

In Confidence

Office of the Minister of Health

Chair, Cabinet Legislation Committee

Health (Drinking Water) Amendment Bill: Approval for Introduction

Proposal

- 1 I seek approval to introduce the Health (Drinking Water) Amendment Bill (the Bill) to Parliament. This Bill will improve the efficiency and effectiveness of the existing drinking-water regulatory regime while work is underway to design a potential new regulatory regime.
- 2 In particular, the five year period for making changes to the Drinking Water Standards (Standards) is amended. The Minister of Health will instead be able to amend the Standards once satisfied that adequate consultation has occurred. This change provides greater responsiveness to address emerging public health risks and recognise new technologies.
- 3 The Bill also clarifies that water safety plans must be implemented in accordance with agreed timetables and streamlines processes to appoint Drinking Water Assessors.
- 4 Cabinet agreed on 9 April 2018 to remove the requirement that the Director-General recognise laboratories and maintain a register of recognised laboratories [CAB-18-MIN-0147 refers]. I seek approval to defer changes to the recognition of laboratories until work relating to the management and regulation of drinking-water is further progressed. This will ensure that decisions about the regulator's role in relation to laboratories are effectively aligned with the more substantive legislative changes associated with that work.

Policy

The Government Inquiry into the Havelock North Drinking-water Outbreak

- 5 The Government Inquiry into the Havelock North Drinking-water Outbreak (the Inquiry) investigated the widespread outbreak of gastroenteritis in Havelock North in August 2016. More than 5000 people were estimated to have fallen ill and four deaths were associated with the outbreak.
- 6 The first stage of the Inquiry focused on identifying the direct causes of the gastroenteritis outbreak and assessing the conduct of those responsible for providing safe drinking-water to Havelock North. The second stage examined the wider regulatory context and steps to be implemented to reduce the likelihood of such an outbreak occurring again.
- 7 The Inquiry released its Stage Two findings in December 2017. The Inquiry found wide-spread systemic failure of water suppliers to meet the high standards required for the safe supply of drinking-water to the public. The Inquiry found that 80 per cent of people served by network supplies that serve

100 people or more have access to water that meets all current standards. The Inquiry raised concerns about the other 20 per cent.

- 8 The Inquiry found inadequate and ineffective enforcement of water suppliers' statutory obligations. It concluded that the present system of regulation does not ensure that water suppliers comply with the law and New Zealand's drinking-water standards and recommended significant reform.
- 9 The Inquiry made 51 recommendations to improve the safety of our drinking-water. The most significant recommendations were that all water supplies should be treated (including with a residual disinfectant such as chlorine) and that a new dedicated drinking-water regulator should be established.
- 10 The Inquiry made a number of 'urgent and early' recommendations, recognising that many of its recommendations would likely require detailed reviews, consultation with interested parties or significant legislative change.

Immediate actions

- 11 The Government has already undertaken some immediate actions in response, including:
 - 11.1 The Ministry of Health (the Ministry) has reminded drinking-water suppliers of their responsibilities, alerted them to the risk of relying on "secure" water sources and encouraged them to use residual treatment. Even when a water source is classed as secure, there can still be risks from contamination in the distribution. Residual treatment helps prevent this.
 - 11.2 The Ministry has taken steps to improve compliance with the Standards by issuing updated guidance and training to Drinking Water Assessors (Assessors), Medical Officers of Health and Health Protection Officers. The Ministry has also provided additional information on compliance and enforcement to these public health officers and is improving its annual reporting on compliance.
 - 11.3 The Ministry has established a Drinking Water Advisory Committee with expertise across a range of relevant disciplines to provide advice on supplying safe drinking-water, including advising on revisions to the Standards.
 - 11.4 The Ministry of Health has clarified the accountability arrangements for Assessors, and is working to improve communication channels between Assessors with regular teleconferences.
 - 11.5 The Ministry has asked Assessors to check that suppliers' Water Safety Plans include critical control points where appropriate. Critical control points are specific points, procedures, or steps in water treatment when controls can reduce, eliminate, or prevent the possibility of a public health hazard. The Ministry has provided advice and guidance to Assessors and suppliers to help them include critical control points in their water safety plans for improved risk assessment and management of drinking-water supplies. The Ministry has also commissioned the Institute of Environmental Science and Research to update the Ministry's water safety plan framework and supporting 39 guidance documents.

