REVIEW OF THE HEALTH (DRINKING WATER) AMENDMENT BILL

FOR LOCAL GOVERNMENT NZ

July 2006

James Tennent
Longview (HB) Limited

HISTORY

This Bill has been a long time in the making. In November 2000 Cabinet agreed that a risk-management-based framework for drinking water should be introduced. Cabinet reconsidered the issue in June 2005. The Bill was introduced to Parliament in July 2006.

COMPLIANCE STATEMENT

The Regulatory impact and business compliance statement from the June 2005 Cabinet paper noted that some local authorities may face extra costs ...

> "It is proposed to amend the Local Government Official Information and Meetings Act 1987 so that territorial authorities would be required to include any drinking-water information it holds on drinking water supply in the building (including if no information is held) on a LIM when they issue one. For example, a LIM may state whether a building is on a network supply and its grading, and whether a "boil water notice" is in place, if the territorial authority holds this information."

> "Some territorial authorities, as issuers of LIMs, would face transitional costs of setting up processes and databases to be able to include on the LIM the grading and other known information on water supply to a building. The ongoing costs per LIM would be small, and are likely to be passed on to prospective property purchasers who are the purchasers of LIMs."

SUMMARY OF HEALTH (DRINKING WATER) AMENDMENT BILL

The purpose of the Bill is "to protect the health and safety of people and communities...". This is noble and would be supported by all local authorities. However, it is not clear that this Bill will lead to a significant improvement in the quality of the water being supplied to most New Zealanders.

For example, the latest survey of drinking water suppliers conducted by ESR in 2004 showed that over 70% of all New Zealanders were receiving water that was in compliance with the drinking water standards. Their report also noted that the percentage of people receiving suitable drinking water has been increasing over the last few yeas. There are also over 10% of the population that receives its drinking water from its own supplies, and therefore fall's outside the proposed regime of this Bill.

The ESR report estimates that only about 15% of New Zealanders are receiving water from drinking water suppliers that do not meet the drinking water standards. Most of these suppliers operate small supply systems (i.e. supplying less than 500 people). Therefore the regime being proposed by this Bill will impose costs on the majority of complying drinking water suppliers, in an attempt to improve the quality of drinking water being provided by a very few suppliers. Also by definition drinking-water supplier does not include a temporary drinking-water supplier or a self-supplier.

Furthermore the need for this Bill as stated by the Ministry of Health is that the present legislative framework, dealing with the safety of drinking water is contained in the Resource Management Act 1991, the Health Act 1956, and the Building Act 2004. There is no demonstration that things are not working, nor that there are any significant failures in the present system. The commentary on the Bill notes that water-borne diseases have recently occurred in Canada, USA, and UK. There is therefore an implicit assumption that New Zealand has a similar disease risk profile as these countries, which may not be the case.

The Bill sets up a regime whereby the control of pollution and contamination into waterways would be managed through the Health Act, while it ignores the requirements imposed by the Local Government Act 2002, on those drinking water suppliers who are also local authorities.

The Bill provides for the Director-General of Health to appoint assessors and officers who will be responsible for auditing and requiring drinking water suppliers to meet the requirements of the Bill, the drinking water standards, and their public health risk management plans.

The powers of these officials create a number of significant issues for local government. The ability of Government officials to direct and impose costs on local authorities could be in direct contravention of the authorities Annual Plan and Long Term Council Community Plan obligations. The ability to impose costs on drinking water suppliers, and local authorities where full costs can not be recovered from drinking water suppliers has the potential to either impact on the operations of local authorities or require increases in the level of rates.

While provision is made in the Bill to be able to appeal the decision of the assessors and officers through the District Court process, doing so will impose further costs on local authorities.

The wording of a number of the clauses in this Bill appear contradictory leading to uncertainty in what a drinking water supplier is actually required to do. For example on one hand they must take all practicable steps to comply with the drinking water standards, in another clause they must remedy actions to ensure that they do comply with the drinking water standards. Definitions of the "source of water" are lacking, and the definition of new sources of raw water is unclear, leading to confusion as to what may or may not be required in certain situation.

This Bill does not acknowledge the asset management approach adopted by local authorities for the management of all of its infrastructure. The Bill requires medium and large drinking water suppliers to develop and implement a public health risk management plan, which could be used as the basis of encouraging the safety management culture of those suppliers. However, the Bill also imposes a centralised bureaucratic system for checking compliance with the requirements of the Bill, the drinking water standards, and the suppliers public health risk management plans, which runs counter to the philosophy of a safety management system.

The incentive on drinking water suppliers to comply with the drinking water standards, apart from a duty of care to their customers, could therefore become the avoidance to significant costs and fines created by this Bill.

