



Report of the

ATTORNEY-GENERAL

under the New Zealand Bill of Rights Act 1990 on
the COVID-19 Public Health Response
Amendment Bill

14 September 2021

Hon David Parker, Attorney-General

Consistency with the New Zealand Bill of Rights Act 1990: COVID-19 Public Health Response Amendment Bill

1. I am satisfied that the COVID-19 Public Health Response Bill is consistent with the rights and freedoms affirmed in the New Zealand Bill of Rights Act 1990 (the Bill of Rights Act). There are a number of provisions in the Bill which engage rights or freedoms protected by the Bill of Rights Act. I have concluded that any limitation they pose on rights are reasonably justifiable under s 5 of the Bill of Rights Act.

Section 14 – Freedom of Expression

2. New section 32T of the Bill requires a person in MIQF to provide their contact information for the purpose of invoicing MIQF charges. The provision also requires people to update their contact details as soon as practicable if their details change before payment of any MIQF charges. A failure to comply with either of these requirements is an infringement offence.
3. Section 14 of the Bill of Rights Act, the right to freedom of expression, is engaged by this provision. 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.¹ I have considered whether the provision can be reasonably justified in terms of s 5 of the Bill of Rights Act. The s 5 inquiry asks whether the objective of the provision is sufficiently important to justify some limitation on the freedom of expression; and if so, whether the limitation is rationally connected and proportionate to that objective and limits the freedom of expression no more than reasonably necessary to achieve that objective².
4. Section 14 (freedom of expression) is engaged and the right is limited because the Crown is using its coercive powers to compel a person to provide information through a criminal offence in order to recover money owing to MIQF, which is a civil debt.
5. The immediate objective that s 32T of the Bill serves is to facilitate the invoicing of people who have used MIQF. This supports the wider objective of supporting the economic sustainability of the MIQF system, and in turn achieving an economically sustainable response to COVID-19. These objectives are related to the important primary objective of managing the public health risks of COVID-19. It is the primary objective of managing public health risks that has been singled out by academic commentators as being an objective that is sufficiently important to justify proportional limits on rights³.
6. At a conceptual level, there is a rational connection between being able to invoice people for their MIQF stay and making MIQF economically sustainable.

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

² *Hansen v R* [2007] NZSC 7, [2007] 3 NZLR 1 at [123].

³ Andrew Butler and Petra Butler in *New Zealand Bill of Rights Act: A Commentary* (2nd ed, LexisNexis, Wellington, 2015) at [16.6.18].

7. The proposed infringement offence for failure to provide or update contact information is in due proportion to the objective of ensuring MIQF is economically sustainable. Entrants to MIQF come to New Zealand with the knowledge that they are expected to pay fees for their stay, and there is no legitimate reason to avoid paying this debt.
8. I note that the MIQF system has been set up at pace as part of the pandemic response, meaning operational processes are not fully developed. The collection of information for invoicing purposes should, in the long run, ideally be addressed through enhancements to MBIE's operational systems. However, in the short-term, other measures are reasonably necessary in this context, including a criminal penalty at the extreme end of regulatory measures. I also note that MBIE has advised that they are moving towards being able to issue invoices to people during their stay in a MIQF, which would provide another avenue to work around the issue of information provision for the purposes of invoicing.
9. For these reasons, I have concluded that the Bill appears to be consistent with the right to freedom of expression in s 14 of the Bill of Rights Act due to this provision.

Section 25(c) – Right to be presumed innocent until proven guilty

10. Proposed s 32 of the Bill creates an offence for failing to comply with the requirement to remain in one's room in MIQF, or other place of isolation or quarantine, except in accordance with specified exceptions (new section 32P(6)).⁴
11. Clause 13 of the Bill replaces s 26 of the principal Act and provides that a person commits an infringement offence if they do anything specified as an infringement offence in the Act or in a COVID-19 order, or breaches a rule made under new s 32Q about the operation of MIQFs. New s 26(4) provides that a person who commits an infringement offence is liable for:
 - a. a \$4,000 fee and \$12,000 fine for an individual or any lesser or equal amount prescribed in regulations, or
 - b. a \$12,000 fee and \$15,000 fine for any other person or any lesser or equal amount prescribed in regulations.
12. New s 33 provides that regulations may be made by the Governor-General prescribing fees and fines for infringement offences that are no more than the maximum amount specified in s 26. However, it is not a requirement for regulations to be made. If these regulations are not made, or until such time that they are made, the default penalties set out above will apply.
13. Because infringement offences are strict liability offences they *prima facie* limit s 25(c) of the Bill of Rights Act, which affirms the right to be presumed innocent until proven guilty. 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.
14. Although infringement offences do not result in a criminal conviction,⁵ the Court of Appeal in *Henderson v Director, Land Transport New Zealand* held that the rights in ss 24 and 25 of the Bill of Rights Act apply to minor offences dealt with under the infringement notice regime.⁶

⁴ It is an offence on conviction to intentionally fail to do so (section 32P(5)).