- 11.6 The Ministry has encouraged Public Health Units to set up collaborative arrangements with water suppliers in their regions to promote information sharing and cooperation at local levels to improve the safety of drinking-water.

Major changes being developed

- 12 On 9 April 2018, Cabinet directed further work to be undertaken on the proposals made by the Inquiry that could result in fundamental changes to the way we manage and regulate drinking-water [CAB-18-MIN-0147 refers]. This includes the Inquiry's recommendations to:
 - 12.1 require water supplies to be treated, including with a residual disinfectant;
 - 12.2 make compliance with the Drinking Water Standards mandatory;
 - 12.3 establish a dedicated drinking-water regulator; and
 - 12.4 establish aggregated, dedicated drinking-water suppliers.
- 13 The Government has not yet made decisions on these matters. Cabinet will receive further advice on these matters in August and October 2018, following consultation with local government, Māori and others. Subject to Cabinet decisions, the Minister of Health and the Minister of Local Government propose to introduce a bill to establish the new regulatory regime for drinking-water in 2019.
- 14 Many of the issues around how drinking-water is managed and regulated extend across all of the 'three waters' services – drinking-water, wastewater and stormwater. Changes to drinking-water are being considered in the context of the entire 'three waters' system [CAB-18-MIN-0145 refers].

Streamlining the current regulatory regime

- 15 Ahead of considering more substantial changes to the drinking-water regulatory regime, Cabinet has agreed to make some straightforward changes that will enable improvements to the efficiency and effectiveness of the existing drinking-water regulatory regime. These changes will not greatly reduce the risk of waterborne illness in New Zealand but will help streamline the current regulatory regime ahead of more comprehensive reforms.
- 16 Specifically, Cabinet agreed to make amendments to the drinking-water provisions of the Health Act 1956 and invited the Minister of Health to issue drafting instructions to the Parliamentary Counsel Office to give effect to the following changes [CAB-18-MIN-0147 refers]:
 - 16.1 remove specified periods for consultation and notice of changes to the Drinking Water Standards for New Zealand;
 - 16.2 clarify that water safety plans must include implementation timetables;
 - 16.3 streamline processes for the appointment of Drinking Water Assessors and use of accredited laboratories; and

- 16.4 other minor and technical amendments, as described in Appendix Three to the paper under CAB-18-SUB-0147.
- 17 Officials have since provided advice that further consideration would be advisable before making changes relating to recognition of laboratories. These potential changes should be more thoroughly considered as part of the longer-term work on the design of the new drinking-water regime. I therefore seek approval to defer these changes until work relating to the management and regulation of drinking-water is further progressed. This will ensure that decisions about the regulator's role in relation to laboratories are effectively aligned with the more substantive legislative changes associated with that work.
- 18 Aside from the changes relating to recognition of laboratories, the proposed Bill gives effect to the changes agreed by Cabinet outlined in paragraph 15.

Proposed Amendment Bill

- 19 [REDACTED]
- 20 The Bill would make technical revisions to Part 2A of the Health Act 1956 (the Act) which sets out provisions regulating the supply of drinking-water. The Act's provisions apply to all networked drinking-water supplies, regardless of their ownership. In practice, the majority of these supplies are owned / operated by local government.
- 21 The implications of these amendments are outlined below.
- 22 There are no changes to the Act's offence provisions.

Removing specified periods for consultation and notice of changes to standards

- 23 The most important proposed amendment would remove the duty to consult on changes to the Standards for an inflexible minimum statutory period prior to changes being made. Additionally, the minimum timeframe for gazetting any changes to the Standards is proposed to be shortened.
- 24 Currently, there is a mandatory period of consultation (three years) and gazette notification (two years) before changes can be made to the Standards (unless the Minister is satisfied that limited statutory exceptions apply). The Inquiry considered that these mandatory consultation and notification periods limit the Government's ability to act swiftly in response to public health risks in situations that warrant this, prevent the standards keeping pace with international best practice and may create barriers to compliance by preventing water suppliers implementing new and potentially more cost effective technologies. The Inquiry recommended that these provisions be amended.
- 25 It is unusual for a New Zealand regulatory regime to include specified minimum durations for consultation or such an extensive gazette notification period. For example, there is no minimum statutory consultation period that must be met to make regulations about standards in relation to food under the Food Act 2014 or to make regulations under the Hazardous Substances and New Organisms Act 1996.