Considerable compliance costs will be imposed on local authorities by the introduction of this Bill, whether or not they are drinking water suppliers.

COMMENTS ON THE BILL CLAUSE BY CLAUSE.

1 Title of the Bill

2 Commencement

This Bill repeals sections 60 to 63 of the Health Act 1956 and replaces them with a new Part 2 being clauses 69A to 69ZZX. Sections 60 to 63 of the Health Act generally deal with the pollution of water supplies. These matters are also dealt with in new Part 2A (inserted by clause 4). However the existing sections 60 to 63 of the Health Act will remain in force until 1 April 2012, and the new clauses will come into force from 1 April 2007. So there will be a five-year transition period when the old and new sections will apply. This provides for the staged requirement to comply depending on the size of the drinking water supplier.

3 Principal Act amended

The principal Act is the Health Act 1956

PART 1

Amendments to principal Act

Clause 4 amends section 23(f) of the Health Act by conferring a reporting function in relation to drinking water on local authorities.

Clause 5 amends section 39(1)(a) of the Health Act by replacing the requirement for a dwellinghouse to have an adequate and convenient supply of "wholesome water" with a requirement to have an adequate and convenient supply of "potable water." There is little actual effect of this as both have similar definitions. Furthermore this Bill uses both "wholesome" and "potable" to describe the quality of water in a number of different clauses.

Clause 6 amends the Health Act by repealing sections 60 to 63, of the Health Act, which comes into force on 1 April 2012.

Clause 7 amends the principal Act by inserting a new Part 2A relating to drinking water. This will come into effect on 1 April 2007.

Clause 69A Purpose

The purpose of new Part 2A, which is to:

> *"Protect the health and safety of people and communities by promoting safe and wholesome drinking water."*

Clauses 69B to 69F deal with the staged application of certain provisions of the new Part 2 to existing drinking water suppliers.

- Large suppliers must comply by 1 April 2008
- Medium suppliers must comply by 1 April 2009
- Minor suppliers must comply by 1 April 2010
- Small suppliers must comply by 1 April 2011, and
- Very small suppliers must comply by 1 April 2012.

Ports and airports are considered drinking water suppliers by this Bill. Local Authorities that own the majority of shares in various port or airport companies will need to consider their shareholder obligations in relation to the impacts this Bill may have on the various operations of those business.

The commencement of this Bill varies depending on the nature of the drinking water supplier from 1 April 2007 to 1 April 2011 as noted above. Councils should ensure that their Long Term Council Community Plans can provide for the requirements of this Bill.

Clause 69G Interpretation

A whole range of terms is defined for the new Part 2A of the Health Act. However, some terms used in this Bill are not defined, in particular "source of water".

As noted above both "potable" and "wholesome" are defined and appear to be interchangeable.

Clause 69H All practicable steps.

This Bill requires a drinking-water supplier to take "all practicable steps" in relation to a number of matters. This clause defines what is meant by this term being:

> *in relation to the achievement of any particular result, means all steps to achieve that result that it is reasonably practicable to take in the circumstances, having regard to:*
>
> *(a) the nature and severity of the harm that may be suffered if the result is not achieved; and*
> *(b) the current state of knowledge about the likelihood that harm of that nature and severity will be suffered if the result is not achieved; and*
> *(c) the current state of knowledge about harm of that nature; and*
> *(d) the current state of knowledge about the means available to achieve the result, and about the likely efficacy of each; and*
> *(e) the availability and cost of each of those means.*
>
> *(2) To avoid doubt, a person required by this Part to take all practicable steps is required to take those steps only in respect of circumstances that the person knows or ought reasonably to know about.*

Drinking water suppliers are required to take "all practicable steps" to achieve numerous requirements imposed by this Bill, being listed in clauses: 69S, 69U, and 69V. This definition also implies a duty on drinking water suppliers to keep its knowledge about affairs current.

However, local authorities may wish to develop policy statements, similar to their statements on "significance" recording what they believe to be "all practicable steps" for the purpose of this Bill. They should probably also seek legal advice and public comment from their ratepayers on what they believe "all practicable steps" are.

Clause 69I Part binds the Crown

This clause provides that (with certain exceptions relating to the New Zealand Defence Force) the new Part 2A binds the Crown.

Registration of drinking-water suppliers, and certain self-suppliers

The existing registration system and the people and organisations on it, are maintained by clause 10 of this Bill.

Clause 69J Drinking water register

This clause provides for the Director-General to maintain a register of networked suppliers, bulk suppliers, water carriers, designated ports and airports, and also those self-suppliers who elect to be entered on the register, and also their supplies (the drinking-water register).

