

16 March 2023

Hon David Parker, Attorney-General

Consistency with the New Zealand Bill of Rights Act 1990: Integrity Sport and Recreation Bill

Purpose

1. We have considered whether the Integrity Sport and Recreation 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 24872/15.0). 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 (right to freedom of expression) and s 21 (right to be secure against unreasonable search and seizure). Our analysis is set out below.

The Bill

4. The Bill implements a single broad policy to strengthen and protect the integrity of New Zealand's sport and recreation sector by establishing an independent body and consolidating integrity functions within it.
5. To achieve these objectives, the Bill establishes a new independent Crown entity called the Commission. The key functions of the Commission will be to:
 - a. promote, advise, and educate on integrity issues and threats to integrity within the sport and physical recreation sector; and
 - b. engage with participants and the sport and physical recreation sector on integrity issues; and
 - c. develop and issue integrity codes including to set out minimum standards of conduct; and
 - d. prescribe policies and procedures for complaints management and dispute resolution; and
 - e. implement the World Anti-Doping Code and facilitate compliance with New Zealand's international obligations with respect to doping in sport; and
 - f. investigate suspected breaches of integrity codes and threats to integrity.
6. The Bill defines threats to integrity to include competition manipulation, corruption and fraud, use of prohibited substances (doping), abuse (including abuse of children),

bullying, violence, harassment, intimidation, and racism, and other forms of discrimination.

7. The ambit of the Commission will include grassroots and community sport and physical recreation as well as elite sport. Sport and physical recreation organisations will still be responsible for managing and resolving integrity issues in an appropriate way. However, the Commission will provide education, guidance, and independent pathways for the resolution of complaints and integrity matters.
8. The Bill will enable the Commission to make integrity codes through secondary legislation that organisations in the sport and physical recreation sector can adopt. The codes are intended to be the cornerstone for the new integrity system as they will set standards of conduct and prescribe policies and procedures for managing and resolving integrity issues.
9. The Commission will have powers to investigate suspected breaches of integrity codes, and to investigate other threats to integrity if it is in the public interest to do so. The Commission will have the power to require information to be provided if that information cannot be obtained by consent. The Commission will also be able to prescribe sanctions for breaches of an integrity code by an individual and, in some circumstances, convene a disciplinary panel to determine whether an integrity code has been breached by a participant and any sanctions to be imposed. Integrity codes may also prescribe means of holding organisations accountable for breaches of an integrity code, including by requiring them to take steps to change their policies or to pay compensation.
10. The Bill requires the Commission to carry out its functions with a strong focus on the needs of participants, including Māori, disabled people, and children and young people. The Commission will be required to have te ao Māori capability, including on the board, and be responsive to tikanga Māori and te Tiriti o Waitangi/the Treaty of Waitangi. In undertaking its functions, it will be required to reflect the needs of participants, including psychological, cultural, language, and disability needs and the needs of rainbow communities, and promote the best interests of children and young people.

Consistency of the Bill with the Bill of Rights Act

Section 14 – Freedom of expression

11. Section 14 of the Bill of Rights Act affirms 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 to freedom of expression has also been interpreted as including the right not to be compelled to say certain things or to provide certain information.¹
12. There are provisions in the Bill that prima facie engage the right to freedom of expression. These include:
 - a. Clause 34 provides the Commission may require a specified person to provide, produce, or furnish information or documents. This is conditional on the Commission believing, on reasonable grounds, that the information is relevant to an investigation into a breach of an integrity code or an investigation of a threat to integrity; that the document cannot be obtained by consent; and that the person holds or is likely to hold the information. ‘Specified person’ includes, for example,

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

Sport and Recreation New Zealand, the New Zealand Olympic Committee, and a national sporting or recreational organisation.

- b. Clause 35(2) provides that, where a person has failed to comply with a requirement under clause 34, the court may make an order directing a person to comply or any other order the court considers appropriate. Clause 35(3) provides that the court may require a person to produce documents or provide other information to the court for the purposes of determining an application under this section. Clause 35(4) provides that the court may make an order under this section subject to any conditions it considers appropriate. Failing to comply with a court order may result in contempt of court.

13. A limit on a right may nonetheless be consistent with the Bill of Rights Act if the limit is justified under s 5 of that Act. The s 5 inquiry asks:

- a. does the provision serve an objective sufficiently important to justify some limitation of the right or freedom?
- b. if so, then:
 - i. is the limit rationally connected with the objective?
 - ii. does the limit impair the right or freedom no more than is reasonably necessary for sufficient achievement of the objective?
 - iii. is the limit in due proportion to the importance of the objective?²

14. We consider that any limits on the freedom of expression contained within the Bill are justified under s 5 of the Bill of Rights Act because:

- a. The overall objective of the Bill, which is to promote, strengthen and protect the integrity of sport and physical recreation in New Zealand, is sufficiently important to justify some limit on s 14. The objective of these provisions appears to be to ensure compliance with the regulatory regime, such as enabling the Commission to properly investigate a breach of an integrity code or a threat to integrity. Being able to require persons to provide relevant information is an important part of the regulatory regime.
- b. The requirements imposed on people to provide certain information in specific circumstances are rationally connected to this objective. Ensuring that relevant information is provided is important for achieving the Bill's regulatory objectives.
- c. The requirements in the Bill limit freedom of expression no more than reasonably necessary for the regime to operate efficiently and are proportionate to the importance of the Bill's objectives. We note that:
 - i. These powers are limited to circumstances where there is an investigation into a breach of an integrity code or a threat to integrity. The Commission may only investigate a breach or apparent breach of an integrity code where the relevant activity, organisation and/or participant is bound by it. The Commission may only investigate a threat to integrity if the matter appears to be a threat to integrity and investigation is in the public interest.