- 26 The proposal would remove these requirements for specified periods of consultation (three years) and gazette notice (two years) and enable changes to the Standards to be made more swiftly to address emerging public health risks and recognise new technologies. The length of consultation would be determined by the Minister of Health and would be proportionate to the nature of the change. Changes will need to be gazetted for a period of 28 days, which is consistent with the standard 28 day period for regulations.
- 27 A comparison of the current and proposed consultation and notification processes is shown in Appendix 1.
- 28 The impact of making changes to the Standards on suppliers could range from minor through to very substantial. The majority of suppliers are territorial authorities. In relation to this group, changes to the Standards could, for example, conceivably result in multi-million dollar upgrades being required to local authority infrastructure that would require years of planning and funding on the part of councils. There is also a significant number of non-council suppliers (which include voluntary and community organisations) who are networked suppliers and must comply with the Standards. Changes to the Standards have a disproportionately high impact on these suppliers because they generally serve small communities and do not have the ability to spread costs more broadly over ratepayers. Thorough consultation with councils and other potentially affected parties is therefore essential to understand the impact of any proposed change to the standards and ensure that the change will be implementable.
- 29 The Bill does not remove the requirement for adequate consultation (for example, consultation with water suppliers on the cost implications of any proposed changes):
- 29.1 under s 69P of the Act, the Minister will still have to be satisfied that there has been “adequate consultation” before issuing new or revised Standards;
- 29.2 common law relating to consultation applies (for example, this requires consultation to be open minded, conducted in good faith and for participants to be provided with opportunities for informed input and to be given sufficient time to make meaningful submissions); and
- 29.3 Cabinet Manual requirements relating to consultation apply.
- 30 Similarly, the proposal does not remove the requirement to formally notify parties of the proposed changes through a gazetting process. The amendment would implement the standard minimum 28 day gazette notification period that typically applies to regulation making processes. Additionally, the standards are disallowable instruments that are subject to review by the Regulations Review Committee. New standards can be reviewed by the Regulations Review Committee after they are made.
- 31 This provides the opportunity for any party to raise concerns with the Regulations Review Committee (RRC). Complaints to the RRC may relate to a number of grounds, including the failure to adequately consult as required by the statute, or because the content is inappropriate for regulation. The grounds

for review are set out in the RRC's Standing Orders. RRC review does not focus on the merits of the policy behind the changes. The RRC assesses whether the power to make the standards has been exercised appropriately and in accordance with statutory prerequisites. If the RRC has concerns, it may report to the House.

- 32 The standards must be presented to Parliament no later than the 16th sitting day following their enactment. The House can resolve to disallow the changes, or parts of the changes.

Clarification around implementation timetable requirements

- 33 The Inquiry recommended that the water safety plan provisions be amended to state explicitly that suppliers must implement water safety plans in accordance with the timeframe approved by an Assessor.
- 34 The Inquiry was concerned that although suppliers had to include a timeframe within their water safety plan, the Health Act does not explicitly require suppliers comply with that timeframe.
- 35 Although officials considered that this was an implicit part of the obligation to implement a water safety plan, to prevent confusion, an amendment is proposed. This will ensure that suppliers know that they must implement their plans in a timely manner, which is a critical part of protecting public health.

Streamlining processes – accreditation of Drinking Water Assessors

- 36 The Bill removes the requirement for third party accreditation of Assessors. The Inquiry considered that accreditation may confer the benefit of having an additional independent system in place to assess the competency of Assessors but that the substantial investment (in terms of resource and time) may be better applied to continuing professional development of Assessors and that the removal of accreditation would reduce administrative complexity.
- 37 The accreditation process assesses systems and capacity within the public health units which employ Assessors. The capability and competency of the individual Assessors is part of the accreditation process. However, officials consider that alternative approaches are available that can assure Assessor competency without the further need for a full accreditation process. Officials agree with the Inquiry that full accreditation is currently using resource that could be better applied to improving training for, and increasing the number of, Assessors.
- 38 The Director-General must be satisfied that a proposed Assessor has the experience, technical competence, and other qualifications to undertake compliance verification functions before appointing them as a new Assessor. This requirement remains. Assessors remain accountable to the Director-General who can conduct periodic independent reviews of Assessor competency as required. This will ensure that the benefits of third party accreditation are continued. Additionally, the Director-General can make Assessor appointment subject to such conditions as are considered appropriate.
- 39 In combination, these tools are more direct mechanisms to ensure that Drinking Water Assessors are competent. Additional competency requirements or