⁵ Section 375(1)(a) of the Criminal Procedure Act 2011.

⁶ [2006] NZAR 629 (CA).

15. The penalties in the Bill are higher than those generally recommended for infringement offences. The Legislation Guidelines set out that, in general, infringement fees should not exceed \$1,000.⁷ However, there are exceptions to this rule and there are infringement provisions in New Zealand legislation that impose penalties in excess of \$1,000.⁸
16. I have considered in particular whether the penalties for the offence are proportionate to the importance of the Bill's objective.
17. The infringement offence in section 32P arises when individuals in MIQF, or other places of isolation or quarantine, fail to remain in their room except for authorised purposes. Individuals are required to be in those places due to either testing positive to COVID-19 or being considered at high risk of having been exposed to COVID-19 (either through travelling outside of New Zealand's borders, or having been in proximity of an individual who has tested positive for COVID-19).
18. Requiring high risk individuals to stay in their room is rationally connected to the public health objective of preventing the outbreak or spread of COVID-19.
19. In addition, a person who leaves their room for an authorised activity but fails to comply with conditions imposed by the chief executive of the agency responsible for MIQF (the Chief Executive), would also be committing an infringement offence under s 32P(5). There is no statutory limit on types of conditions that can be imposed, for which a breach of conditions may be low risk. However, it is foreseeable that the types of conditions imposed on persons leaving their room for an authorised purpose will be conditions directly related to the public health objective (for example mask wearing requirements, social distancing etc). The Bill of Rights Act applies to conditions made by the Chief Executive meaning conditions which are inconsistent with the Bill of Rights Act will be ultra vires. For these reasons, I consider an infringement offence related to breach of such conditions is also rationally connected to the public health objective.
20. I consider that the infringement offence in s32P is a justifiable limit on section 25(c) because:
 - a. the offences are in the nature of a public welfare regulatory offence and do not result in a criminal conviction;
 - b. the defendant is in the best position to justify their apparent failure to comply with the law; and
 - c. the penalty for the offence is proportionate to the importance of the Bill's objective.
21. As discussed above, new section 32T of the Bill also creates an infringement offence for individuals who fail to provide, or keep updated, contact details for the purposes of invoicing MIQF charges. Being able to invoice individuals for their MIQF stay is important to retaining an MIQF system which is economically viable. An economically sustainable response to COVID-19 is connected to managing the public health risks of COVID-19. The COVID-19 pandemic continues to constitute an exceptional situation in respect of a virus that has been shown to have extreme impacts on public health and wellbeing. This context continues to necessitate the utmost caution being taken to protect public health.

⁷ Legislation Guidelines (18th edition) at 25.2.

⁸ Legislation Guidelines (18th edition) Chapter 25. The guidelines make it clear that these are exceptions to the general principle and should not operate as precedents for new infringement offence regimes.

22. For these reasons I consider these infringement offences are a justified limitation on the presumption of innocence and the penalties are proportionate as they are tied to an important public health objective. Accordingly, the limit that sections 32 (P) and 32T may place on the right on the right to be presumed innocent until proven guilty according to law are justified under section 5 of the Bill of Rights Act.

Sections 16, 17 and 18 – Freedom of peaceful assembly, freedom of association and freedom of movement

