Nor is it clear what instruments constitute “international best practice”, and multiple sources might be pointed to as indicating best practice. Identifying with more precision what international best practice is relevant would improve the clarity of the legislation.

#### **4 Clause 39 – Review by Taumata Arowai**

- 4.1 Clause 39(2) provides that Taumata Arowai may take “any action” it considers necessary in response to a complaint. It may be helpful to clarify that these actions can only be exercised in accordance with the statutory powers granted to Taumata Arowai (so that it is clear to consumers that Taumata Arowai is limited to its statutory powers in responding to a complaint).

#### **5 Clause 61 – Special powers of Taumata Arowai during drinking water emergency**

- 5.1 Clause 61 grants special powers to Taumata Arowai that may only be exercised during a drinking water emergency. Any emergency direction made under these special powers may be exempted from the provisions of Part 3 of the Resource Management Act 1991 (RMA).<sup>4</sup>
- 5.2 However, the Bill does not specify how the clause 61 special powers relate to other statutory obligations and powers. The express provision for Part 3 of the RMA could be taken to imply that emergency directions under clause 61 do not override statutory powers or obligations other than those under the RMA. If that is the intention, it should be stated clearly.
- 5.3 Conversely, if directions under clause 61 are intended to override all other statutory rights and obligations, then this should be made clear. As decisions relating to emergency directions will need to be made quickly, certainty about the relationship between directions and other statutory rights and obligations will be essential.

#### **6 Clause 92 – Powers of the District Court on appeal**


- 6.1 Clause 92(4) grants powers to the District Court to deal with matters on appeal, including powers to confirm, vary, set aside or substitute decisions and compliance orders.
- 6.2 The proposed powers do not include remitting the decision or compliance order to the decision-maker. Adding a power to remit the decision would give the Court more flexibility to craft appropriate orders to resolve an appeal – for example, where the Court has identified a legal error in a decision which requires additional fact-finding or expert consideration, and there is some benefit in a finding on those issues at first instance, rather than addressing them for the first time on appeal.
- 6.3 As well, a provision providing for the application of the District Court Rules to any appeal, such as in section 150 of the Accident Compensation Act 2001, would assist parties to an appeal (and the Court) by confirming the applicable procedure on an appeal.

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<sup>4</sup> Clause 64(1) of the Bill.

**7**      **Clause 191 – Levy**

7.1      Clause 191 provides for the costs of Taumata Arowai to be recovered by a levy but does not expressly state who can be levied. It seems implicit that the Bill seeks to levy drinking water suppliers,<sup>5</sup> but it would aid certainty to specify who can be levied.

A handwritten signature in black ink, appearing to read 'Herman Visagie', written in a cursive style.

Herman Visagie  
**Vice-President**

17 February 2021

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<sup>5</sup> See clause 191(2)(c), which requires the Minister to consult drinking water suppliers, or representatives of suppliers, “who will be affected by the levy”, before making a recommendation to prescribe a levy. (See also clause 53(4): applications for registration as a drinking water supplier must be accompanied by the fee or levy prescribed in regulations made under section 190 or 191, and clause 55(5): an owner of a drinking water supply must pay any prescribed fee or levy when applying to renew their registration.)