conditions of appointment can be added as required. Furthermore, the Ministry contracts public health units directly, so there are also contractual means to ensure that public health units and the Assessors they employ deliver services to the required standard.

Other minor and technical amendments

- 40 The proposed Amendment Bill includes a small number of other minor and technical amendments to improve the effectiveness and efficiency of Part 2A of the Act, including the definition of medical officer of health, the provisions relating to designated ports and airports, and examples of activities that may constitute taking reasonable steps to contribute to the protection of sources of raw water.
- 41 Many of these changes ensure that there is consistency across the Health Act to support ease of compliance and clarity for statutory officers conducting enforcement processes.

Impact analysis

- 42 The Treasury determined that an Impact Analysis was not required for this proposal as it has no or only minor impacts on businesses, individuals or not-for-profit entities.

Compliance

- 43 The Bill complies with:
- 43.1 the principles of the Treaty of Waitangi. The Bill makes minor and mainly administrative amendments to Part 2A of the Act but does not change the substantive nature of the provisions that are being amended;
 - 43.2 the rights and freedoms contained in the New Zealand Bill of Rights Act 1990 and the Human Rights Act 1993;
 - 43.3 the disclosure statement requirements (a copy of the departmental disclosure statement is attached to this paper);
 - 43.4 the principles and guidelines set out in the Privacy Act 1993.
 - 43.5 relevant international standards and obligations. Compliance with obligations under the International Health Regulations 2005 will not be affected by the proposed removal of references to designated ports and airports;
 - 43.6 the Legislation Advisory Committee Guidelines on the Process and Content of Legislation (2014 edition), which are maintained by the Legislation Design and Advisory Committee.

Consultation

- 44 The following government agencies were consulted on, or informed of, this paper: Ministry of Business, Innovation & Employment, Ministry of Justice, Te Puni Kōkiri, State Services Commission, Department of Internal Affairs, The

Treasury, the Ministry for the Environment, Parliamentary Counsel Office, the Department of the Prime Minister and Cabinet (Policy Advisory Group).

- 45 As the representative of local government drinking-water suppliers, LGNZ has an interest in the potential impacts of any new legislation on its members. For that reason, LGNZ was invited to provide feedback on the proposed Bill, in particular on the removal of the specified time periods for consultation and gazetted notification. LGNZ indicated that, overall, the changes are consistent with the tenor of the Inquiry's recommendations and should not be a surprise or concern to the bulk of the LGNZ membership. LGNZ suggested making one clarification in the Bill's explanatory note. This amendment has been made.
- 46 Due to time constraints, no public consultation was undertaken on the proposed Bill. Private organisations were not consulted. It is therefore proposed to proactively release this Cabinet paper in conjunction with the Bill being introduced to the House.
- 47 The government caucuses and other parties in Parliament have been consulted.

Binding on the Crown

- 48 The proposals in the Bill bind the Crown, as provided for in section 69I of the Act.

Creating new agencies or amending law relating to existing agencies

- 49 The Bill does not create new agencies or amend the law relating to existing agencies.

Allocation of decision making powers

- 50 The Bill does not change the allocation of decision making powers between the Executive and the Courts.

Associated regulations

- 51 The Bill does not alter existing regulation making powers and no regulations are required to enable the Bill to operate.

Other instruments

- 52 The Bill would amend the consultation and notice periods associated with issuing or amending Standards for drinking-water (which are legislative instruments) but there are no provisions in the Bill to make other instruments per se.

Definition of Minister/department

- 53 The Bill does not contain, create or amend any definition of 'Minister' or 'department'.

Commencement of legislation

- 54 The Bill would come into force on the day after the date on which it receives the Royal assent.