Drinking water suppliers are required to list the source of the water used. However as noted above the "source of water" is not defined. However, drinking water suppliers should be able to list the location from where they draw their supplies of drinking water. For clarity the wording of "source of water" which appears several times throughout this Bill should be changed to better reflect the location or body of water from which a drinking water supplier takes its water.

Clause 69K Applications for registration

Obliges any person who intends to supply drinking water from a drinking-water supply, or who is or intends to be a water carrier, to apply to be registered on that register.

Clause 69L Renewal of registration by water carriers

Requires persons registered as water carriers to renew their registration at yearly intervals.

Clause 69MDuty to update details on register

Provides that persons who are on the drinking-water register must notify the Director-General of any changes that must be made to the particulars on the register.

Clause 69N Removal from register

Requires the Director-General to remove a person's name from the drinking-water register at that person's request if the person is registered as a specified self-supplier or a water carrier and the Director-General is satisfied the person is no longer a specified self-supplier or water carrier.

The Director-General is also able to remove the name of a person registered as a water carrier from the drinking-water register in the case of failure or inability to comply with the requirements of new Part 2A.

Drinking-water standards

Clause 69O Minister may issue, adopt, amend, or revoke drinking water standards.

Provides that the Minister may issue, adopt, amend, or revoke drinking-water standards and sets out the matters that those standards may cover. Among other things, the standards may include requirements as to the method of transporting water, specifications as to drinking water composition, monitoring requirements for drinking water, test methods to be used, and remedial actions to be taken if non-compliance is detected. Drinking-water standards may also include non-binding guidelines for avoiding adverse aesthetic effects in drinking water, which are defined as adverse effects on the colour, clarity, smell, taste, or general appearance of drinking water that make it unpleasant for an average person to drink.

New sections 69P to 69R set out the details of how drinking-water standards must be issued. Clause 13 of this Bill deems that the existing Drinking Water Standards for New Zealand 2000 published in August 2000 by the Ministry o Health, were made in accordance with this Part of the Health Act.

Clause 69P Minister must consult before issuing, adopting, or amending drinking-water standards

Allows the Minister to issue, adopt, amend, or revoke drinking water standards. The drinking water standards are deemed to be regulations for the purpose of the Regulations (Disallowance) Act 1989, but are not regulations for the purpose of the Acts and Regulations Publications Act 1989.

Before issuing, adopting, or amending drinking water standards, the Minister must be satisfied that "*appropriate consultation*" has been carried out, unless they need to be issued, adopted, or amended urgently. The clause describes "adequate consultation" as being adequate and appropriate notice, reasonable opportunity to make submissions, and appropriate consideration.

Given that this Bill proposed significant penalties for not complying with the drinking water standards, there should be more certainty provided to the drinking water suppliers as to the process that must be followed before the drinking water standards can be amended.

Clause 69Q Drinking-water standards must be notified and made available

Provides that the drinking-water standards, and any amendments to them, must be publicly notified and made available for inspection free of charge.

Clause 69R Commencement of drinking-water standards

As is typical for regulations, the drinking water standards come into force 28 days after they have been published in the *Gazette.*

Duties of drinking-water suppliers and temporary drinking-water suppliers

Clause 69S Duty of suppliers in relation to provision of drinking water

Imposes a duty on networked suppliers, bulk suppliers, and water carriers to take all practicable steps to ensure that an adequate supply of drinking water is provided to each point of supply.

The supply of water can not be interrupted for more than 8 hours unless certain conditions are met. This duty is also subject to clause 69T.

Clause 69T Duties where risk to water is actual or foreseeable

Sets out what a drinking water supplier must do if it considers that its ability to maintain an adequate supply of water is *or may be* at risk for any reason.

Under such conditions the local authority would be requested to use its powers to assist the drinking water supplier to provide adequate supply.

What "may be a risk" to the supply of drinking water could therefore range from the possibility of reduced rainfall, to increased demand due to increasing population. It would therefore appear that a local authority may be required to use its powers to make rain or reduce population growth to assist in the supply of drinking water!!

Clause 69U Duty to take reasonable steps to contribute to protection of source of drinking water

Every drinking water supplier must take reasonable steps to contribute to the protection from contamination of each source of raw water.

Example of reasonable steps are provided: being making submissions, and contributing directly to improved catchment management.

It would appear from the examples of reasonable steps that a drinking water supplier is required to contribute to the protection of the area from where it collects its raw water, rather than the actual source of water itself. However by using the term "source of water" the Bill creates a level of uncertainty as to what is actually required.

Clause 69V Duty to take all practicable steps to comply with drinking-water standards

A drinking water supply need not actually comply with the standards, it only needs to take *all practicable steps* to comply.

