

24 April 2023

Hon David Parker, Attorney-General

Consistency with the New Zealand Bill of Rights Act 1990: Regulatory Systems (Primary Industries) Amendment Bill

Purpose

1. We have considered whether the Regulatory Systems (Primary Industries) Amendment Bill (the Bill) is consistent with the rights and freedoms affirmed in the New Zealand Bill of Rights Act 1990 (the Bill of Rights Act).
2. We have not yet received a final version of the Bill. This advice has been prepared in relation to the latest version of the Bill (PCO 22574/3.3). We will provide you with further advice if the final version includes amendments that affect the conclusions in this advice.
3. We have concluded that the Bill appears to be consistent with the rights and freedoms affirmed in the Bill of Rights Act. In reaching that conclusion, we have considered the consistency of the Bill with:
 - a. section 9: right not to be subjected to disproportionately severe treatment or punishment,
 - b. section 14: freedom of expression,
 - c. section 21: freedom from unreasonable search and seizure,
 - d. section 25(c): right to be presumed innocent until proven guilty, and
 - e. section 27(1): right to natural justice.
4. Our analysis is set out below.

The Bill

5. The Bill contains amendments to legislation administered by the Ministry for Primary Industries, to improve regulatory systems by ensuring that they are effective and efficient, and they accord with best regulatory practice.
6. The amendments achieve this purpose through:
 - a. clarifying and updating statutory provisions to give effect to the purpose of various Acts and their provisions,
 - b. addressing regulatory duplication, gaps, errors, and inconsistencies within and between different pieces of legislation,
 - c. ensuring the regulatory systems remain up to date and relevant, and
 - d. reducing administrative burden for regulators and regulated parties.

7. To that effect, the Bill amends the following principal Acts and some associated secondary legislation:
 - a. Agricultural Compounds and Veterinary Medicines Act 1997,
 - b. Animal Products Act 1999,
 - c. Animal Welfare Act 1999,
 - d. Biosecurity Act 1993,
 - e. Climate Change Response Act 2002,
 - f. Commodity Levies Act 1990,
 - g. Dairy Industry Restructuring Act 2001,
 - h. Fisheries Act 1996,
 - i. Food Act 2014,
 - j. Forests Act 1949,
 - k. Kaikoura (Te Tai o Marokura) Marine Management Act 2014,
 - l. National Animal Identification and Tracing Act 2012,
 - m. Primary Products Marketing Act 1953,
 - n. Walking Access Act 2008, and
 - o. Wine Act 2003.
8. The Bill repeals the following Acts:
 - a. Animal Products (Ancillary and Transitional Provisions) Act 1999,
 - b. Food Safety Law Reform Act 2018,
 - c. Forests (West Coast Accord) Act 2000,
 - d. Hop Industry Restructuring Act 2003, and
 - e. Wool Industry Restructuring Act 2003.

Consistency of the Bill with the Bill of Rights Act

Section 9 – Right not to be subjected to disproportionately severe treatment or punishment

9. Section 9 of the Bill of Rights Act affirms that everyone has the right not to be subjected to disproportionately severe treatment or punishment.
10. Clause 68 of the Bill inserts new sections into the Animal Welfare Act 1999 (Animal Welfare Act). New section 182A provides that any fee or charge that has become payable

to the Crown is a statutory debt and is recoverable by the Director-General in any court of competent jurisdiction. New section 182D then provides for an increasing penalty regime that applies following the continued failure of a person to pay all or part of the fee or charge:

- a. 10% of the debt (or of that part of the debt that remains unpaid after the expiry of the time provided for the debt's payment); and
 - b. For every complete period of 6 months after that expiry during which the debt or any part of it (including any deemed increase calculated under this subsection) remains unpaid, 10% of the debt or that part.
11. The section does not provide for a maximum amount by which the debt may increase. The imposition of a penalty that can, theoretically, increase without limitation could potentially amount to disproportionately severe treatment or punishment in some cases.
 12. Whether section 9 applies to a financial penalty, rather than interference with bodily integrity alone, is not entirely clear. Section 9 appears in the subpart of the Bill of Rights Act entitled "life and security of the person", and the other sections in that subpart all deal with interferences with bodily integrity.¹ While it has not received detailed judicial consideration, the Court of Appeal in *Lyall v Solicitor-General* appears to have proceeded on the assumption that section 9 was applicable to property for forfeiture.² On this basis, this section could arguably apply to financial penalties.
 13. In the event that a fine can fall within section 9, we consider that section 182D does not amount to disproportionately severe treatment or punishment. The existence of a mechanism to impose an increasing penalty does not mean that an additional penalty will always be imposed. Additionally, new section 182E provides several grounds under which the penalty may be waived. These include a genuine dispute as to the person's liability to pay the debt or the amount of the debt, or if there is "some other good reason" for waiving the payment.

