

17 September 2018

Hon David Parker, Attorney-General

Consistency with the New Zealand Bill of Rights Act 1990: Regulatory Systems (Workforce) Amendment Bill (No 2)

Purpose

1. We have considered whether the Regulatory Systems (Workforce) Amendment Bill (No 2) ('the Bill') is consistent with the rights and freedoms affirmed in the New Zealand Bill of Rights Act 1990 ('the Bill of Rights Act'). The Bill replicates the Regulatory Systems (Workforce) Amendment Bill, which we advised was consistent with the Bill of Rights Act in June 2018.
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 21637/8.0). 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 s 14 (freedom of expression) and s 21 (unreasonable search and seizure). Our analysis is set out below.

The Bill

4. The purpose of the Bill is to improve regulatory systems by ensuring that they are effective, efficient, and accord with best regulatory practice.
5. Part 1 of the Bill amends the Employment Relations Act 2000 ('the Employment Relations Act'). It allows a member of the Employment Relations Authority ('the Authority') to be remunerated at a higher rate where they have been delegated duties of the Chief of the Authority. It also authorises a Labour Inspector to use the entry and inspection powers under s 229 of the Employment Relations Act to investigate whether a premises is a place of employment.
6. Part 1 also amends the Remuneration Authority Act 1977. It adds members of the Employment Relations Authority, to whom the Chief of the Authority's functions, duties, or powers have been delegated, to the list of officers whose remuneration is to be determined by the Remuneration Authority.
7. Part 2 amends the Holidays Act 2003 to clarify that penalties for failure to comply with provisions of that Act apply to persons who are involved in the failure to comply as well as employers.
8. Part 3 amends the Parental Leave and Employment Protection Act 1987. It extends the definition of 'primary carer' to include a spouse or partner who takes on permanent primary responsibility for the care, development and upbringing of a child under 12 months old, in situations where the biological mother was not entitled to parental leave or a parental leave payment.

Consistency of the Bill with the Bill of Rights Act

Section 14 – Freedom of Expression

9. 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 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.¹
10. New s 229A allows Labour Inspectors to interview any person at any premises that the Labour Inspector reasonably believes to be a workplace, and the power to interview any employer or employee. Section 229(5) provides that a person is not required to give an answer that will incriminate them. Section 229(5A) specifies that the interviewee's answer is not admissible in criminal proceedings, but the person is not excused from answering a Labour Inspector's questions on the grounds that doing so might expose the person to a pecuniary penalty.
11. To the extent that this is considered to limit the freedom of expression affirmed in s 14 of the Bill of Rights Act, we consider that limitation is justified taking into account the restrictions in the Employment Relations Act on the use of information acquired under that power and the exemption from answering questions if those answers would incriminate the interviewee.

Section 21 – Unreasonable search and seizure

12. 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 to be secure against unreasonable search or seizure protects a number of values including personal privacy, dignity, and property.²
13. New s 229A of the Employment Relations Act grants a power to a Labour Inspector, who has reasonable grounds to believe work is being performed at a premises, to exercise any of the powers under s 229 of the Employment Relations Act to investigate whether:
 - a. any place is a workplace; or
 - b. any person performing work is an employee (as distinct from a contractor or another type of worker); or
 - c. any person for whom work is being performed is an employer.
14. Among other powers, s 229 permits Labour Inspectors, for the purpose of performing their legislative functions and duties, to enter any premises at a reasonable hour to assess whether a person is employed and to require the production of, and to inspect and take copies of various relevant documents relating to the workplace or its workers.
15. New 229A imposes a penalty for a person for whom work is performed who, without reasonable cause, does not comply with the requirements under s 229.

¹ See, for example, *Slaight Communications v Davidson* 59 DLR (4th) 416; *Wooley v Maynard* 430 US 705 (1977).

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

16. We consider the extension of the powers under s 229 to a wider set of circumstances constitutes a search for the purposes of s 21 of the Bill of Rights Act. Ordinarily, a provision found to limit a particular right or freedom may nevertheless be consistent with the Bill of Rights Act if it can be considered reasonably justified in terms of s 5 of that Act. However, the Supreme Court has held an unreasonable search logically cannot be demonstrably justified and therefore the s 5 inquiry does not need to be undertaken.³
17. In assessing whether the search and seizure powers in the Bill are reasonable, we have considered the importance of the objective sought to be achieved and whether the provisions are rationally connected and proportionate to that objective.
18. We consider that the powers of entry and inspection in new s 229A are reasonably required to allow Labour Inspectors to perform their functions and duties, which are aimed at the important objective of ensuring effective enforcement of employment standards.
19. In order to exercise the power of entry, new s 229A(2)(a) provides that a Labour Inspector must have reasonable grounds to believe work is being performed at the premises. The Bill also retains the existing measures in ss 230-233A of the Employment Relations Act as safeguards against the power in new s 229A. These include an obligation not to disclose information obtained as a result of a s 229A investigation, and a requirement for a Labour Inspector to acquire a warrant from a Judge before entering a premises that is a dwellinghouse.
20. We therefore consider that the search and seizure powers in s 229A of the Bill are not unreasonable for the purposes of s 21 of the Bill of Rights Act.

Conclusion

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

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³ Ibid at [162] per Blanchard J.