

16 September 2021

Hon David Parker, Attorney-General

Consistency with the New Zealand Bill of Rights Act 1990: Data and Statistics Bill

Purpose

1. We have considered whether the Data and Statistics 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 20416/20.0). 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 ss 14 (freedom of expression), 21 (right to be secure against unreasonable search or seizure) and 25(c) (the right to be presumed innocent until proved guilty according to law). Our analysis is set out below.

The Bill

4. The Bill replaces the Statistics Act 1975 (the Act) with a modern legislative framework to support a well-functioning data and statistics system.
5. The purpose of the Bill is to ensure high-quality official statistics can be produced, promote consistent and collaborative practices across government, improve the quality of data collection, protect the interests of people and organisations represented in the data, and recognise and respect the Crown's responsibility to give effect to te Tiriti o Waitangi by providing for the interests of Māori.
6. The Government Statistician (Statistician), who also holds the position of chief executive of Statistics New Zealand (Stats NZ), is the primary producer of official statistics. The Statistician will continue to have the ability to make mandatory requests for data, subject to Ministerial approval.
7. The Bill also modernises the Act's offence provisions, by introducing a range of enforcement tools to respond to non-compliance:
 - a. the ability to issue compliance notices, suitable to address "fixable" non-compliance related to accessing data for research;
 - b. infringement offences, for non-compliance with obligations to provide data;
 - c. retaining some strict liability offences which currently exist in the Act; and
 - d. creating new criminal offences (that require a *mens rea* element).

Consistency of the Bill with the Bill of Rights Act

Section 14 – Freedom of expression

8. Section 14 of the Bill of Rights Act affirms that everyone has the right to freedom of expression, including the freedom to seek, receive, and impart information and opinions of any kind in any form. The right has been interpreted as including the right not to be compelled to say certain things or to provide certain information.¹
9. The Bill distinguishes between collecting data for producing official statistics and data for research purposes. Official statistics may be produced on any matter relating to New Zealand, including its economic, social, cultural, and environmental situation.²
10. The Bill allows for the collection of data where the information is considered by the Statistician “necessary or desirable to enable the Statistician to produce official statistics.” The Statistician can request data from an individual, public sector agency or organisation in a position to provide it (cl 22) or a public sector agency can request data on behalf of the Statistician (cl 25).
11. Once a request is made under clause 22 or 25, the recipient of the request is required to provide that data, by the date, and in the manner and form, specified in the request (cl 28(1)).
12. Failure to comply with a request for information under clause 22 or 25 is an infringement offence (cl 87). If a person *intentionally* fails to comply with a request for information under clause 22 or 25 they can be liable upon conviction to a fine not exceeding \$2,000 in the case of an individual or \$12,000 in any other case (cl 75).
13. These powers described above, *prima facie* limit the right to freedom of expression as they require an individual to provide information at the request of the Statistician or an authorised public sector agency.
14. Where a provision is found to limit a particular right or freedom, it may nevertheless be consistent with the Bill of Rights Act if it can be considered a reasonable limit that is demonstrably justified in terms of section 5 of that Act. The section 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?

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

² Proposed s 42 of the Bill.

³ See *Hansen v R* [2007] NZSC 7, [2007] 3 NZLR 1 (SC) at [123].

iii. is the limit in due proportion to the importance of the objective?

Does the provision serve an objective sufficiently important to justify some limitation of the right or freedom, and is the limit rationally connected with the objective?

15. We understand the objective is to enable high-quality, impartial and objective data to be collected to produce official statistics. Official statistics provide an evidential basis for government (and private sector) functions and inform decision-making. They also help inform the public. Decisions based on official statistics include a wide range of areas such as child wellbeing, future infrastructure requirements for local authorities, and providing economic indicators, such as GDP and CPI.
16. We consider this is a sufficiently important objective to justify some limitation on the freedom of expression.
17. We understand from Stats NZ that reliable and robust official statistics are created from high volumes of high-quality data. The ability to compel the provision of information helps reduce the risk of non-compliance which may undermine the integrity, reliability and quality of data to produce official statistics. Statistics NZ advises that voluntary requests for data consistently have lower response rates than mandatory requests.
18. As such, we consider that the ability to compel a response to a request for data (which will be used to produce official statistics) is rationally connected with the objective to enable high-quality, impartial and objective official statistics to be produced.

Is the impairment on the right no greater than reasonably necessary?

