

5 April 2006

Attorney-General (Hon Michael Cullen)

**CONSISTENCY WITH THE NEW ZEALAND BILL OF RIGHTS ACT
LAW REFORM (EPIDEMIC PREPAREDNESS) BILL**

Purpose of Briefing

1. This briefing provides advice on the consistency of a late amendment to the Law Reform (Epidemic Preparedness) Bill (the Bill) with the New Zealand Bill of Rights Act 1990 (the Bill of Rights Act). We conclude that the provision, which authorises the temporary detention and continued surveillance of persons suffering from an infectious disease is inconsistent with sections 14 and 22 of the Bill of Rights Act, and that this inconsistency cannot be justified in terms of section 5 of that Act.

Purpose of the Provision

2. As you will be aware, the Policy Cabinet Committee is considering the Bill at its meeting this morning. We have provided you with advice, in which we conclude that the version of the Bill that we were asked to vet (version 12) is consistent with the rights and freedoms protected in the Bill of Rights Act.
3. Late yesterday (at 5:30 pm), we were told by the Parliamentary Council Office that a provision had been inserted into the Bill that would extend the circumstances in which the Medical Officer of Health may order the surveillance of a person who had been exposed to a disease. Prior to the insertion of this provision, this power could only be exercised in relation to a quarantinable disease (cholera, plague, yellow fever and avian influenza) and would only apply to the passengers and crew of a craft arriving from overseas. We were advised that the Ministry of Health wanted to widen the scope of this power to include persons living in the community.
4. The text of the provision (new clause 71A), however, is wider than this stated aim. The provision will allow the temporary detention (up to 14 days with a possible extension to 28 days) and continued surveillance of any person who is suffering from an infectious disease listed in Schedule 1 of the Health Act 1956, which includes diseases such as salmonellosis, measles, mumps, scabies, hepatitis and acquired immune deficiency syndrome. Although the provision ties the use of this power to a state of emergency declared under the Civil Defence Emergency Management Act, the provision allows the Minister of Health to authorise the use of this

power, outside a state of emergency, in relation to an outbreak of an infectious disease – a term which could apply to a single infection.

Issues of Inconsistency with the Bill of Rights Act

5. We have considered whether new clause 71A raises an issue of inconsistency with section 14 and 22 of the Bill of Rights Act.

Section 22: Right not to be arbitrarily detained

6. In our view, new clause 71A is prima facie inconsistent with the right not to be arbitrarily detained (section 22 BORA). We note that the power can only be used in a civil defence emergency or upon the authorisation of the Minister. However, the language used in the provision, particularly the phrase “following an outbreak” which would apply to a single infection, does not provide the level of certainty and appropriateness required by section 22.
7. We acknowledge that an argument can be made that isolating persons who are suffering from an infectious disease serves an important and significant objective. However we do not consider that the measures proposed are rationally and proportionally connected to that purpose. All diseases within the list of infectious diseases will be covered by this power, including many diseases (e.g. hepatitis and acquired immune deficiency syndrome) where adequate management regimes well short of detention may be in place to prevent the spread of the disease.
8. We have considered whether the provision would be saved by section 6 of the Bill of Rights Act, but note the comments of Thomas J in *Quilter v Attorney General*¹ on the application of this section that “even if a meaning is theoretically possible, it must be rejected if it is clearly contrary to what Parliament intended.” New clause 71A clearly states that a person suffering from an infectious disease may be temporarily detained. In light of Thomas J’s view in *Quilter*, it is our view that the courts would be obliged to read clause 71A as authorising the arbitrary detention of a person.

Section 14: Right to freedom of expression

9. We have considered whether new section 71A raises an issue in relation to section 14 (freedom of expression) of the Bill of Rights Act. This provision requires a person who is detained under this provision to supply various pieces of information to a Medical Officer of Health that will enable the management of risks to public health. Such information would include the person’s name, address, movements, and recent contacts and activities. The provision also sets out a similar requirement in respect of a person who is kept under surveillance at large.

¹ *Quilter v Attorney General* [1998] 1 NZLR 523 at 542

10. We consider that the provision of information relating to a person's movements and recent contacts and activities could be said to attract the protection of section 14 of the Bill of Rights Act, as such information can be described as expressive or representative of expressive content. Since the provision covers all infectious diseases, including many where a person suffering from the disease could be said to be always capable of passing it on (e.g. hepatitis and acquired immune deficiency syndrome), we do not consider that this measure is justified in terms of section 5 of the Bill of Rights Act. This is because the measure lacks proportionality: there are other less intrusive management techniques available.
11. We therefore conclude that new clause 71A is inconsistent with sections 14 and 22 of the Bill of Rights Act and that these inconsistencies cannot be justified in terms of section 5 of that Act.

Remarks

12. We have contacted the Ministry of Health about our concerns and it is unclear, at this stage, whether POL will be asked to consider version 12 of the Bill or the one containing the inconsistent provision (version 13). If POL is asked to consider the latter and approve the Bill for introduction, we recommend that you bring the Bill to the attention of the House of Representatives, pursuant to section 7 of the Bill of Rights Act and Standing Order 264. We will prepare a draft report for this purpose.

Recommendations

It is recommended that you:

- a) **Note** that we were advised that a late change was being made to the Law Reform (Epidemic Preparedness) Bill to insert a provision that would authorise the temporary detention and continued surveillance of persons suffering from an infectious disease in certain circumstances;
- b) **Note** that this provision appears to be inconsistent with sections 14 and 22 of the Bill of Rights Act and that these inconsistencies cannot be justified in terms of section 5 of that Act.
- c) **Agree** that if the Policy Cabinet Committee is asked to consider the version 13 of the Bill and approve this version for introduction, we recommend that you bring the Bill to the attention of the House of Representatives, pursuant to section 7 of the Bill of Rights Act.

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