Clause69W Duty to take reasonable steps to supply wholesome drinking water

It will be recalled that clause 5 of this Bill deleted the term "wholesome water" in the Health Act and replaces it with "water that is potable." However, it appears that the two terms are inter-changeable

Examples of "reasonable steps" as required by Clause 69U were provided. They are not for this clause. It is therefore not clear whether they are to be used as examples of what is expected here, or something else is expected of drinking water suppliers.

Clause 69X Duties in relation to new water sources.

Before connecting a new source of raw water to the drinking-water supply, a drinking-water supplier **must** ensure that raw water from that new source:

(a) if untreated, will contain no determinands that exceed the maximum acceptable values specified in the drinking-water standards when it is supplied; or

(b) is, or will be, treated in such a way that it will contain no determinands that exceed the maximum acceptable values specified in those standards when it is supplied.

This clause appears to require a higher standard of care for "new sources" of raw water than is required by clause 69V. There is also a conflict with the use of "raw" and its definition.

Raw water: means water intended for domestic and food preparation use that has been taken from a source of water but:

(i) has not been assessed for suitability for that use without treatment; or
(ii) is not suitable for that use without treatment and has not yet been treated to make it suitable for that use; but

It does not include:

(i) water that has been assessed as suitable for that use without treatment; or
(ii) water that has been treated to make it suitable for that use; or
(iii) water that has not entered any pipe, tank, or cistern leading from a source of raw water

69X(a) implies that the water must have been assessed, so it can not be raw water.

69X(b) if the water has been treated, then by definition it is also not raw water.

The wording of this clause should be amended to remove "raw" in both instances to make sense.

The other issue is to determine what a new source of water actually means. Is it water some distance upstream that has not yet been tested from the supply intake? Or does it mean something else?

Clause 69Y Duty to monitor drinking water

A drinking water supplier is only required to take all practicable steps to ensure that drinking water complies with the drinking water standards (Clause 69V), unless the supply of water is new (clause 69X).

However, a drinking water supplier **must** monitor the drinking water supply, to:

(a) determine whether it complies with the drinking-water standards; and

(b) detect and assess public health risks generally.

The monitoring **must** be carried out in accordance with the drinking water standards.

Clause 69Z Duty to prepare and implement public health risk management plan

Requires drinking water suppliers (exemption is given to small and very small supplies) to prepare a public health risk management plan. What is required of the public health risk management plan is specified in 69Z(2). However clause 69Z(2)(a)(v) allows for additional requirements to be imposed by the Director-General.

Therefore a drinking water supplier has no certainty of what will be required in its public health risk management plan, and no apparent recourse if it has difficulty in agreeing to any such requirements.

Drinking water suppliers also need to take all practicable steps to ensure that their public health risk management plan is approved.

Every drinking water supplier that is required to produce a public health risk management plan must implement that plan, within one month of approval.

Clause 69ZA Medical Officer of Health may require preparation and implementation of public health risk management plan

A Medical Officer of Health may, if he or she considers it to be in the interests of public health to do so, require a drinking-water supplier who supplies drinking water from a small drinking-water supply or a very small drinking-water supply, or a temporary drinking-water supplier, to prepare and implement a public health risk management plan in relation to that supplier's drinking-water supply.

Clause 69ZB Duration of plans

The duration of Public Heath Risk Management Plans can not exceed 4 years.

Clause69ZC Review and renewal of plans

Before Public Health Risk Management Plans are due to expire, they must be reviewed, and new approval sought.

Clause 69ZD Duty to keep records and make them available

Every drinking-water supplier must keep records that contain sufficient information to enable a drinking-water assessor to ascertain whether or not that drinking-water supplier is complying with the requirements of:

(a) the new Part 2A of the Health Act; and

(b) the drinking-water standards; and

(c) that drinking-water supplier's public health risk management plan.

There may be extra compliance costs associated with the creation of these records.

Clause 69ZE Duty to investigate complaints

Every drinking-water supplier who receives a complaint about the quality (including the wholesomeness) of the drinking water supplied by that supplier, or, as the case may require, transported by that supplier in the supplier's capacity as a water carrier, must investigate that complaint and:

(a) if the complaint relates to the wholesomeness of the drinking water, take all practicable steps to improve the wholesomeness of that drinking water; or

(b) if the complaint relates to a failure to meet the drinking-water standards, take the appropriate remedial action specified in section 69ZF.

All complaints about the quality of drinking water **must** be investigated. Even though clause 69V only requires that all practicable steps are taken to comply with the drinking water standards, if a complaint is made about the failure to meet the drinking water standards, then the appropriate remedial action specified in section 69ZF must be followed.

Clause 69ZF Duty to take remedial action if drinking-water standards breached

Clause 69V requires a drinking water supplier to take all practicable steps to comply with the drinking water standards. A drinking water supplier must also monitor the water it supplies (clause 69Y).

