

12 May 2021

Hon David Parker, Attorney-General

## **Consistency with the New Zealand Bill of Rights Act 1990: COVID-19 Public Health Response (Validation of Managed Isolation and Quarantine Charges) Amendment Bill**

### **Purpose**

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1. We have considered whether the COVID-19 Public Health Response (Validation of Managed Isolation and Quarantine Charges) 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 23757/1.4). This advice has been prepared in a short timeframe due to late receipt of the Bill that was not in compliance with Cabinet Office Guidance. 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), s 26(1) (retroactivity), and s 27(3) (right to bring civil proceedings against the Crown). Our analysis is set out below.

### **The Bill**

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4. The Bill amends the COVID-19 Public Health Response Act 2020. The purpose of the Bill is to correct an error that resulted in Australian temporary entry class visa holders being unlawfully charged a higher fee for their Managed Isolation Quarantine (MIQ) stay. MIQ fees are charged in accordance with the COVID-19 Public Health Response (Managed Isolation and Quarantine Charges) Regulations 2020 (the Regulations).
5. Immigration New Zealand's processes for giving visas to Australian citizens is different to processes applying to citizens of other countries, due to New Zealand's special relationship with Australia. New Zealand's immigration settings generally convert all Australians entering New Zealand to the same resident visa status, even if they have travelled to New Zealand on a temporary class visa.<sup>1</sup>
6. Australians travelling to New Zealand under a temporary class visa have been charged MIQ fees at the temporary class visa holder rate for MIQ.<sup>2</sup> However, because they had been converted to resident visa status on entry to New Zealand, and liability for MIQ fees

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<sup>1</sup> This is in accordance with the Immigration (Visa, Entry Permission, and Related Matters) Regulations 2010.

<sup>2</sup> This is higher than the rate payable by most New Zealand citizens and residents, and Australians who are ordinarily resident in New Zealand.

arises at the point of entry into MIQ (that is, after their visa status has changed), the Regulations do not allow them to be charged at the temporary class visa rate.

7. The effect of the Bill is to validate the fees actually charged and provide that any money received in payment of the fees is lawfully collected and applied. These changes mean Australian temporary class visa holders are deprived of the right to request a refund of any unlawful charge.
8. The Bill also amends the Regulations to provide for charging MIQ fees to Australians who travel to New Zealand on a temporary class visa at the higher rate.

## **Consistency of the Bill with the Bill of Rights Act**

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### **Section 19 – Freedom from discrimination**

9. Section 19 of the Bill of Rights Act affirms that everyone has the right to freedom from discrimination on the grounds of discrimination set out in the Human Rights Act 1993 (the Human Rights Act).
10. The Bill retroactively treats Australian temporary class visa holders differently from other arrivals who have been through MIQ. This raises the question of whether the right to be free from discrimination is engaged. The key questions in assessing whether there is a limit on the right to freedom from discrimination are:<sup>3</sup>
  - a. does the legislation draw a distinction on one of the prohibited grounds of discrimination under s 21 of the Human Rights Act and, if so
  - b. does the distinction involve disadvantage to one or more classes of individuals?
11. 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.<sup>4</sup>
12. There is a distinction present, however it does not appear to be made on the basis of a prohibited ground. The key distinction appears to be between Australians (and others) who are ordinarily resident in New Zealand and Australians who are not ordinarily resident and travel to New Zealand on a temporary class visa. This distinction appears to be based on place of residence, rather than on ethnic or national origins or citizenship. We also note that it is very difficult to draw a comparator group here, as Australians are already treated differently from other groups within our immigration system.
13. For these reasons, it does not appear that s 19 is engaged.

### **Section 26(1) – Retroactivity**

14. Clause 4 of the Bill will have retroactive effect by validating all previous charges that were incorrectly made. While this engages the principle that legislation should not have

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<sup>3</sup> 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.

<sup>4</sup> 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.

retroactive effect,<sup>5</sup> it does not involve the retrospective application of a criminal offence. The Bill therefore does not engage section 26(1) of the Bill of Rights Act, which relates to retroactive offences.

### **Section 27(3) – Right to bring civil proceedings against the Crown**

15. Clause 4 of the Bill deprives those Australian arrivals covered by the Bill, including Australian temporary class visa holders, the right to a refund of any unlawful charge.
16. This clause might be seen to raise an issue of compliance with s 27(3) of the Bill of Rights Act, namely the right to bring civil proceedings against the Crown and have those heard according to law in the same way as civil proceedings between individuals. However, cl 4 of the Bill affects the substantive law and does not fall within the ambit of s 27(3) of the Bill of Rights, which protects procedural rights.<sup>6</sup>

### **Conclusion**

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17. 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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<sup>5</sup> *Legislation Guidelines* (2018 edition), chapter 12.1.

<sup>6</sup> *Westco Lagan Ltd v Attorney-General* [2001] 1 NZLR 40, 55: “[s]ection 27(3) ... cannot restrict the power of the legislature to determine what substantive rights the Crown is to have. Section 27(3) merely directs that the Crown shall have no procedural advantage in any proceeding to enforce rights if such rights exist.”