

5 May 2021

Hon David Parker, Attorney-General

## **Consistency with the New Zealand Bill of Rights Act 1990: Biosecurity (Information for Incoming Passengers) Amendment Bill**

### **Purpose**

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1. We have considered whether the Biosecurity (Information for Incoming Passengers) 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 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 25(c) (right to be considered innocent until proven guilty). Our analysis is set out below.

### **The Bill**

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3. The Bill amends the Biosecurity Act 1993 (the principal Act) to require that the person in charge of a craft coming into New Zealand is required to provide biosecurity information to the persons on board by means of an audiovisual recording and writing.
4. The purpose of the Bill is to ensure that people entering New Zealand are aware of our biosecurity protections.
5. Clause 4 inserts proposed new s 17AA into the principal Act which requires the person in charge of an incoming craft to:
  - a. give each person on board the craft a copy of approved written information about New Zealand's biosecurity requirements; and
  - b. play a copy of approved audiovisual information about New Zealand's biosecurity requirements in a prominent location that is able to be seen and heard by each person on board the craft.
6. Clause 6 of the Bill amends s 154N of the principal Act to provide that failing to comply with proposed new s 17AA is a strict liability offence under the principal Act.

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

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#### **Section 14 – Freedom of Expression**

7. Section 14 of the Bill of Rights Act affirms the right to freedom of expression. This includes the freedom to seek, receive, and impart information and opinions of any kind

and in any form. This right has been interpreted as including the right not to be compelled to say certain things or provide certain information.<sup>1</sup>

8. The requirement in cl 4 for the person in charge of an incoming craft to distribute and communicate, and for those on the aircraft to receive, approved information creates a *prima facie* limit on the right to freedom of expression.
9. 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. This section 5 inquiry may be approached as follows: does the provision serve an objective sufficiently important to justify some limitation of the right or freedom?
  - a. 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?
10. The objective of the Bill is to provide people entering New Zealand with information regarding New Zealand's biosecurity requirements. This supports the purpose of the principal Act, which is to provide a legal framework for the Ministry for Primary Industries and others to help keep harmful organisms out of New Zealand. We consider providing information to create an understanding of New Zealand's biosecurity requirements in order to help keep harmful organisms from entering New Zealand and causing damage is a sufficiently important objective. Requiring the person in charge to provide biosecurity information to people on the craft in written and audiovisual form is rationally connected to the objective of the Bill
11. We consider that the limit on the right is no more than is reasonably necessary and proportionate to the achievement of the objective of the Bill. The Bill only applies to craft coming from outside of New Zealand that will arrive in New Zealand. The biosecurity information provided to people on craft is important to the protection of New Zealand's environment and economy. It is therefore proportionate for people in charge of craft to be required to communicate this information in approved forms to people on-board.
12. For these reasons, we conclude that any limits on the right to freedom of expression imposed by the Bill are justified under s 5 of the Bill of Rights Act.

### **Section 25(c) – Right to be considered innocent until proven guilty**

13. Section 25(c) of the Bill of Rights Act affirms that everyone who is charged with an offence has, in relation to the determination of that charge, the right to be presumed innocent until proven guilty according to law. The right to be presumed innocent requires that an

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

individual must be proven guilty beyond reasonable doubt, and that the State must bear the burden of proof.<sup>2</sup>

14. The Bill creates a new strict liability offence. Clause 6 of the Bill amends s 154N of the principal Act to provide that failing to comply with proposed new s 17AA is a strict liability offence and the prosecution is not required to prove that the defendant intended to commit the offence.
15. Strict liability offences *prima facie* limit s 25(c) of the Bill of Rights Act. This is because a strict liability offence may be proved by a finding that certain facts occurred without proof of *mens rea*. The accused is required to prove a defence (on the balance of probabilities), or disprove a presumption, to avoid liability.
16. The *prima facie* inconsistency with s 25(c) of the Bill of Rights created by the new strict liability offence may nevertheless be consistent with the Bill of Rights Act if the limits can be demonstrably justified in a free and democratic society, as per s 5 of the Bill of Rights Act.
17. We consider that the *prima facie* limit proposed by cl 6 of the Bill appears to be justified. In reaching this conclusion we have taken into account the nature and context of the activity being regulated, the ability of the defendants to exonerate themselves, and the penalty levels.
18. Strict liability offences are more easily justifiable where they are in the category of 'public welfare regulatory offences'. The strict liability offence in the Bill arises in the context of minimising harm. Providing New Zealand biosecurity information to people on incoming crafts may reduce the likelihood of harmful organisms entering New Zealand. We consider that this is a sufficiently important objective and the limit is rationally connected to the objective.
19. We note that s 154N of the principal Act contains several general defences for the relevant strict liability offences which would include the offence created by the Bill.
20. The penalty set out in s 157 of the principal Act is a fine not exceeding \$5,000 for an individual and not exceeding \$15,000 for a body corporate. This penalty is in line with penalty ranges for other regulatory regimes and is proportionate to the importance of the Bill's objective which is to provide people entering New Zealand with information regarding New Zealand's biosecurity requirements.
21. For the above reasons, we consider the limit on s 25(c) of the Bill of Rights Act can be justified under s 5 of the Bill of Rights Act.

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<sup>2</sup> *Hansen v R* [2007] NZSC 7 [30], also *R v Wholesale Travel Group* (1992) 84 DLR (4th) 161, 188 citing *R v Oakes* [1986] 1 SCR 103.

## Conclusion

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22. 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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