However, under this clause if the drinking water supplier becomes aware that the drinking water standards are not being met then they must take the appropriate remedial action to correct the problem, or if no remedial action is set out in the drinking water standards, take all practicable steps to correct the problem.

So it therefore appears that regardless of other duties, a drinking water supplier needs to comply with the drinking water standard.

Clause 69ZG Duty to provide reasonable assistance to drinking-water assessors, designated officers, and Medical Officers of Health

All drinking water suppliers are required to provide access and reasonable assistance to drinking water assessors, and designated officers to enable them to carry out their functions as specified in Clause 69ZP and to assist the Medical Officer of Health carry out his functions as specified in Clause 69ZJ.

69ZH Duty to provide information to territorial authority

Drinking water suppliers are required to notify the appropriate territorial authority if the connection of additional residential properties to a drinking-water supply may compromise the supplier's ability to provide an adequate supply to any property.

Local Authorities will need to develop systems to process, store, and retrieve the information provided to it, in accordance with this clause. Local Authorities will need to consider what compliance costs will be associated with these requirements.

Clause 69ZI Temporary supplier to notify Medical Officer of Health of source and quality of raw water

Temporary drinking-water suppliers are required to advise the Medical Officer of Health of the sources of water that they use, however that term is defined.

Clause 69ZJ Powers of Medical Officer of Health relating to temporary drinking-water suppliers

A Medical Officer of Health has power to---

- impose reasonable monitoring requirements on a temporary drinking-water supplier; and
- prohibit a temporary drinking-water supplier using a particular source.

Drinking-water assessors and designated officers

Clause 69ZK Director-General may appoint drinking-water assessors

The Director-General may appoint 1 or more persons or agencies to be drinking-water assessors. The appointment of drinking water assessors need to meet specified criteria.

Clause 69ZL Functions of drinking-water assessors

The main functions are to:

- ascertain compliance by drinking-water suppliers with the Health Act, their public health risk management plans, and the drinking-water standards; and
- notify designated officers and the drinking-water supplier concerned of any non-compliance; and
- provide information to the Ministry and the Director-General; and
- approve, and certify the implementation of, the public health risk management plans prepared by drinking-water suppliers; and
- check that complaints are recorded and responded to appropriately.

Clause 69ZM Drinking-water assessors accountable to Director-General for performance of functions

The drinking-water assessor's are accountable to the Director-General for the performance of their functions.

Clause 69ZN Functions of Designated Officers

The functions of a designated officer is to ensure that any requirement imposed by a drinking water assessor, or Medical Officer of Health is complied with and to investigate offences and to bring proceedings in respect of these offences.

These functions should be of the greatest concern to local government, as the compliance with directions issued by the Designated Officers has the ability to cut across the operation of local authorities as specified in its publicly agreed Long Term Council Community Plan.

Clause 69ZO Powers of designated officer

This clause should be deleted. It provides powers to a designated officer to require every person to comply with their requirements when they believe that there is a serious risk of harm to the health or safety of any people arising from the drinking water supplied to those people. This is so similar to the wording used to provide the Minister the power to declare a drinking water emergency (Clause 69ZZA). If the situation is that serious the emergency should be declared, and the provisions of emergency powers used.

Clause 69ZP Powers of drinking-water assessors and designated officers

This clause sets out the powers of drinking-water assessors and designated officers which may be exercised subject to certain conditions relating to prior approval and prior attempts to obtain relevant information (see clause 69ZR(1)).

Clause 69ZQ Ancillary powers

Sets out ancillary powers that may be exercised when powers are exercised under new section 69ZG.

Clause 69ZR Restrictions on exercise of powers

Sets out preconditions to the exercise of, and restrictions on, the powers of drinking-water assessors and designated officers. In particular, it provides that those powers do not override other enactments that restrict the availability of particular information, and do not require any person to answer questions or provide information that would tend to incriminate that person.

Clauses 69ZS and 69ZT impose a requirement to obtain a search warrant to enter a dwelling house in order to exercise any power under new section 69ZP and set out requirements relating to the execution of a search warrant of that kind.

Clause 69ZU provides that drinking-water assessors and designated officers must produce identification when exercising powers under the new Part 2A.

Clause 69ZV requires an inventory of all things seized under new section 69ZP to be left with, or sent to, the occupier of the place from which they were seized.

Clause 69ZW Review of decisions of drinking-water assessors

Provides the mechanisms by which a drinking water supplier may request a review by the Director-General of Health of a range of decisions made by a drinking water assessor.

Of potential concern to local authorities is that the request for a review must be made within 28 days. This will not normally allow time for a full Council to consider the issues, and decisions to seek a review will need to be made by Council staff.

Also it appears that the Director-General of Health does not have to review the decision. It is a discretionary power. It would provide more certainty if the Director-General of Health was required to consider all requests for review.

