

7 September 2022

Hon David Parker, Attorney-General

Consistency with the New Zealand Bill of Rights Act 1990: Charities Amendment Bill

Purpose

1. We have considered whether the Charities 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 21878/4.5). 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 19 (freedom from discrimination). Our analysis is set out below.

The Bill

4. The Bill amends the Charities Act 2005 (the **principal Act**), which provides for the registration and deregistration of charities where charitable entities are fulfilling a charitable purpose. The principal Act provides a framework of provisions that seek to promote public trust and confidence in charities.
5. The objective of the Bill is to make practical changes to the principal Act to support charities to continue their vital contribution to community wellbeing, while ensuring that contribution is sufficiently transparent to interested parties and the public. The Bill does this by:
 - a. Enabling simpler financial reporting from small charities, to reduce compliance burden;
 - b. Improving access to justice in the appeals process;
 - c. Enhancing regulatory decision-making requirements, to further promote transparency and fairness;
 - d. Improving regulatory compliance and enforcement tools; and
 - e. Clarifying the role of officers and supporting the governance of charities.

Consistency of the Bill with the Bill of Rights Act

Section 19 – freedom from discrimination

6. Section 19 of the Bill of Rights Act concerns the right to be free from discrimination, on the grounds contained in the Human Rights Act 1993, which includes ‘age’. Under s 21 of the Human Rights Act, ‘age’ means any age commencing with the age of 16 years.
7. The key questions in assessing whether there is a limit on the right to freedom from discrimination are:
 - a. Does the legislation draw a distinction on one of the prohibited grounds of discrimination under s 21 of the Human Rights Act?¹ and, if so,
 - b. Does the distinction involve disadvantage to one or more classes of individuals?²
8. A distinction will arise if the legislation treats two comparable groups of people differently on one or more of the prohibited grounds of discrimination. Whether disadvantage arises is a factual determination.
9. Clause 7 of the Bill creates a new requirement for *at least one* officer of a charitable entity to be aged 18 years or older. By removing the ability of individuals aged 16 and 17 to be an officer of a charity without the assistance of an officer aged 18 and over, clause 7 treats individuals aged 16 and 17 disadvantageously relative to individuals aged 18 and over, who may be an officer of a charity alone or with any other officer or officers of their choice. Accordingly, the Bill prima facie limits the right to be free from discrimination on the basis of age.
10. Any limit on the non-discrimination right may be considered a reasonable limit if it can be demonstrably justified in terms of s 5 of the Bill of Rights Act. The s 5 inquiry may be approached as follows:³
 - 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?

¹ See, for example, *Atkinson v Minister of Health and others* [2010] NZHRRT 1; *McAlister v Air New Zealand* [2009] NZSC 78; and *Child Poverty Action Group v Attorney-General* [2008] NZHRRT 31.

² See, for example, *Child Poverty Action Group v Attorney-General* above n 1 at [179]; and *McAlister v Air New Zealand* above n 1 at [40] per Elias CJ, Blanchard and Wilson JJ.

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

11. We understand that part of the objective of the limitation in cl 7 is to promote public trust and confidence in the charitable sector by ensuring that persons involved in charity governance are mature enough to take on the legal and financial responsibility involved. We consider that this objective is sufficiently important to justify some limit on the right to freedom from discrimination.
12. In our view, the requirement in cl 7 for at least one officer to be aged 18 years or older is rationally connected to this objective. We understand that the age limit in the Bill is intended to act as a proxy for maturity. Such bright-line age restrictions are necessarily arbitrary to a degree but can provide a level of certainty and consistency where (as here) an individual assessment of maturity is not practical. We note that the requirement in cl 7 also aligns with similar age requirements for trustees of trusts (under the Trusts Act 2019), company directors (under the Companies Act 1993), and contact persons of incorporated societies (under the Incorporated Societies Act 2022).
13. We also consider that the age requirement in cl 7 impairs the freedom from discrimination of individuals aged 16 and 17 no more than is reasonably necessary for the achievement of, and is proportionate to, its objective. The use of 'at least one' ensures that 16 and 17 year olds are not precluded from making a significant contribution to charity governance, including in an officer capacity.
14. For these reasons, we consider that the limitation on s 19 of the Bill of Rights Act in cl 7 of the Bill is justified.

Conclusion

15. 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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