

10 May 2022

Hon David Parker, Attorney-General

## **Consistency with the New Zealand Bill of Rights Act 1990: Foreign Affairs (Consular Loans) Amendment Bill**

### **Purpose**

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1. We have considered whether the Foreign Affairs (Consular Loans) 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 not yet received a final version of the Bill. This advice has been prepared in relation to the latest version of the Bill (PCO 23529/6.0). 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 s 19 (freedom from discrimination) of the Bill of Rights Act. Our analysis is set out below.

### **The Bill**

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4. The Bill provides express statutory authority for the Minister of Foreign Affairs to continue the existing practice of issuing consular loans in exceptional circumstances to New Zealand citizens and permanent residents who are in distress overseas, and to individuals assisting them.
5. The Ministry of Foreign Affairs and Trade (MFAT) has a long-standing practice of assisting New Zealanders overseas by providing them with temporary financial assistance by way of a consular loan, where they have no other means of financial assistance and their immediate health and safety is at risk. The issue of these loans did not require express authority under the Public Finance Act 1989 (the Public Finance Act) until that Act was amended in 2013.
6. The Bill allows for the continued issuing of consular loans in the circumstances described in paragraph 4 above, as well as retrospectively validating the consular loans granted by MFAT after the Public Finance Act was amended in 2013 but before MFAT received delegated authority in 2020 to lend money under the Public Finance Act.

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

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#### **Application of the Bill of Rights Act**

7. As a starting point, we have considered whether the Bill of Rights Act applies to individuals who are offshore, in relation to government decisions made by actors based in New Zealand. The law governing the extent to which the Bill of Rights Act has extraterritorial application in relation to individuals who are offshore is unsettled. In the

absence of any clear direction, we have undertaken a Bill of Rights Act analysis as if it does apply.

## **Section 19 – Freedom from discrimination**

8. Section 19(1) of the Bill of Rights Act affirms that everyone has the right to freedom from discrimination on the grounds set out in the Human Rights Act 1993 (the Human Rights Act). Section 21 of the Human Rights Act lists the prohibited grounds of discrimination. These include “ethnic or national origin, which includes nationality or citizenship” (s 21(g)).
9. The key questions in assessing whether there is a limit on the right to freedom from discrimination are:<sup>1</sup>
  - 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?
10. 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 a disadvantage arises is a factual determination.<sup>2</sup>
11. The Bill provides the Minister with the express statutory authority to issue consular loans in exceptional circumstances to New Zealand citizens and permanent residents who are in distress overseas, and those assisting them. We have considered whether the Bill draws a distinction on the basis of national or ethnic origins, which includes citizenship.
12. We consider that it is arguable as to whether there is a distinction on the basis of a prohibited ground of discrimination. This is because the Bill distinguishes between people based on whether they are New Zealand citizens or permanent residents of New Zealand, rather than purely on the basis of citizenship.
13. In any event, even if the Bill does draw a distinction on the basis of citizenship, we consider that it does not involve disadvantage to one or more classes of individuals. This is because there is no clearly identifiable group of people that are disadvantaged by any distinction. People who have a right to live in New Zealand who are not citizens or permanent residents of New Zealand (and are therefore not eligible for loans under the Bill) will be citizens of their own countries and could therefore receive any applicable assistance from that country if they were in distress overseas.
14. We therefore consider that the right to be free from discrimination affirmed by s 19(1) of the Bill of Rights Act is not engaged.

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<sup>1</sup> 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.

<sup>2</sup> See, for example *McAlister v Air New Zealand* above n 14 at [40] per Elias CJ, Blanchard and Wilson JJ.

## Conclusion

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15. 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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