Section 14 – Freedom of expression

14. Section 14 of the Bill of Rights Act affirms that everyone has the right to freedom of expression, including the freedom to seek, receive, and impart information and opinions of any kind and in any form. The right has been interpreted as including the right not to be compelled to say certain things or to provide certain information.³
15. There are a vast number of provisions in the Bill which prima facie engage the right to freedom of expression. For example, there are several provisions throughout the Bill where individuals may be required to provide particular or additional information to the relevant authorities for proper procedures to be followed and regulatory functions complied with. The following clauses in the Bill are of note as examples of the Ministry for Primary Industries requiring individuals to comply with statutory requirements:
 - a. Clause 82 amends the Biosecurity Act 1993 (Biosecurity Act) to provide that, where a person in charge of a craft is unable to arrive at the port or destination as

¹ See ss 8 – 11 of the Bill of Rights Act.

² *Lyall v Solicitor-General* (1997) 15 CRNZ 1 (CA), 6-7 and 9.

³ See, for example, *Slaight Communications v Davidson* 59 DLR (4th) 416; *Wooley v Maynard* 430 US 705 (1977).

notified, the person in charge of a craft must provide further details to the Director-General including the approximate location of the craft and the new port or destination; and

- b. Clause 88 amends the Biosecurity Act to provide that persons in biosecurity control areas must provide an inspector with any documentation relating to imported goods.
16. Where a provision is found to limit a particular right or freedom, it may nevertheless be consistent with the Bill of Rights Act if it can be considered a reasonable limit that is demonstrably justified in terms of section 5 of that Act. The section 5 inquiry asks whether the objective of the provision is sufficiently important to justify some limitation on the right or freedom; and if so, whether the limitation is rationally connected and proportionate to that objective and limits the right or freedom no more than reasonably necessary to achieve that objective.⁴
17. We consider that any limits on the freedom of expression created by these provisions are justified under section 5 because:
- a. the overall objective of ensuring effective and efficient regulatory systems, and in the case of biosecurity provisions the objective of excluding, eradicating and effectively managing pests and unwanted organisms from entering New Zealand, is sufficiently important to justify some limit on the right;
 - b. the requirement to provide certain information in specific circumstances is rationally connected to this objective – for example, ensuring that relevant information is provided is fundamental for the overall function and efficiency of biosecurity border controls; and
 - c. the requirements are no greater than reasonably necessary and proportionate to the importance of the objective.
18. The Bill also, in many instances, requires the relevant Minister or Chief Executive to publicly notify decisions, outcomes of disputes, or exemptions to certain requirements.⁵ We note that the requirements for what type of information needs to be notified or shared is largely factual by nature and contains limited expressive value. They also impose limits no more than reasonably necessary for the regime to operate efficiently. Accordingly, any limits to section 14 for these actors are justified under section 5 of the Bill of Rights Act.

Section 21 – Freedom from unreasonable search and seizure

19. Section 21 of the Bill of Rights Act affirms that everyone has the right to be secure against unreasonable search or seizure, whether of the person, property, correspondence or otherwise. The right protects a number of values including personal freedom, privacy, dignity, and property.⁶

⁴ *Hansen v R* [2007] NZSC 7, [2007] NZLR 1.

⁵ For example, clause 71 amends the Animal Welfare Act to provide for the Director-General to notify the approval of a proposed code of ethical conduct in the Gazette and keep online a record of approved codes.

⁶ See, for example, *Hamed v R* [2011] NZSC 101, [2012] 2 NZLR 305 at [161] per Blanchard J.

20. There are two limbs to the section 21 right. First, the section is applicable only in respect of activities that constitute a search or seizure. Secondly, it protects only against those searches or seizures that are “unreasonable” in the circumstances.
21. The Bill includes several provisions that we consider clarify or amend existing powers of search,⁷ or of search and seizure.⁸ Most notably, clause 99 provides for the removal of the requirement for an inspector to be accompanied by a constable when executing search warrants under the Biosecurity Act. We understand that this change is intended to ease administrative and resourcing burden for the New Zealand Police and the Ministry for Primary Industries. The removal of this safeguard necessitates a consideration of whether this search power remains reasonable.
22. Ordinarily, a provision found to limit a particular right or freedom may be consistent with the Bill of Rights Act if it can be reasonably justified in terms of section 5 of that Act. However, the Supreme Court has held that an unreasonable search logically cannot be demonstrably justified and therefore the inquiry does not need to be undertaken.⁹ Rather, section 21 is self-limiting in that the assessment to be undertaken is whether the search and power is reasonable. The reasonableness of a search or seizure can be assessed with reference to its purpose and the degree of intrusion on the values which the right seeks to protect.
23. We consider this power is still reasonable, given the power is necessary to investigating offences under the Biosecurity Act; and given the existing safeguards, such as the ongoing requirement for a warrant, compliance with conditions specified in the warrant and training for inspectors on the execution of a search warrant. These safeguards ensure that searches will be conducted in a lawful manner. It is important to note the provision does not preclude the ability for an inspector to request a constable to accompany them, where appropriate.
24. We consider the other clarifications and amendments of existing search, or search and seizure powers in the Bill to be consistent with the Bill’s purpose of ensuring regulatory systems are effective, efficient, and accord with best regulatory practice. The powers appear reasonable for the purpose of ensuring compliance with the provisions of the Bill.

