

12 October 2021

Hon David Parker, Attorney-General

Consistency with the New Zealand Bill of Rights Act 1990: Pae Ora (Healthy Futures) Bill

Purpose

1. We have considered whether the Pae Ora (Healthy Futures) 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 23441/6.0). 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 the right to freedom of expression, the right to freedom from discrimination, the right to be presumed innocent until proved guilty, minimum standards of criminal procedure, and the right to justice. Our analysis is set out below.

Summary

4. The Bill provides for the public funding and provision of health services and establishes publicly-owned health organisations. It aims to improve equity, promote and protect health, and achieve pae ora/healthy futures for all New Zealanders.
5. The provision requiring individuals to provide information to the mortality review committees for its purposes engages the right to freedom of expression. Provisions explicitly promote Māori health and the principles of Te Tiriti o Waitangi and may be seen to engage the freedom from discrimination on the basis of race or ethnic origins. A strict liability offence in relation to information required or held by mortality review committees engages the right to be presumed innocent until proved guilty. Provisions to dismiss and remove people from boards and committees engages the right to justice.
6. We have concluded that, to the extent that the Bill limits these rights and freedoms, the limits are justified. The Bill therefore appears to be consistent with the rights and freedoms affirmed in the Bill of Rights Act.

The Bill

7. Following a health and disability review the New Zealand Government announced a health system reform that will fundamentally change the structure and delivery of health services in New Zealand. It is therefore necessary to repeal the New Zealand Public Health and Disability Act 2000 in its entirety. The Bill replaces that Act.
8. The specific purposes of the Bill, as outlined in cl 3, are to provide for the public funding and provision of health services in order to—
 - a. protect, promote, and improve the health of all New Zealanders

- b. achieve equity by reducing health disparities among New Zealand's population groups, in particular for Māori, and
 - c. build towards pae ora (healthy futures) for all New Zealanders.
9. The Bill disestablishes New Zealand's District Health Boards (DHBs) and establishes Health New Zealand (Health NZ). It also transfers DHBs' assets and liabilities to Health NZ to reduce system complexity and enable consistency and a population health focus. Under the Bill, Health NZ will establish regional divisions to plan and commission primary and community health services and engage with communities. Health NZ's decisions about the delivery of primary and community health services, and development of a New Zealand Health Plan, must be made jointly with the Māori Health Authority (the Authority).
10. The Bill establishes the Authority to drive improvement in hauora Māori. Its functions include policy and strategy, commissioning services, and performance monitoring. The Authority's structure is designed to ensure it has operational autonomy to give effect to Māori aspirations and needs, while remaining aligned with other health entities and structures. The Bill also provides for iwi-Māori partnership boards to represent Māori perspectives at a local level, and for Health NZ and the Authority to provide support for the boards to carry out their functions.
11. The Bill makes a suite of related changes to existing public health system structures and roles, including:
- a. refocusing the Ministry of Health's role on strategy, policy, regulation, and monitoring, and establishing a Public Health Agency within the Ministry
 - b. providing for permanent public health advisory and Hauora Māori advisory committees
 - c. transferring functions currently held by Te Hiringa Hauora/Health Promotion Agency and entities under the New Zealand Public Health and Disability Act 2000
 - d. strengthening system leadership and intervention powers, and
 - e. requiring the creation of accountability documents, including a Government Policy Statement and a New Zealand Health Strategy, Plan, and Charter.

Consistency of the Bill with the Bill of Rights Act

Section 14 - Right or Freedom of Expression

12. Section 14 of the Bill of Rights Act affirms 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 to freedom of expression has also been interpreted as including the right not to be compelled to say certain things or to provide certain information.¹
13. Clause 2 of Sch 4 of the Bill allows the chairperson of a mortality review committee, or its agent, to require information that is relevant to the mortality review committee's functions from any person who has possession or control of that information. It is an offence under cl 73(5) of the Bill to not comply with this requirement without reasonable excuse. These provisions *prima facie* limit the freedom of expression under s 14 of the Bill of Rights Act.

¹ *RJR MacDonald v Attorney-General of Canada* (1995) 127 DLR (4th) 1.

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 s 5 of that Act. Justification under s 5 occurs where the limit seeks to achieve, and is rationally connected to, a sufficiently important objective; impairs the right or freedom no more than reasonably necessary to achieve the objective; and is otherwise in proportion to the importance of the objective.²
15. Mortality review committees are statutory committees that review and report to the Health Quality and Safety Commission on particular deaths, or the deaths of particular people, in order to learn how to best prevent those deaths in the future. For mortality review committees to be able to conduct effective reviews which lead to system-wide improvements, they need to be able to gather information from a wide range of sources. Clause 2 of Sch 4 enables the mortality review committees to do this. We consider that this requirement is rationally connected to the Bill's overarching objective of improving the health system and its outcomes.
16. The Bill recognises the sensitive nature of the information that is likely to be provided to the mortality review committees. Information may only be requested where the information is relevant to a committee's functions and Sch 4 places statutory limits on when and how a committee can disclose the information. Further, cl 73(6) provides that a person who discloses information contrary to Sch 4 is liable to a fine not exceeding \$10,000.
17. There is also an offence under cl 73(5) for failure to provide information. It appears this is necessary to encourage compliance with the requests from the chair of a mortality review committee, or the chair's agent. We consider the offences to be rationally connected to the objective of obtaining necessary and relevant information to enable the mortality review committee to conduct an effective review and consider them to be a proportionate response.³
18. For the reasons above, we consider that these limitations are proportionate and limit the right to freedom of expression no more than is reasonably necessary. We therefore consider that any limits within the Bill on the right to freedom of expression are justified in terms of s 5 of the Bill of Rights Act.
19. For completeness, we consider that the power to require information (and the associated offence for failure to provide it) can also be considered a search engaging s 21 of the Bill of Rights Act, which protects against unreasonable search and seizure. However, for the reasons given above, we do not consider it amounts to an unreasonable search in terms of s 21 of the Bill of Rights Act.

Section 19 – Freedom from discrimination

20. Section 19(1) of the Bill of Rights Act affirms the right to freedom from discrimination on the grounds set out in the Human Rights Act 1993 (the Human Rights Act). The key questions in assessing whether there is a limit on this right are:⁴

² See *Hansen v R* [2007] NZSC 7, [2007] 3 NZLR 1 (SC).

³ We discuss these offences further below at para 30 to 37 in relation to the presumption of innocence.

⁴ See, for example, *McAlister v Air New Zealand* [2009] NZSC 78, [2010] 1 NZLR 153; *Ministry of Health v Atkinson* [2012] NZCA 184, [2012] 3 NZLR 456; and *Child Poverty Action Group Inc v Attorney-General* [2013] NZCA 402, [2013] 3 NZLR 729.

- 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?
21. 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.⁵
22. The Bill has various provisions to explicitly promote Māori health and uphold the principles of Te Tiriti o Waitangi. One of the Bill's three stated purposes is to achieve equity by reducing health disparities among New Zealand's population groups, in particular for Māori. The health system principles in clause 7, which are mandated to guide the Ministry's and other health entities' functions under the Act, predominantly focus on improving the health system's support, responsiveness, empowerment, and outcomes for Māori.
23. Further to this emphasis, the Bill:
- a. establishes the Authority (cl 17) and the Hauora Māori Advisory Committee to advise the Minister of Health (cl 83)
 - b. gives recognition to iwi-Māori partnership boards to enable Māori to contribute to local planning and decision-making on health priorities (cl 92 and Sch 3)
 - c. requires Health NZ and the Authority to work together to achieve equitable outcomes for Māori (s 6(e))
 - d. requires the boards of Pharmac, the New Zealand Blood and Organ Service, and the Health Quality and Safety Commission to endeavour, where appropriate, to ensure representation of Māori on their committees (cl 80), and
 - e. requires the boards of Health NZ and the Authority to have collective knowledge of, experience, and capability in giving effect to Te Tiriti o Waitangi; to engage with Māori; and to understand mātauranga Māori (cl 6).
24. While the Bill requires the creation of a Disability health strategy (cl 38) and Pacific health strategy (cl 37), there is no other explicit prioritisation of other groups' interests. There is also no obligation to appoint Board members who have knowledge or expertise in other cultural approaches, and no obligation to appoint an authority or permanent committee to advise Health NZ or the Minister of Health on other non-Māori interests and knowledge.
25. The Bill could therefore be seen to draw distinctions on the basis of race or ethnic origins. However, to the extent the distinctions reflect the status of Māori as the Crown's Treaty partner, and the Crown's duties under Te Tiriti o Waitangi, we do not consider any other group is in a comparable position. The result of this assessment is that s 19 of the Bill of Rights Act is not engaged.
26. Nevertheless, for completeness we have considered whether a disadvantage arises to any class of people. We do not consider that this is the case, for the following reasons.

⁵ See, for example *McAlister v Air New Zealand* above n 4 at [40] per Elias CJ, Blanchard and Wilson JJ.

27. The relevant provisions are not designed to provide a specific advantage to Māori, but rather to achieve equity among New Zealand's population groups. Addressing inequity does not result in disadvantage to those not already disadvantaged. As the Bill identifies, disparities in health services, access, and outcomes exist currently, in particular for Māori. This factor also supports our assessment that the Bill's distinctions are not drawn between comparator groups.
28. The requirements for boards of health entities to have collective knowledge and experience to te ao Māori do not prevent non-Māori from being appointed. Because the requirement applies collectively, we do not consider even an indirect disadvantage arises to non-Māori seeking appointment. Even if we had concluded otherwise, we would have considered the resultant limit on the freedom from discrimination to be justified. Without this collective knowledge, Health New Zealand, the Authority, and health entity boards would have difficulty performing their functions in a way that meets their obligations.
29. More generally, while it is an inescapable fact of our health system that resources need to be prioritised, nothing in the Bill requires a choice between different population groups. In any case, to the extent the Bill is found to create any disadvantage to non-Māori, we consider that disadvantage would be both minor and justified in light of Te Tiriti o Waitangi and the imperative of reducing systemic inequities and improving hauora Māori.

Section 25(c) - Right to be presumed innocent until proved guilty according to law

30. Section 25(c) affirms the right to be presumed innocent until proved 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.⁶
31. To give full recognition to this fundamental principle of criminal law, the prosecution must retain both 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.
32. Clause 73 of the Bill creates two strict liability offences.
 - a. Every person who fails, without reasonable excuse, to comply with a requirement imposed under Sch 4 by the chairperson of a mortality review committee to provide information commits an offence and is liable on conviction to a fine not exceeding \$10,000 (cl 73(5)).
 - b. Every person who discloses information contrary to Sch 4 commits an offence and is liable on conviction to a fine not exceeding \$10,000 (cl 73(6)).⁷
33. Strict liability offences *prima facie* limit s 25(c) of the Bill of Rights Act. This is because a strict liability offence may be provided 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. This means that, where the accused is unable to prove a defence, they could be convicted even where reasonable doubt about their guilt exists.

⁶ *R v Wholesale Travel Group* (1992) 84 DLR (4th) 161, 188 citing *R v Oakes* [1986] 1 SCR 103.

⁷ While there is no specified defence to this offence, the 'total absence of fault' common law defence will apply. This is available in respect of any charge, whether under the Crimes Act 1961 or otherwise, unless it has been modified or is inconsistent with the relevant offence provisions (s 20(1) Crimes Act 1961).

34. Strict liability offences have been considered more 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.
35. We consider the limit on s 25(c) to be justified under s 5 of the Bill of Rights Act because:
- a. the mortality review committees' need to obtain necessary and relevant information to enable them to conduct effective reviews in order to reduce the number of deaths of groups of people; and
 - b. the mortality review committees have an obligation to protect personal and potentially sensitive health information, from disclosure outside of the committee.
36. The penalties for the offences are financial in nature, carrying a fine of up to \$10,000, and do not involve imprisonment. We consider financial penalties are appropriate in these circumstances as they ensure that people comply with the requests for information and ensure personal information is protected, and thereby meeting the Bill's objective of improving the health system and its outcomes.
37. For the reasons given above, we have concluded that the offences set out in cl 73 are justified in terms of s 5 of the Bill of Rights Act.

Section 27(1) – Right to justice

38. Section 27(1) of the Bill of Rights Act provides that every person whose interests are affected by a decision of a public authority has the right to the observance of the principles of natural justice. Section 27 is concerned with procedural fairness and what will be procedurally fair depends on the facts of each case. Natural justice includes the right to a fair hearing.
39. There are a number of provisions which enable the Minister of Health to remove members from various entities which *prima facie* engage s 27(1). However, we are satisfied that s 27(1) is not engaged for the following reasons:
- a. Clause 11 provides that the Crown Entities Act 2004 applies to Health NZ except to the extent expressly provided otherwise. Clause 54(6) provides that all provisions of the Crown Entities Act that apply to appointed members of a board apply, with necessary modifications, to a commissioner and a deputy commissioner that are appointed under cl 54 to replace Health NZ or the Authority. Sections 38 – 41 of the Crown Entities Act require that the removal of individuals from members of boards must have just cause, and that the process for removal must comply the principle of natural justice.
 - b. Clause 23 of the Bill outlines that the Minister of Health can remove a member of the board of the Authority at any time, but only if the Minister considers that the removal is justified and has consulted the Hauora Māori Advisory Committee and had regards to its views. Because the Authority is an independent statutory entity it does not benefit from ss 38 – 40 of the Crown Entities Act. However, cl 24 applies s 41 of the Crown Entities Act to the Authority, which ensures the principles of natural justice apply to the removal of members of its board.

40. Other clauses in the Bill specify Ministerial rights to dismiss or remove people from certain roles.⁸ While specific procedural requirements are scarce in these provisions, we note that the Public Service Commission's guidance on Ministerial Advisory Committees provides that the same principles apply to the appointment process as to that of a Crown entity board member.⁹ This suggests that the Minister of Health must have just cause to remove an individual from an advisory committee and the process for removal must comply with the principle of natural justice.
41. Further, the Minister is obliged to act consistently with the Bill of Rights Act in the exercise of public and statutory functions. Combined with the desirability of flexible and responsive processes, and the ability to judicially review any Ministerial action on the basis of unreasonableness, we are satisfied that these provisions are not inconsistent with s 27(1) of the Bill of Rights Act.

Conclusion

42. 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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⁸ Clause 81 allows the Minister of Health to establish any committee they consider necessary or desirable for any purpose relating to the Bill or its administration, and to appoint or remove any person as a member or chairperson by written notice. Clauses 83, 84 and 85 require the Minister to appoint a Hauora Advisory Committee, national advisory committee on health services ethics and an expert advisory committee on public health, but do not specify processes for appointment or removal of members.

⁹ Public Service Commission *Machinery of Government Supplementary Guidance Note: Ministerial Advisory Committees*.