Clasue 69ZX provides that the Director-General must maintain a register of agencies appointed as drinking-water assessors.

Recognised laboratories

New section 69ZY provides for the Minister to recognise laboratories for the purposes of testing and analysing drinking water.

New section 69ZZ provides that compliance tests for the purposes of the principal Act and the drinking-water standards must be carried out by a recognised laboratory, unless it is not reasonably practicable to do so and the Director-General has approved an alternative.

Emergency powers

Clauses 69ZZA to 69ZZG deal with public health emergencies relating to drinking water. The Minister may declare there to be a drinking-water emergency if he or she believes, on reasonable grounds, that there is a significant risk of harm to people arising in any way from the drinking water supplied to them.

Clause 69ZZB Maximum duration of drinking-water emergency declaration

The maximum duration of a drinking water emergency is 28 days.

Civil defence emergencies declared under the Civil Defence Emergency Management Act 2002 are for up to 7 days, with the ability to extend them. There is probably good sense to keep a similar arrangement for drinking water emergencies.

Clause 69ZZC enables a drinking-water emergency to be declared or continued even if an emergency is declared in relation to the same circumstances under another enactment.

Clause 69ZZD Special powers of designated officer during drinking-water emergency

One of the powers of the designated officer is to require the elimination of **any** risk to public health arising from the drinking water supply regardless of whether or not that risk has any relation to the cause of the emergency. (This power is also in clause 69ZO which needs to be deleted)

This clause allows designated officers to recovery costs of specified actions from drinking water suppliers within the geographical area specified within the emergency declaration.

A process is also provided to enables the drinking water supplier to go to Court to appeal the decision to recover costs.

Local authorities will need to ensure that the insurance cover they have will cover these arrangements, and is also sufficient for any necessary actions.

The ability to impose costs on drinking water suppliers, who are local authorities, may also have an impact on its rating requirements.

Clause 69ZZE Compensation for property requisitioned or destroyed

The Director-General of Health may require a drinking water supplier who has caused or substantially contributed to an emergency to reimburse the Crown for all or part of any compensation paid.

The Director-General of Health can also require one or more territorial authorities whose districts were affected by the emergency to reimburse the Crown for any shortfall received from a drinking water supplier.

This appears to be a significant financial risk to local authorities.

Given this Bill sets up a regime where assessors, appointed by the Director-General of Health have powers and are required to assess drinking water suppliers, it is not clear why then local authorities should have to bear any financial responsibilities because the assessors have failed in their jobs.

Clause 69ZZF Actions taken under emergency powers may be exempted from requirements of Part 3 of Resource Management Act 1991

Actions taken under the emergency powers are exempted from Part 3 of the Resource Management Act 1991 for up to 28 days. After 28 days, if the Minister considers it is necessary to continue the action, regulations may be made continuing that exemption for up to 2 years.

Section 330 of the Resource Management Act sets out how actions under an emergency can be carried out. The Civil Defence Emergency Management Act makes reference to these procedures. There does not appear any good reason why any special works that are required under a drinking water emergency should not also comply with section 330 of the RMA.

Clause 69ZZG provides that if an exemption is granted, the provisions of Part 3 of the Resource Management Act 1991 do not apply to actions taken under new sections 69ZO or 69ZZD.

Compliance orders

Clause 69ZZH Medical Officer of Health may issue compliance order

A drinking water supplier is required to comply with a compliance order served by a Medical Officer of Health.

The Medical Officer of Health can require the drinking water supplier to do something that the Medical Officer of Health believes, on reasonable grounds, is necessary to prevent, remedy, or mitigate ***any risk*** to public health arising from that person's drinking-water supply.

Clause 69ZZI Compliance with compliance order

A drinking-water supplier (or temporary drinking-water supplier) must comply with a compliance order. Under clause 69ZZR(2)(c), it is an offence to fail to comply with a compliance order.

The drinking water supplier must also pay the expenses of complying with that order.

The requirement to comply with the compliance order may force a local authority to carry out actions contrary to its Annual Plan or Long Term Council Community Plan.

As with other clauses, which can impose costs on a drinking water supplier, there may be insurance implications or rating implications that will face the local authority.

Clause 69ZZJ describes the form and required content of compliance orders.

Clause 69ZZK gives a right of appeal to the District Court against all or part of a compliance order.

Clause 69ZZL Stay of compliance order pending appeal

A drinking water supplier may appeal to the District Court against all or part of a compliance order, as provided by clause 69ZZH.

Such an appeal process even if successful will still impose legal and staff costs on a local authority.

There is a similar appeal process provided for in clause 69ZZN.