Section 25(c) – Right to be presumed innocent until proven guilty

25. Section 25(c) of the Bill of Rights Act affirms the right to be presumed innocent until proven guilty according to the law. The right to be presumed innocent requires that an individual must be proven guilty beyond reasonable doubt and that the state must bear the burden of proof.¹⁰
26. As strict liability offences, infringement offences prima facie limit section 25(c) of the Bill of Rights Act. This is because a strict liability offence may be proved by finding that certain facts occurred without proof of mens rea. The accused is required to prove a defence (on the balance of probabilities), or disprove a presumption, to avoid liability.

⁷ For example, clause 88 enables an inspector to request documentation relating to imported goods from an individual in a biosecurity control area.

⁸ For example, clause 101 allows for the seizure and disposal of any container, package or thing in which unauthorised goods are or have been contained.

⁹ *Hamed v R* [2011] NZSC 101, [2012] 2 NZLR 305 at [162] per Blanchard J.

¹⁰ *R v Wholesale Travel Group* (1992) 84 DLR (4th) 161, 188 citing *R v Oakes* [1986] 1 SCR 103.

27. Although infringement offences do not result in a criminal conviction, the Court of Appeal in *Henderson v Director, Land Transport New Zealand* held that the rights in section 24 and 25 of the Bill of Rights Act apply to minor offences dealt with under the infringement notice regime.¹¹
28. The Bill, at clause 63, contains an infringement offence resulting in the requirement to pay an infringement fine, where an individual fails to meet the specified requirements in section 36(1) of the Animal Welfare Act to manually inspect a trap. The Bill provides that the infringement fine cannot be more than \$900. A person issued with an infringement offence may either pay the infringement fee or elect for the matter to go to court, and the matter will generally be dealt with in accordance with the Criminal Procedure Act 2011 for a category 1 offence.
29. Strict liability offences have been found more likely to be justifiable where:
- a. the offences are regulatory in nature and apply to persons participating in a highly regulated industry;
 - b. the defendant will be in the best position to justify their apparent failure to comply with the law, rather than requiring the Crown to prove the opposite; and
 - c. the penalty for the offence is proportionate to the importance of the Bill's objective.
30. This infringement offence exists within a highly regulated environment designed to achieve the important purpose of ensuring owners and persons in charge of animals attend properly to the welfare of those animals, and is rationally connected to that purpose. The defendant will be best placed to justify their apparent failure to comply, and a statutory defence is provided for. Fines are also set at a level that accounts for a no-fault-based offence. Bearing this in mind, this offence appears to be a justifiable limit to the right to be presumed innocent.
31. We also note that the Bill, for example at clause 198, clarifies penalties for directors and managers convicted of various strict liability offences in the Fisheries Act to ensure that these penalties apply equally to all convicted of those offences. In effect, the Bill addresses a drafting issue, as penalties currently do not apply to those who hold such positions for offences under the Act. We have considered whether the limit on the presumption of innocence is still justified in light of these penalties. We consider the limits are justified because:
- a. the overall objective of the Fisheries Act, which provides for the utilisation of fisheries resources while ensuring sustainability, remains sufficiently important to justify some limit on the right, and the penalties are rationally connected to this objective; and
 - b. the penalties for directors and managers appear proportionate, and no greater than reasonably necessary, in light of their general responsibilities for activities which are regulated by the Fisheries Act.

¹¹ [2006] NZAR 629 (CA).

Section 27(1) – Right to natural justice

32. Section 27(1) of the Bill of Rights Act affirms that every person has the right to the observance of the principles of natural justice by any tribunal or other public authority which has the power to make a determination in respect of that person's rights, obligations, or interests protected or recognised by law.
33. Clauses 93 and 116, which amend the Biosecurity Act, place a 3-month limitation for a dispute regarding compensation to be submitted for arbitration. These provisions may be considered to engage section 27(1) on the basis that the time limit may, in some circumstances, affect a claimant's right to be heard. However, we consider these provisions achieve an appropriate balance between the right to be heard and the practical considerations such a process must account for (for example, the timely resolution of disputes). Thus, to the extent that the timeframe constitutes a limit on section 27(1), we consider that limit is justified.

Conclusion

34. We have concluded that the Bill appears to be consistent with the rights and freedoms affirmed in the Bill of Rights Act.



Edrick Child
Deputy Chief Legal Counsel
Office of Legal Counsel