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

Purpose

1. We have considered whether the COVID-19 Public Health Response 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 22923/4.2). 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 16 (freedom of peaceful assembly);
 - c. s 17 (freedom of association);
 - d. s 18 (freedom of movement);
 - e. s 19 (freedom from discrimination);
 - f. s 21 (right to be free from unreasonable search and seizure);
 - g. s 22 (liberty of the person); and
 - h. s 27(3) (rights to justice in civil proceedings with the Crown).
4. Our analysis is set out below.

The Bill

5. The Bill creates a bespoke legal framework for managing the public health risks posed by COVID-19 over the next two years, supplementing existing powers. The Bill is broadly based on powers in sections 70 and 92I of the Health Act 1956 and allows the Minister of Health (and the Director-General of Health in limited circumstances) to make enforceable public health orders in respect of people, business, and activities. These orders can be applied at either a national, regional, or cluster level.
6. The Bill empowers the Crown to continue its precautionary approach to preventing and limiting the risk of the outbreak of COVID-19 in New Zealand, particularly at lower alert levels and as the risk of transmission reduces over time. In doing so, the Bill recognises

the highly contagious nature of COVID-19, along with the potential for asymptomatic transmission, and provides for continued applicability of necessary public health measures.

7. The Bill also amends the Civil Defence Emergency Management Act 2002 to ensure the orderly transition from the state of emergency and ensure a nationally consistent response.
8. The Bill is repealed on the earlier date of either 2 years after the date of commencement, or a date appointed by the Governor-General by Order in Council.

Trigger for the availability of powers

9. Orders under the Bill can be made only where one of the following circumstances applies:
 - a. an Epidemic Notice for COVID-19 issued under s 5 of the Epidemic Preparedness Act 2006 is in force;
 - b. a state of emergency or transition period in respect of COVID-19 declared under the Civil Defence and Emergency Management Act 2002 is in force; or
 - c. the Prime Minister authorises the use of orders after being satisfied that there is a risk of outbreak or spread of COVID-19.
10. Certain prerequisites must be met before an order can be made by the Minister of Health. These are that the Minister must:
 - a. receive advice from the Director-General of Health about:
 - i. the risks presented by the outbreak or spread of COVID-19; and
 - ii. the nature and extent of measures that are necessary to respond to those risks; and
 - b. have regard to any decision by the Government on how to respond to those risks and avoid, mitigate, or remedy the effects of the outbreak or spread of COVID-19 (including taking into account any social, economic, or other factors);
 - c. consult the Prime Minister, the Minister of Justice, and any other Minister that the Minister of Health thinks fit;
 - d. be satisfied that the order is appropriate to achieve the purpose of this Act.
11. The Bill also authorises the Director-General of Health to make orders in a more restricted manner. They may only apply within the boundaries of a single territorial authority district, and can only be made when it is the Director-General of Health's opinion that the order is urgently needed to contain or prevent the outbreak of COVID-19 and is the most appropriate way of addressing those matters at the time .
12. Orders made by the Minister of Health are automatically revoked if not approved by a motion of the House of Representatives within a narrowly defined period of time, and orders made by the Director-General of Health expire after one month. All orders are disallowable instruments.

Permissible orders may limit a number of rights

13. The scope of orders able to be made under the Bill is broad. An order may require persons to refrain from taking any action that contributes to the risk of outbreak of COVID-19. Orders may also require persons to comply with measures or take action to contribute to preventing outbreak and spread of the virus. This includes significant restrictions on movement and association.
14. An order may require any person or class of persons to report for a medical examination or testing, to refrain from participating in gatherings or associating with certain people. Orders also extend to premises, ships, vehicles, and animals.
15. Notably, the Bill explicitly provides that orders may not limit or affect the application of the Bill of Rights Act.

Enforcement and non-compliance

16. The Bill provides for the enforcement of orders and consequences for non-compliance in the following ways:
 - a. offences relating to the exercise of enforcement powers and for intentionally failing to comply with an order. Upon conviction, serious offences carry a penalty of imprisonment of up to 6 months or a fine of up to \$4,000;
 - b. infringement offences with an infringement fee of \$300, or a fine imposed by a court not exceeding \$1,000;
 - c. businesses can be ordered to close for up to 24 hours;
 - d. warrantless powers of entry onto all types of premises, including private house dwellings and marae in certain circumstances; and
 - e. enforcement officers can direct people to stop any activity that is or is likely to contravene an order.

Consistency of the Bill with the Bill of Rights Act

Extraordinary powers in exceptional circumstances

17. It is important to acknowledge at the outset that the powers in the Bill allow for the making of orders that may impose serious limitations on the rights and freedoms enshrined in the Bill of Rights Act.
18. The backdrop to this Bill is an unprecedented public health emergency that requires a number of exceptional powers that would be unlikely to be justified in ordinary circumstances. In this context, it remains important to scrutinise each limit on a right or freedom carefully to ensure that it is justified in the circumstances.

Examination of the trigger for the availability of powers

19. As noted above, the Bill specifies that the power to make orders under cl 10 may be exercised only where an Epidemic Notice for COVID-19 is in force, where a state of emergency or transition period in respect of COVID-19 is in force, or where the Prime Minister is satisfied that there is a risk of outbreak or spread of COVID-19.