Clause 69ZZM sets out the process for a Medical Officer of Health to cancel a compliance order if he or she considers that it is no longer required. It also allows any person who is directly affected by a compliance order to apply in writing for that order to be changed or cancelled.

Clause 69ZZN Appeals against decision on change or cancellation of compliance order

Clause 69ZZN gives a person directly affected by a compliance order a right of appeal to the District Court against a decision made in relation to an application for that compliance order to be changed or cancelled.

However, unlike clause 69ZZL there is no ability to apply for a stay of the compliance order. There does not seem any reason for this inconsistency.

Contamination of water supplies and sources

Clauses 69ZZO and 69ZZP effectively replace existing sections 60 to 63 of the principal Act. Currently, those sections deal with the pollution of water supplies. The new sections use the term contamination as well as the term pollution. A definition of contamination is contained in the interpretation section for new Part 2A (see new section 69G). Under the existing section 60, the term pollution is not defined; however, the section applies if the effect of the pollution is to make the water dangerous to health, offensive, or unfit for domestic use.

The types of water to which the provisions apply have also been extended to include raw water that is a source for a drinking-water supply. A definition of raw water is also added to the defined terms for the purposes of new Part 2A (see new section 69G).

Currently, section 60 of the Health Act provides that it is an offence, punishable by a fine not exceeding $1,000, to directly, or indirectly, pollute a water supply or a watercourse so as to make the water offensive or dangerous to health. Clause 69ZZO makes it an offence to perform an act likely to contaminate any raw water or watercourse or pollute any drinking water. Clause 69ZZO also differs from the existing section, in that it specifies that the offence is committed whether the act that contaminates the water is performed intentionally or recklessly. The penalty for the offence is increased to a fine not exceeding $200,000 or imprisonment for 2 years, or both.

Clause 69ZZP requires a local authority that receives a risk notification from a Medical Officer of Health to warn users of self-supplied building water supplies about any contamination of those supplies.

Clause 69ZZO Contamination of water supply

It is an offence for any person who does something which is likely to contaminate any raw water or pollute any drinking water.

The main issue here is what is "*likely*" How high a probability does an action need to be before it becomes likely.

This also opens up the possibility that someone creates an offence even when the contamination has not occurred, and may not even occur. It is just likely that it might occur.

Clause 69ZZD Local authority may be required to warn uses of self-supplied building water supplies about contamination

A local authority is required to take action to warn people and to take action to remedy the situation when a Medical Officer of Health believes that a source of drinking water is contaminated.

It is not at all clear why the Medical Officer of Health can not issue warnings to people and use the various powers available to the Medical Officer of Health to remedy the situation.

Offences

It is not an offence to fail to comply with the duties to provide wholesome drinking water, or to take reasonably practicable steps to improve the wholesomeness of the drinking water supplied. Therefore, those duties will only be enforceable through civil proceedings. It is an offence to contravene any of the other duties (new section 69ZZR). It is also not an offence for a drinking-water supplier to fail to provide information to a territorial authority under new section 69ZH.

Clauses 69ZZQ to 69ZZX set out the offences under the Health Act and the applicable penalties.

Clause 69ZZQ makes it an offence for a person to supply drinking water through a drinking-water supply or to transport water if that person is not registered as a drinking-water supplier or, as the case may require, as a water carrier on the drinking-water register.

Clause 69ZZR, there are 3 classes of offence against new Part 2A. The offences listed in subsection (1) are the more serious offences and, under new section 69ZZV(1), are punishable by a maximum fine of $200,000, and by a further fine not exceeding $10,000 per day for continuing offences. These offences are---

- failure to protect the source of drinking water; and
- failure to take all practicable steps to comply with the drinking-water standards (other than guidelines for avoiding adverse aesthetic effects); and
- failure to monitor drinking water; and
- failure to implement a public health risk management plan; and
- failure to take remedial action to correct a breach of the drinking-waters standards; and
- failure to comply with the requirements of a designated officer during a drinking-water emergency.

Given the very high level of fines, it is even more important that this Bill defines what it means by "source of water" or "source of drinking water" as both terms are used throughout this Bill.

The offences listed in subsection (2) are less serious and, under clause 69ZZV(2), are punishable by a fine not exceeding $10,000, and also by a further fine not exceeding $1,000 per day for continuing offences. These offences are---

- failure to keep records; and
- failure to provide reasonable assistance to a drinking-water assessor; and
- failure to comply with a compliance order.

The offences listed in subsection (3) are the least serious and, under clause 69ZZV(3), are punishable by a fine not exceeding $5,000. These offences are---

- failure to apply for registration, or update details, on the drinking-water register; and
- failure to provide an adequate supply of drinking water; and
- failure to test new water sources.