² *Hansen v R* [2007] NZSC 7, [2007] 3 NZLR 1.

- ii. The power in clause 34 is appropriately limited in that the Commission can only request information from a suitably limited list of persons; must believe on reasonable grounds that the information cannot be obtained by consent; and must believe on reasonable grounds that the information is relevant to an investigation. The Commission is required to report on the use of these powers as part of their annual report, which acts as an additional safeguard.
 - iii. Similarly, the court's powers in clause 35 are appropriately limited to requiring a person to provide information for the purposes of assessing an application for a failure to comply with a requirement of clause 34.
15. Accordingly, any limits to s 14 are justified under s 5 of the Bill of Rights Act. For completeness, we have also considered these clauses in terms of section 21 of the Bill of Rights Act, which protects against unreasonable search and seizure. For the reasons given above, we do not consider it amounts to an unreasonable search in terms of section 21 of the Bill of Rights Act.
16. We further note that clause 19 provides that the Commission has the power to make one or more integrity codes. An integrity code may: require an organisation that adopts the integrity code or a participant, or other person, who has agreed to be bound by the integrity code to provide to the Commission information or documents that the Commission considers is reasonably necessary for the purposes of any investigation conducted by the Commission under section 31 (investigation into a breach of an integrity code) or section 32 (investigation of a threat to integrity); require an organisation that adopts the integrity code to provide to the Commission information or documents that the Commission considers reasonably necessary for the purpose of monitoring implementation of the integrity code; and require an organisation that adopts an integrity code to report to the Commission issues of serious concern regarding integrity.
17. We further note that clause 23 provides that the Commission may make anti-doping rules that are necessary and desirable to govern the practice and procedure of certain functions of the Commission. The Commission may make anti-doping rules requiring an organisation to which, or individual to whom, the anti-doping rules apply to provide to the Commission information or documents that the Commission considers reasonably necessary for the purposes of performing its function to comply with and implement the anti-doping rules.
18. These empowering provisions do not, in and of themselves, limit rights under the Bill of Rights Act; and are accordingly consistent with the Bill of Rights Act. However, secondary legislation made under these empowering provisions may limit rights under the Bill of Rights Act. We note for completeness that secondary legislation must be consistent with the Bill of Rights Act, otherwise there is a risk it will be ultra vires (go beyond the authority of the primary legislation).

Section 21 - Right to be secure against unreasonable search or 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, or correspondence or

otherwise. The right protects a number of values including personal freedom, privacy, dignity, and property.³

20. 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 that logically, an unreasonable search cannot be demonstrably justified and therefore the inquiry does not need to be undertaken.⁴ Rather, in order for a statutory power to be consistent with s 21, engagement of the right must not be unreasonable.
21. Whether a search will be unreasonable turns on a number of factors, including the nature of the place or object being searched, the degree of intrusiveness into personal privacy and the rationale of the search.⁵ The greater the degree of intrusiveness, the greater the need for justification and attendant safeguards.

Power to make anti-doping rules

22. Clause 23 requires the Commission to make and have anti-doping rules to implement the World Anti-Doping Code (defined in clause 4). We understand that testing, amongst other things, will be provided for under these anti-doping rules and that athletes who are bound by the anti-doping rules will be subject to testing and can be required to provide a urine or blood sample at any time for the purposes of doping control. We understand that an individual will be bound by the rules (and therefore subject to testing) if they participate in a sport to which the rules apply. We note that there are already rules in place that provide for such matters (Sports Anti-Doping Rules), and that rules made pursuant to clause 23 are likely to be of a similar nature.
23. These empowering provisions do not, in and of themselves, limit rights under the Bill of Rights Act; and are accordingly consistent with the Bill of Rights Act. However, we note that the rules will also have to be drafted in a manner that is consistent with the Bill of Rights Act, otherwise they may be open to challenge for being ultra vires.⁶
24. The rules will be publicly available and are disallowable instruments that must be presented to the House of Representatives. This provides legislative oversight.
25. We also note that the entitlement to conduct any search and the manner in which a particular search is conducted will be subject to scrutiny under s 21 of the Bill of Rights Act. The power to make a rule conferring an entitlement to make a search does not authorise searches that would be unreasonable and thus, infringe protected rights.⁷ Therefore, testing and monitoring will need to be undertaken in a manner that is compliant with s 21.

³ See, for example, *Hamed v R* [2011] NZSC 101, [2012] 2 NZLR 305 at [161] per Blanchard J.

⁴ Ibid at [162] per Blanchard J.

⁵ *Hamed v R* [2011] NZSC 101, [2012] 2 NZLR 305 at [172] per Blanchard J.

⁶ *Drew v Attorney General* [2002] 1 NZLR 58 (CA).

⁷ *Cropp v Judicial Committee* [2008] 3 NZLR 774.

Conclusion

26. 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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