Parliamentary stages

- 55 It is proposed that the Bill be introduced into Parliament on 4 July following consideration by Cabinet. The Bill would be referred to the Health Committee for further consideration.

Recommendations

The Minister of Health recommends that the Committee:

- 1 **note** that on 9 April 2018, Cabinet agreed to make the following amendments to the drinking-water provisions of the Health Act 1956 and invited the Minister of Health to issue drafting instructions to the Parliamentary Counsel Office to give effect to these changes [CAB-18-MIN-0147 refers]:
 - 1.1 remove specified periods for consultation and notice of changes to the Drinking Water Standards for New Zealand
 - 1.2 clarify that water safety plans must include implementation timetables and use of accredited laboratories
 - 1.3 streamline processes for the appointment of Drinking Water Assessors
 - 1.4 other minor and technical amendments, as described in Appendix Three to the paper under CAB-18-SUB-0147.
- 2 **agree** to defer the streamlining of processes for the use of accredited laboratories until work on potential changes to the management and regulation of drinking-water is further progressed and align with the substantive legislative changes resulting from that work.
- 3 **note** that the Bill gives effect to some of the recommendations from the Havelock North Drinking Water Inquiry: Stage 2 [REDACTED]
[REDACTED]
- 4 **note** that the Bill will amend Part 2A of the Health Act 1956 to remove specified consultation and amend notice periods that are required prior to amending the Drinking Water Standards, clarify that water safety plans must include implementation timetables, streamline processes for the appointment of Drinking Water Assessors and other minor technical amendments.
- 5 **approve** the Bill for introduction, subject to the final approval of the government caucuses and sufficient support in the House of Representatives.
- 6 **agree** that the Bill be introduced on 4 July 2018.
- 7 **agree** that the Government propose that the Bill be:

7.1 referred to the Health Committee for consideration; and

7.2 [REDACTED]

8 **agree** to proactively release this Cabinet paper in conjunction with the Bill being introduced to the House.

Authorised for lodgement

Hon Dr David Clark

Minister of Health

Comparison of current and proposed consultation and notification processes for changing Drinking Water Standards

| Step | Current process | Proposed new process |
|------|--|--|
| 1 | The Minister is advised of proposed amendments to the Standards | The Minister is advised of proposed amendments to the Standards |
| 2 | <p>The Minister must consult.</p> <p>The Minister must be satisfied that the length of consultation is adequate in light of the nature of the amendments, extent of public health risk etc and that this has taken at least 3 years.</p> <p>The Minister must be satisfied that there has been:</p> <ul style="list-style-type: none"> - adequate and appropriate notice of the intention to issue, adopt, or amend the Standards published in a daily newspaper in each of the cities of Auckland, Wellington, Christchurch, and Dunedin; and - a reasonable opportunity for interested persons to make submissions; and - appropriate consideration of any submissions received. <p>Consultation may be waived if the change is urgent or minor (i.e. the change will not adversely and substantially affect the interest of any person).</p> | <p>The Minister must consult.</p> <p>The Minister must be satisfied that the length of consultation is adequate in light of the nature of the amendments, extent of public health risk etc.</p> <p>The Minister must be satisfied that there has been:</p> <ul style="list-style-type: none"> - adequate and appropriate notice of the intention to issue, adopt, or amend the standards published in a daily newspaper in each of the cities of Auckland, Wellington, Christchurch, and Dunedin; and - a reasonable opportunity for interested persons to make submissions; and - appropriate consideration of any submissions received. <p>Consultation may be waived if the change is urgent or minor (i.e. the change will not adversely and substantially affect the interest of any person).</p> |
| 3 | Once the Minister is satisfied that adequate consultation of at least three years has occurred, the Minister may approve the Standards and gazette them for a period of at least 2 years . | Once the Minister is satisfied that adequate consultation has occurred, the Minister may approve the Standards and gazette the new standards for a period of at least 28 days . |
| 4 | The Minister must present the new Standards to the House within 16 sitting days (the House can disallow the changes). | The Minister must present the new Standards to the House within 16 sitting days (the House can disallow the changes). |
| 5 | At the end of the 2 year gazetting period, the new Standards come into force. | At the end of the gazetting period (at least 28 days), the new Standards come into force. |