19. We understand there is presently no alternative reliable way of obtaining the necessary information to produce official statistics other than requesting it. Currently, Stats NZ relies on accessing administrative data and data collection to produce official statistics. At present, administrative data is not sufficiently reliable to provide the level of detail needed to produce high-quality and reliable official statistics.⁴
20. There are a number of aspects of the Bill which reduce the degree to which freedom of expression is impaired. The primary provisions are:
 - a. Ministerial approval is required before Stats NZ can request data from an individual or organisation (or authorise another public sector agency to do so) (cl 27);
 - b. there is a privilege against information provided to the Statistician being disclosed or used as evidence 'in any proceedings whatsoever', except in respect of a prosecution under the Bill (cl 92);
 - c. the ability to require data to be provided only applies to official statistics, the Statistician is not able to require data to be provided for research; and

⁴ <https://www.stats.govt.nz/research/the-potential-for-linked-administrative-data-to-provide-household-and-family-information>.

- d. the Bill also enables the Statistician to make requests (either themselves or through a public sector agency) for voluntary provision of data⁵. We understand this may be used where it would be inappropriate to compel provision of data due to the nature of the data requested, such as respondents not being required to answer a question about religious affiliation.

21. Due to the necessity of collecting data to inform official statistics, and the above protections, we do not consider the impairment on freedom of expression is greater than reasonably necessary.

Is the limit in due proportion to the importance of the objective?

22. We consider the limitation on the right to freedom of expression appears to be in due proportion to the importance of the objective of producing high-quality and reliable official statistics. We do not believe the requirement to respond to a request for information is particularly onerous, when compared to the importance of the official statistics that are produced.

23. The instances in which information can be requested or required are limited to circumstances as outlined above. The limitations on the freedom of expression go no further than reasonably necessary to achieve their purpose.

Section 21 – right to be secure against unreasonable search or seizure

24. Section 21 of the Bill of Rights Act affirms that everyone has the right to be secure against unreasonable search and seizure, whether of the person, property, correspondence or otherwise. The right protects a number of values including personal privacy, dignity, and property.⁶ The touchstone of this section is a reasonable expectation of privacy.⁷

25. The Bill provides the Statistician the power of entry and inspection in respect of a business “for the purpose of obtaining any data that the Statistician considers necessary or desirable to enable the Statistician to produce official statistics” (cl 56). The Statistician may enter any place of business and inspect any part of the premises, any goods stored or offered for sale, and any relevant records. Further they may require any person (as part of their role relating to the business), to produce for inspection relevant records specified by the Statistician or authorised employee. These actions constitute a search.

26. As noted above, ordinarily a provision found to limit a particular right or freedom may be consistent with the Bill of Rights Act if it can be considered reasonably justified in terms of s 5 of that Act. However, the Supreme Court has held that an unreasonable search logically cannot be reasonably justified and therefore the inquiry does not need to be undertaken.⁸

27. Rather, the assessment to be undertaken is first, whether what occurs is a search or seizure, and, if so, whether that search or seizure was reasonable. In assessing whether

⁵ Clauses 22(2), 24(2), and 26(e) and (f) of the Bill.

⁶ See, for example, *Hamed v R* [2011] NZSC 101, [2012] 2 NZLR 305 at [161] per Blanchard J.

⁷ *Hamed v R* [2011] NZSC 101, [2012] 2 NZLR 305 at [161].

⁸ *Cropp v Judicial Committee* [2008] 3 NZLR 744 at [33]; *Hamed v R* [2012] 2 NZLR 305 at [162].

the search power in the Bill is reasonable, we have considered the place of the search, the degree of intrusiveness into privacy, and the reasons why it is necessary.⁹

28. The power of entry and inspection is limited to “any place of business (other than a private dwelling or marae).” The reasonable expectation of privacy is less for a place of business than a private dwelling. The degree of intrusiveness is limited as the Statistician or authorised employee may only exercise search powers if:
 - a. The occupier of the place consents; or
 - b. A search warrant is obtained under clause 57. Before issuing the warrant, the issuing officer must be satisfied that there are reasonable grounds for believing that it is necessary or desirable for the purpose of enabling the Statistician to produce official statistics.
29. The requirements for obtaining a search warrant under the Bill cross-reference the relevant provisions in the Search and Surveillance Act 2012, which we consider contain a reasonable framework in terms of s 21 of the Bill of Rights Act. Further, data obtained after a search or inspection is treated for all purposes under the Bill and any other legislation as data provided to the Statistician under the Bill, and therefore subject to the same confidentiality requirements discussed above at para 20 (cl 58).
30. We consider that the search and inspection powers in the Bill appear necessary. The power is relatively confined to inspecting goods stored or offered for sale and associated records. We understand the existing power in the Act (right of entry) is used to enter business premises to price and inspect relevant products to obtain data for inclusion in particular surveys such as the food price index. For these reasons, the search power in clause 56 is reasonable under s 21 of the Bill of Rights Act.