23. Section 16 of the Bill of Rights Act provides that everyone has the right to freedom of peaceful assembly, s 17 that everyone has the right to freedom of association, and s 18(1) that everyone lawfully in New Zealand has the right to freedom of movement and residence in New Zealand.
24. Sections 11(1)(b) and 32P are designed to restrict movement of individuals to, from and within MIQF and other places of isolation or quarantine. The proposed new s 22(3A) gives a constable the power to stop a vehicle at any roadblock or checkpoint established for the purpose of enforcing or monitoring compliance with a COVID-19 order which restricts movement of persons. New section 22(5) extends this power to enforcement officers, provided that they are acting under the supervision of a constable.
25. These new sections prima facie limit an individual's right to move freely, assemble and associate. Nevertheless, the Bill may be consistent with the Bill of Rights Act if the limitations are necessary and can be justified in a free and democratic society.⁹
26. The purpose of new sections 11(1)(b) and 32P are to restrict movement of individuals to, from and within MIQF and other places of isolation or quarantine. Those individuals are at higher risk of spreading COVID-19 in the community and the utmost caution must be taken to protect public health. The power granted to constables and enforcement officers to stop vehicles at a checkpoint serves the important objective of enforcing and monitoring compliance with an order that restricts movements of persons, for the purpose of preventing transmission of a serious public health risk is an important objective.
27. COVID-19 is transmitted through physical proximity. Restricting the movement of individuals moving to, from or within places of isolation or quarantine, and accordingly their ability to assemble, associate and move freely is rationally connected to the public health objective of preventing, containing, reducing, controlling, managing, eliminating or limiting the risks of an outbreak, or the spread, of COVID-19.
28. The Bill aims to enable the public health response to COVID-19 to continue to function in a co-ordinated and orderly way. A number of the restrictions on individuals moving to, from and within MIQF already exist operationally or through the existing orders made under the principal Act. It is more suitable for these restrictions to sit in primary legislation to ensure transparency and proportionality of any restrictions on the rights and freedoms contained in the Bill of Rights Act. Any discretionary decision-making powers that these new sections provide for must be made in a manner consistent with the Bill of Rights Act.
29. A constable or enforcement officer exercising the power in section 22(3A) to stop a vehicle, may only do so where a road block or checkpoint has been established for the purpose of enforcing or monitoring compliance with an order that restricts movements of persons, a power which I consider reasonably necessary to minimise movement in and out of areas where COVID-19 is, or is likely to be, present in the community. Restricting movement through the use of authorised road blocks and checkpoints for the purposes of containing an outbreak, or preventing the spread, of COVID-19 is rationally connected to the public health objective.

⁹ Section 5 of the Bill of Rights Act.

30. The Bill provides for extensive limits on freedom of association, assembly and movement. However, in the context of a global pandemic, these powers reflect the significant risk that COVID-19 poses to the public health and wellbeing of individuals in New Zealand. The limitation on freedom of association, assembly and movement for a limited period is in due proportion to the public health response. The principal Act already provides for a number of significant safeguards to ensure that when orders are made consideration is given to the public health concerns, rights and freedoms affected, and wider social interests. Orders may only be made where a risk of transmission remains and must be kept under review. These safeguards ensure that powers are used transparently and are subject to public and parliamentary scrutiny.
31. For these reasons, the limits that section 11 (1)(b), 22 and 32P (1) may place on the rights and freedoms of movement, peaceful assembly and association are justified under section 5 of the Bill of Rights Act.

Section 21 – Right to be free from unreasonable search and seizure

32. New s 32S provides the Chief Executive the power to seize and hold items people may possess (or have delivered) in an MIQF in breach of the rules – for example, alcohol in excess of the limits. While I consider that this provision engages s 21 of the Bill of Rights Act, the right to be free from unreasonable search and seizure, I consider that the limit on the right is reasonably justified,
33. This provision would allow the Chief Executive to seize and hold items that may pose a risk to the health and safety of individuals in MIQFs, which may require the intervention of MIQF staff and/or the congregation of individuals within MIQF (for example, if restricted goods cause an incident requiring the building to be evacuated) and thereby heighten the risk of transmission if the individual is infectious with COVID-19. Mitigating the risk of COVID-19 transmission from those in MIQF facilities to the community is a sufficiently important public policy objective to justify the use of some seizure powers in this context.
34. The ability to seize items is proportionate to the purpose of the provision in ensuring the effective and orderly operations of MIQFs, and in doing so mitigating the risk of COVID-19 transmission from MIQ facilities to the wider community. The seizure power is also accompanied by adequate safeguards to ensure it will not be exercised unreasonably. These include that the Chief Executive must be satisfied that rules are a justified limit under the BORA, items can only be held until the end of a person's stay and the powers can only be exercised where there are reasonable grounds to believe there is a breach of the rules.

Conclusion

35. I am satisfied that the COVID-19 Public Health Response Bill is consistent with the rights and freedoms enshrined in the Bill of Rights Act.



Hon David Parker
Attorney-General