

27 July 2020

Hon David Parker, Attorney-General

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

Purpose

1. We have considered whether the COVID-19 Public Health Response 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 23099/3.0). 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:
 - a. s 11 (right to refuse to undergo medical treatment);
 - b. s 18 (freedom of movement); and
 - c. s 19 (freedom from discrimination).
4. Our analysis is set out below.

The Bill

5. The Bill amends the COVID-19 Public Health Response Act ('the principal Act') with the aim of supporting a public health response to COVID-19 that is economically sustainable.
6. The Bill provides a framework that would allow the government to charge those who stay at a managed isolation or quarantine facility ('MIQF'). The Bill sets certain minimum criteria for the cost recovery system and provides for certain classes of people to be exempt from the requirement to pay charges. Other matters of implementation, such as the manner and timing of payments and provisions relating to exemptions, waivers, and refunds, will be prescribed in regulations.
7. The Bill also provides for orders made under s 11 of the principal Act ('s 11 orders') to:
 - a. require persons to undergo, as well as report for, medical examination or testing; and
 - b. require those entering New Zealand to have already booked with an MIQF before arrival.

Consistency of the Bill with the Bill of Rights Act

Section 11 - Right to refuse to undergo medical treatment

8. Section 11 of the Bill of Rights Act affirms the right to refuse to undergo medical treatment.

9. Section 11(1)(a)(viii) of the principal Act provides that s 11 orders may require persons to report for medical examination or testing in any specified way or in any specified circumstances. Clause 7(2) of the Bill proposes to replace this provision with a version that expressly states that persons may be required to undergo, as well as report for, medical examination and testing, and that the requirement may relate to any specified place or time.
10. Our previous advice on the COVID-19 Public Health Response Bill concluded that the clause that became s 11(1)(a)(viii) was a justified limitation on the right to refuse to undergo medical treatment.¹ That advice was prepared on the understanding that a requirement to undergo, as well as to merely report for, COVID-19 testing was already contemplated by the current formulation of s 11(1)(a)(viii).
11. In accordance with this view, we consider that the proposed additions to the provision clarify, rather than expand, its scope, and therefore do not engage the right to refuse to undergo medical treatment in a way not already considered in our earlier advice. For the reasons given in our earlier advice, we consider that cl 7(2) of the Bill is a justified limitation on the right to refuse to undergo medical treatment.

Section 18 – Freedom of movement

12. Section 18(2) of the Bill of Rights Act provides that every New Zealand citizen has the right to enter New Zealand.
13. In our view the right to enter New Zealand is engaged by:
 - a. proposed new s 33A and subpart 3A of Part 2, which enable the New Zealand government to recover MIQF costs from users and make regulations for the purpose of prescribing such charges; and
 - b. proposed new s 11(1)(a)(x), which would allow s 11 orders to require those entering New Zealand to have already registered to enter an MIQF before arrival.
14. The prospect of being required to pay or contribute to the costs of a mandatory 14-day stay in a MIQF could have a chilling effect on a citizen's ability to exercise their right to enter New Zealand, particularly for citizens who may already be experiencing financial hardship as a result of the effects of COVID-19 or otherwise. The booking requirement could delay a citizen's ability to exercise their right due to a lack of availability of places at a MIQF.
15. 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. The s 5 inquiry may be 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 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 Ministry of Justice *Legal advice - Consistency with the New Zealand Bill of Rights Act: COVID-19 Public Health Response Bill* (11 May 2020).

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

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

Do the limits serve a sufficiently important objective? Are the limits rationally connected to the objective?

16. In the context of an extraordinary global pandemic of a virus that has been shown to have extreme impacts on public health and wellbeing, the utmost caution must be taken to protect public health. Public health measures have been singled out by academic commentators as an objective that is sufficiently important to justify proportional limits on, in particular, the right to freedom of movement.³
17. New Zealand has, to date, succeeded in eliminating community transmission of the virus. However, cases arriving at the border, if not detected and managed correctly, still pose a significant public health risk. Currently, almost everyone entering New Zealand is required to be isolated or quarantined at a government-managed facility for 14 days.⁴ It is understood that without some form of MIQ, border cases would likely have sparked some resumption of community transmission.
18. Given the steady worsening of the pandemic globally and the clear risk of importing cases at the border, ensuring the quality and sustainability of New Zealand's MIQs is of paramount importance to the continuing effectiveness of New Zealand's response to the pandemic. However, the cost of MIQ is substantial and increasing. It is projected that providing MIQ to meet anticipated demand in the six-month period from 1 July to 31 December 2020 will cost around \$630 million.
19. The ability to require users to register in advance and pay for MIQ promotes the quality and sustainability of New Zealand's MIQ system by managing its financial cost and regulating demand. We are satisfied that these measures both serve, and are rationally connected to, an objective that is sufficiently important to justify some limit on the right to enter New Zealand.

Do the limits impair the rights or freedoms no more than is reasonably necessary for sufficient achievement of the objective? Is the limit in due proportion to the importance of the objective?

20. In considering whether the proposed charges for MIQ are minimally impairing and proportionate to the objective, we are mindful that the government has had to boost borrowing relative to gross domestic product in order to respond to the significant public health risks posed by COVID-19. In these circumstances, we accept that the government is entitled to a degree of latitude in its decisions as to how best to apportion the funds available for COVID-19 response and recovery.
21. In our view, the effect of charging for MIQ on the right to enter is substantially mitigated by proposed new s 32C(1)(b) of the principal Act, which prevents the relevant Minister from recommending the making of regulations prescribing charges unless satisfied that there is appropriate provision to grant relief where to require payment would cause undue hardship. Other provisions of proposed new s 32C require the Minister to also be satisfied that the charges will not exceed the actual and reasonable costs of MIQ and are justified limits on the rights and freedoms affirmed by the Bill of Rights Act.
22. We further understand that it is intended that charges will be used to recover only part of the average actual costs of MIQ and will be applied to a relatively small proportion of returning citizens.

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

⁴ See, in particular, the COVID-19 Public Health Response (Air Border) Order 2020.

23. For these reasons, we are of the view that the proposed ability to prescribe charges for MIQ costs is justified under s 5 of the Bill of Rights Act.
24. In reaching this view, we note that the provisions of the Bill are broad and empowering in nature. Much of the detail of the cost recovery system, including the amount of any fees and the nature of the mechanism by which relief can be granted to avoid undue financial hardship, will be prescribed in regulations made under proposed s 33A. As such, the consistency of the cost recovery system as a whole with the right to enter will largely depend on whether the detailed scheme, as prescribed in regulations, amounts to a reasonable, proportionate and justifiable limitation on the right.
25. We are satisfied that a requirement to register to enter a MIQF before entering New Zealand is both minimally impairing of the right to freedom of movement, and in due proportion to its objective. Although managing the flow of arrivals in this way could lead to delay for some people wishing to enter New Zealand, the requirement is an effective way to ensure that MIQFs have sufficient capacity to meet demand at any given time. This, in turn, is essential to the effective operation and integrity of the MIQ system. We also note that proposed new s 9(1)(ba) of the principal Act would require the Minister to consider whether any s 11 order requiring persons to register to enter a MIQF before arriving is a justified limit on the rights and freedoms affirmed by the Bill of Rights Act, including s 18.

Section 19 - Freedom from discrimination

26. We note that there is scope for cost recovery regulations made under proposed new s 33A of the principal Act, which may prescribe classes of persons liable to pay charges, to have disproportionate impacts on certain groups protected from discrimination under s 21 of the Human Rights Act 1993.
27. While we consider that the power to make regulations that might apply differently to different groups is justifiable on public health grounds, we would expect these impacts to be taken into account when considering whether features of the scheme are a necessary and proportionate measure to further the public health response.
28. We also note that proposed new s 32C(1)(c) of the principal Act would prevent the Minister from recommending the making of regulations under s 33A unless satisfied that the prescribed charges are justified limitations on the rights and freedoms affirmed by the Bill of Rights Act, including s 19.

Conclusion

29. We have concluded that the Bill appears to be consistent with the rights and freedoms affirmed in the Bill of Rights Act.

Jeff Orr
Chief Legal Counsel
Office of Legal Counsel