Section 25(c) – the right to be presumed innocent until proved guilty according to law

31. Section 25(c) of the Bill of Rights Act affirms the right to be presumed innocent until proven guilty. The right to be presumed innocent requires that an individual must be proven guilty beyond reasonable doubt, and that the State must bear the burden of proof.¹⁰ In order to give full recognition to this right, a fundamental principle of criminal law, the legal burden of proving every element of an offence to the required standard of proof, and the onus for disproving any potentially available defence, must remain on the prosecution.
32. The Bill contains four strict liability offences:
 - a. An infringement offence for failing to supply data (cl 87);
 - b. An infringement offence for failing to obtain a request for data in the census (cl 88);
 - c. An offence for non-compliance with a compliance notice (cl 81); and,

⁹ *Hamed v R* [2011] NZSC 101, [2012] 2 NZLR 305 at [172] per Blanchard J.

- d. An offence for failing to comply with any temporary condition(s) imposed by the Statistician in relation to broadcasting, publishing or otherwise disclosing statistics. For example, a condition that the statistics cannot be disclosed for a specified period of time (cl 86).
33. Strict liability offences *prima facie* limit s 25(c) of the Bill of Rights Act because the accused is required to prove a defence (on the balance of probabilities), or disprove a presumption, to avoid liability. This means that where the accused is unable to prove a defence, they could be convicted even where reasonable doubt about their guilt exists.
34. Strict liability offences have been considered justifiable where:
- a. the offence is in the nature of a public welfare regulatory offence;
 - b. the defendant is in the best position to justify their apparent failure to comply with the law, rather than requiring the Crown to prove the opposite; and,
 - c. the penalty for the offence is proportionate to the importance of the Bill's objective.

Infringement offences

35. Although infringement offences do not result in a conviction¹¹, 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.¹²
36. Although we recognise this is not strictly a public welfare regulatory offence area, we consider that the use of infringement offences is appropriate. The purpose of an infringement offence is to deter conduct that is of relatively low seriousness and that does not justify the full imposition of the criminal law.
37. If a person has been issued an infringement notice, it can be revoked before the infringement fee is paid or an order for payment of fine is made or deemed to be made by the court (clause 70). We presume that would be where a person provides the information requested or raises a valid defence (for example mistaken identification).¹³
38. We do note that it is an infringement offence for an individual to fail to comply with their duty to obtain a copy of the request or details of how to access a request for data in the census. This reflects the importance of the official statistics collected through the census for the purposes highlighted in our s 14 analysis above.
39. The maximum monetary penalties for these particular offences appear near the middle/high-end of the spectrum for the relatively low-level serious nature of the offence

¹¹ Section 375(1)(a) of the Criminal Procedure Act 2011.

¹² [2006] NZAR 629 (CA).

¹³ We note Statistic NZ's approach is to help respondents meet their obligations, i.e. to 'assist to comply' as first resort. If that fails, the legislative enforcement regime has a range of options to deal with non-compliance, with criminal prosecution being the last resort.

(under the Act they are \$500 for an individual, and \$2,000 for a body corporate). The new maximum infringement fees in the Bill are \$1000 for an individual, and \$3000 for a body corporate. The exact amount will be prescribed in the Regulations, which may be less than the maximum penalties in the Bill. We recognise the updated penalties may have a significant impact on individuals and small businesses. However, we do not consider these are disproportionate penalties for achieving the important objective of obtaining data for official statistics.

Other new strict liability offences

40. In respect of the other two strict liability offences, we note the purpose of these offences is to uphold the confidentiality and integrity of the data held by Stats NZ. The Bill provides a 'without reasonable excuse' justification for both of these offences. The matters of justification and excuse (the defences) are more likely to be in the knowledge of the person who has not complied with the notice or condition(s). For example, the defendant will be better placed to identify that the breach was due to an act or omission of another person, was an accident, or the person took all reasonable precautions and exercised due diligence.
41. The maximum monetary penalties for these offences are relatively modest; \$5,000 for an individual and \$15,000 in any other case. With the presence of a defence of reasonable excuse, we do not consider these are disproportionate penalties for achieving the objective.
42. For the above reasons, we consider the strict liability offences to be justified in terms of s 25(c) of the Bill of Rights Act.

Conclusion

43. 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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