Clause 69ZZS provides that there is no need to prove intention in a prosecution for an offence under clauses 69ZZQ and 69ZZR, which are strict liability offences, but that it will be a good defence if the defendant can prove lack of intent and that all practicable steps were taken to prevent the commission of the offence.

Clause 69ZZT creates a specific offence for making false or misleading statements in, or destroying or altering, or failing to provide, any document or information that is required to be provided under the principal Act, and for tampering with samples or tests. An offence against this section is punishable by a maximum fine of $200,000 or imprisonment for up to 2 years, and also by a further fine of $10,000 per day for continuing offences.

Clause 69ZZU creates an exception to section 14 of the Summary Proceedings Act 1957 (which provides that an information must be laid within 6 months from the time the matter arose). Clause 69ZZU provides that a person may lay an information within 3 years of the time when the matter that is the subject of the information arose.

Clause 69ZZV sets out the penalties that apply to offences under new Part 2A.

Clause 69ZZW provides for an additional penalty to be applied if the Court is satisfied that an offence was committed in the course of producing a commercial gain.

Clause 69ZZX provides that a principal is liable for an offence committed by that person's agent, contractor, or employee unless the principal did not know about the offence, took all practicable steps to prevent it, and took all practicable steps to remedy the effects of the offence.

That is contracting out the functions does not remove the responsibility for the actions.

Clause 69ZZX also provides that, if a body corporate is convicted of an offence against new Part 2A, the directors and persons concerned in the management of that body corporate are also guilty of that offence if they permitted the offence to take place.

Miscellaneous

Clause 69ZZY is a regulation-making power that allows the Governor-General to make regulations for various purposes.

Clause 69ZZZ enables networked suppliers to install back-flow prevention systems in the network on the side of the point of supply for which the supplier is responsible for maintaining, in certain circumstances (where the suppliers public health risk management plan indicates a risk of problems from back-flow). The owner of the land in respect of which the back-flow prevention system operates may be required to reimburse the supplier for the cost of installation, testing, and maintenance of that system. The networked supplier is also

empowered to require property owners to repair or modify back-flow prevention systems, whether installed by the supplier or the owner.

Clause 69ZZZA prescribes the details of how registers that are required to be kept under new Part 2A must be kept.

Clause 69ZZZB requires the Director-General to publish an annual report on drinking water, and sets out what information must be included in that report.

Clause 69ZZZC allows the Director-General to publish statements relating to drinking water emergencies or to the performance of duties imposed under new Part 2A.

Clause 69ZZZD gives immunity to certain persons who perform functions and duties, or exercise powers, under new Part 2A, and provides that statements, notices, warnings, and declarations made under that Part are protected by qualified privilege.

Clause 69ZZZE clarifies the relationship between new Part 2A and certain other enactments.

Clause 8 amends section 129 of the principal Act to align the immunity provisions of that section with the immunity provisions in new Part 2A.

Clause 9 inserts new sections 137A to 137H into the principal Act. Those provisions deal with the treatment and status of material incorporated by reference into the Act or into regulations made under the Act, and related issues.

Clause 10 deems every person registered on the Ministry's register of drinking-water suppliers at the date of commencement of new Part 2A to be registered on the drinking-water register for the purposes of new section 69K.

Clauses 11 and 12 contain similar provisions preserving the existing registers of accredited drinking-water assessors and recognised laboratories.

Clause 13 deems the existing drinking-water standards to have been issued in accordance with new Part 2A, subject to certain qualifications.

DRINKING WATER REFERENCES IN OTHER ACTS

The Civil Defence Emergency Management Act 2002

The CDEM Act describes any entity that supplies or distributes water to the inhabitants of a city, district, or other place as a lifeline utility.

Section 60 of the CDEM Act describes the duties of a lifeline utility as being to ensure that it is able to function to the fullest possible extent, even though this may be at a reduced level, during and after an emergency.

Lifeline utilities will also need to comply with any requirements of the National Civil Defence Emergency Management Plan, and the Civil Defence Emergency Management Group Plans for the area within which they operate.

Building Act 2004

The Building Act defines an organisation that undertakes or proposes to undertake the distribution of water for supply (including irrigation) as a network utility operator.

A building is insanitary for the purposes of the Building Act if the building does not have a supply of potable water that is adequate for its intended use. (See section 123)

However the Building Act does not define potable water.

Schedule 1 of the Building Act describes those works that are exempt from a building consent.

Clause (e) of Schedule 1 deals with the construction of any tank or pool and any structural support of the tank or pool (except a swimming pool),

(i) not exceeding 35 000 litres capacity and supported directly by the ground; or
(ii) not exceeding 2 000 litres capacity and supported not more than 2 metres above the supporting ground; or
(iii) not exceeding 500 litres capacity and supported not more than 4 metres above the supporting ground: