

2 March 2022

Hon David Parker, Attorney-General

Consistency with the New Zealand Bill of Rights Act 1990: Natural Hazard Insurance Bill

Purpose

1. We have considered whether the Natural Hazard Insurance 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 22619/19.1). 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 14 (freedom of expression), s 21 (freedom from unreasonable search and seizure), and s 25(c) (right to be presumed innocent until proved guilty) of the Bill of Rights Act. Our analysis is set out below.

The Bill

4. The Bill replaces the Earthquake Commission Act 1993 (the EQC Act). The changes from the EQC Act are intended to:
 - a. enable better community recovery from natural hazards;
 - b. clarify the role of the Earthquake Commission and the cover provided by the Act; and
 - c. enhance the durability and flexibility of the legislation.
5. The Bill changes the name of the Earthquake Commission to Toka Tū Āke – Natural Hazard Commission (the Commission) to reflect the broad range of hazards covered by the legislation and dealt with by the Commission. It continues to be a Crown Entity and to have a board with between 5 and 9 members.
6. The Bill seeks to clarify the Commission's core functions to better recognise its obligations to stakeholders, including through:
 - a. a revised insurance function framed around claims management with a clear statutory objective requiring the Commission to ensure claims are managed and settled in a fair and timely manner;
 - b. targeted revisions to ensure the Commission's research and education function has sufficient flexibility to allow it to contribute to community resilience, a whole-of-government disaster recovery, and work that seeks to reduce the cost of insurance over time; and

- c. reframing the Commission's function in relation to the Natural Hazard Fund to better reflect its objective as a fund manager and aligning the Commission's fund management mandate with the mandate of other entities that invest assets on behalf of the Crown.
7. The Bill also makes various other amendments in relation to building and land cover, claims handling and settlement, financial governance, roles and sustainability, and other technical issues.

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 the right to freedom of expression. This includes the freedom to seek, receive, and impart information and opinion 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
9. The Bill contains a number of clauses that require certain people to provide information and details to the Commission in performing its functions and exercising its powers under the Bill (clauses 48, 51, 52, 54, 110(2), 136(1) and 140(1)), such as personal and property information required to make a claim and for the Commission to assess and settle a claim. Compelling these persons to provide information *prima facie* limits s 14 of the Bill of Rights Act.

Is the limitation justified and proportionate under s 5 of the Bill of Rights Act?

10. Where a provision is found to limit any 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 justifiable in terms of s 5 of that Act. The s 5 inquiry is approached as follows:²
 - 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 to 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?
11. We consider that any limits contained within the Bill are justified under s 5 of the Bill of Rights Act because:
 - a. the objectives of reducing the impact of natural hazards on the community, managing the financial risk to the Crown of providing natural hazard cover, and

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.

ensuring claims are managed and settled in a fair and timely manner, are sufficiently important to justify some limit on s 14;

- b. requiring persons (including insured persons) to provide information to the Commission is rationally connected to that objective; and
- c. the provisions impair s 14 no more than is reasonably necessary and are in due proportion to the importance of the objectives, noting that the information that may be required is of limited expressive value. Additionally, it is reasonable that persons who receive the benefit of adequate insurance cover in the event of a natural hazard will likely have an expectation of regulation and information-sharing to enable those objectives to be achieved.

12. Accordingly, we consider this to be a justifiable limit on the freedom of expression.

Section 21 – Freedom from unreasonable search and seizure

- 13. Section 21 of the Bill of Rights Act affirms that everyone has the right to be secure against unreasonable search or seizure, whether of the person, property, or correspondence or otherwise. The right protects a number of values including personal privacy, dignity, and property.³
- 14. The Bill contains a search power in clause 142, which permits an authorised person, for the purpose of obtaining information that the Commission reasonably needs for the purpose of performing its functions, to enter land, buildings or places and inspect or examine the place and anything found there. In addition, clause 143 provides that an authorised person must not enter any land, building or place for the purpose of ascertaining whether an offence against the legislation has been committed or obtaining evidence in relation to an offence except with the consent of the occupier or under a search warrant (which they are able to apply for).
- 15. 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 demonstrably justified and therefore the inquiry does not need to be undertaken.⁴ Rather, s 21 is self-limiting in that the assessment to be undertaken is whether the search power is reasonable.
- 16. Whether a search will be reasonable turns on a number of factors, including the nature of the place or object being searched, the degree of intrusiveness into personal privacy and the rationale for the search.⁵ The greater the degree of intrusiveness, the greater the need for justification and attendant safeguards.

Clause 142

- 17. The search power contained in clause 142 is exercised by an authorised person entering land, a building or place to obtain information. This type of search constitutes a greater intrusion into a person's expectation of privacy than a search power exercised by, for example, requiring information to be given via written notice.

³ See, for example, *Hamed v R* [2011] NZSC 101, [2012] 2 NZLR 305 at [161] per Blanchard J.

⁴ *Hamed v R*, above n 3, at [162] per Blanchard J

⁵ *Hamed v R*, above n 3, at [172]

18. Although the degree of intrusiveness into personal privacy is relatively high given the power could extend to entry into private dwellings, clause 142 contains several safeguards and limits on when it can be used:
- a. the power may only be exercised by an authorised person, as authorised by the Commission under clause 139 of the Bill;
 - b. before the authorised person enters the target place, the occupier must be given reasonable notice unless it is impracticable to do so (cl 142(2)), and if notice is not given before entry and the occupier is not present when entry occurs, they must be given written notice as soon as practicable following entry (cl 142(3));
 - c. the notice must state that entry is authorised, the purpose for which entry is required and how and when entry is to be (or was) made (cl 142(4)); and
 - d. the authorised person must have with them evidence of their identity and their authorisation, and must produce this evidence to the occupier (cl 142(5)).
19. The search power is also limited to the purpose of the authorised person obtaining information that the Commission reasonably needs to perform its functions. These functions (set out in clause 123) include administering natural hazard cover and a number of other functions relating to the purposes of the Bill, which are intended to reduce the impact of natural hazards on people, property and the community by providing natural hazard cover. In some instances, the Commission will be operating in an emergency context, where natural disasters have caused damage to buildings. Accordingly, it is reasonable that providing notice in advance may not always be able to be given.
20. On balance, we consider that the search power contained in clause 142 is reasonable. Although the power of entry is relatively intrusive, the power is confined to search and inspection to obtain information relevant to the Commission's functions and there are sufficient safeguards to ensure the power is exercised only when necessary. The power to enter is only to 'inspect and examine' the place and things on it. Therefore, while it applies to all of the Commission's functions, it will not be relevant to all of them and will need to be read down accordingly. While it might be useful if the cl 142 power was limited only to the relevant functions, we do not consider the present drafting makes the power unreasonable. We consider that the degree of intrusiveness is proportionate given that the Commission is often operating in the context of natural disasters, and the search power ultimately serves the purpose of allowing the Commission to provide adequate insurance cover when natural disasters occur. For these reasons, we consider the search power in clause 142 is reasonable and therefore does not limit s 21 of the Bill of Rights Act.

Clause 143

21. The search power contained in clause 143 allows an authorised person to perform a search with the consent of the occupier, or under a search warrant. Although the search power is relatively intrusive as it could involve the authorised person entering and searching a private dwelling, we consider this power contains significant safeguards:
- a. the power can only be used by an authorised person;
 - b. the power may only be exercised with either the consent of the occupier, or under warrant issued pursuant to the requirements of the Search and Surveillance Act 2012; and

- c. in order to issue the warrant, the issuing officer must have reasonable grounds to believe an offence has been committed and there is evidence in that place.
22. We consider that these safeguards impose clear requirements, regulating how and when this search power can be exercised. We therefore consider that the search power in clause 143 is reasonable, and therefore does not limit s 21 of the Bill of Rights Act.

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

23. 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.⁶
24. The Bill creates several strict liability offences:
- a. clause 141 – failure to comply with a notice to produce information;
 - b. clause 146(4) – failure of a fire insurer to keep records of fire insurance contracts; and
 - c. clause 147(2) – failure of a fire insurer to comply with any requirements in regulations relating to audit and reporting obligations of the fire insurer.
25. Strict liability offences *prima facie* limit 25(c) of the Bill of Rights Act because the accused is required to prove a defence, or disprove a presumption, in order to avoid liability.
26. In the context of strict liability offences, considerations especially relevant to the reasonableness of limits on s 25(c) are:
- a. the regulatory context – where a field of activity is an activity that is regulated in the interests of public welfare, and persons entering the field do so in the knowledge that it is a regulated activity;
 - b. whether matters of justification and excuse for particular actions or states of affairs are likely to be in the particular knowledge of defendants rather than the prosecution, such that it is reasonable to require that defendant's advance evidence or prove those matters to avoid conviction; and
 - c. penalty levels – the penalty for the offence is proportionate to the importance of the Bill's objective. Typically fines or low levels of imprisonment are reasonable in the regulatory context.
27. We consider that the limits to s 25(c) of the Bill of Rights Act are justified under s 5 of the Bill of Rights Act. In reaching this conclusion we have taken into account the following:
- a. the strict liability offences in the Bill arise in the regulatory context of ensuring the Commission is able to sufficiently carry out its function of providing insurance in the event of a natural disaster. Persons engaging with the legislation will do so in the knowledge that this is a regulated area;

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

- b. if a person is charged with a strict liability offence, the accused may provide a lawful or reasonable excuse to exonerate themselves. The accused would be in the best position to justify their apparent failure to comply with the law, rather than requiring the Crown to prove the opposite. For example, the accused 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; and
- c. in all cases the penalty for the strict liability offences must not exceed \$5,000 in the case of an individual and \$25,000 in any other case. We consider these penalties to be proportionate to the conduct being prohibited.

28. For the reasons above, we consider that any limits on s 25(c) through these strict liability offences are justified under s 5 of the Bill of Rights Act.

Conclusion

29. 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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