20. While the trigger provision does not directly raise an issue of inconsistency with the Bill of Rights Act, the way the provision is framed impacts on the proportionality of the powers available once the conditions for their exercise have been met. We have therefore examined the reasonableness of the trigger provision, together with the other pre-requisites and safeguards surrounding the making of orders under the Bill.
21. In our view, for a public health crisis to justify significant intrusions on protected rights and freedoms the situation must:
 - a. be of an exceptional and temporary nature;
 - b. pose an actual or imminent threat; and
 - c. affect all branches of the life of the community.
22. The last two factors are taken from the decision of Lord Bingham in *A v Secretary of State for the Home Department*.¹ Although that case concerned a terrorist threat, we consider that the same criteria need to be satisfied in the case of a public health threat.
23. We consider that the provisions in the Bill that trigger the use of order making powers incorporate each of these factors. Most importantly, under cl 8 it will only be possible to use these powers in relation to COVID-19. There is no question that the global COVID-19 pandemic constitutes an exceptional situation that poses an actual or imminent threat affecting all branches of the life of the New Zealand community.
24. With respect to reasonableness and proportionality, we note that before making an order the Minister of Health must receive the advice of the Director-General of Health, have regard to the factors set out in cl 8A(2)(b), and consult with other Ministerial colleagues. There is an express requirement for the Minister to be satisfied that any order is appropriate to achieve the purposes of the Bill. The Director-General of Health, whose orders may apply only to a single Territorial Authority district, must be of the opinion that the order is urgently needed to prevent or contain the outbreak or spread of COVID-19, and is the most appropriate way of addressing those matters at the time. We consider that these pre-requisites will help to ensure that orders are reasonable and proportionate.
25. The Bill also includes several safeguards to ensure that orders are reasonable and will go no further than necessary in the circumstances. The Bill contains an express requirement for the Minister of Health and Director-General to keep any orders under review (cl 13(5)). Orders made under the Bill are also temporary in nature. The Bill provides that all orders made by the Minister of Health are automatically revoked if not approved by a motion of the House of Representatives within a narrowly defined period of time, and orders made by the Director-General of Health expire after one month. Ultimately the Act itself expires within two years of its commencement, if not earlier revoked by the Governor-General by Order in Council.
26. For the reasons discussed above, we consider that the trigger provision for making orders under the Bill is framed in a reasonable way. We also consider that there are appropriate safeguards in the process for making the orders. However, each type of order enabled by the Bill must still be a proportionate response to the serious public health risk that has been identified. We examine these further below in relation to the particular rights engaged.

¹ [2004] UKHL 56.

Section 11 - Right to refuse to undergo medical treatment

27. Section 11 of the Bill of Rights Act affirms that everyone has the right to refuse to undergo medical treatment. The right to refuse to undergo medical treatment protects the concept of personal autonomy and bodily integrity, specifically the idea that individuals have the right to determine for themselves what they do or do not do to their own body, free from restraint or coercion.²
28. Clause 10(a)(viii) of the Bill allows for orders to be made requiring people to report for medical examination or testing in any specified way or in any specified circumstances.
29. The right to refuse medical treatment is engaged where a medical service is provided to an individual in the context of a therapeutic relationship.³ We consider that the right to refuse medical treatment is engaged by certain forms of medical examination, and particularly, a test for COVID-19. A COVID-19 test requires the collection of a bodily sample from an individual for the purpose of diagnosis and assessment. It can include the use of a moderately invasive procedure – a nasopharyngeal swab to collect nasal secretions from the back of the nose and throat.
30. Clause 10(a)(vii) *prima facie* limits the right to refuse to undergo medical treatment. Where a provision proposes a limit on a right or freedom, it may nevertheless be consistent with the Bills of Rights Act if the limit is reasonable and justifiable in terms of s 5 of that Act.
31. The s 5 inquiry may be approached as follows:⁴
 - 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?
 - iii. is the limit in due proportion to the importance of the objective?
32. The purpose of cl 10(a)(viii) is to ensure that appropriate public health control measures can be applied in respect of people who may have COVID-19, and also that public health authorities can collect information about potentially unknown vectors of transmission in the community. The collection of this information is clearly necessary and rationally connected to the wider objective of protecting against future outbreaks of COVID-19. Public health concerns, particularly as it relates to infectious diseases, have explicitly been held to be a sufficiently important objective to justify a limit on the right to refuse medical treatment.⁵
33. With regard to the proportionality of the limit on the right, we note that an outbreak of COVID-19 would have extreme consequences for public health and wellbeing. While the

² *New Health New Zealand Inc v South Taranaki District Council* [2014] NZHC 395 at [52].

³ *New Health New Zealand Inc v South Taranaki District Council* [2014] NZHC 395 at [84].

⁴ See *Hansen v R* [2007] NZSC 7, [2007] 3 NZLR 1 at [123].

⁵ *New Health New Zealand Inc v South Taranaki District Council* [2014] NZHC 395 at [86].

Bill empowers orders to be issued in respect of medical examination and testing, it does not require a person to undertake any particular ongoing form of treatment. In this way, the Bill continues to preserve the scope of personal autonomy and bodily integrity as far as is possible while maintaining public health.

34. For these reasons, we consider that this limitation on s 11 of the Bill of Rights Act is justifiable. We note that the taking of a bodily sample for assessment would also amount to a search or seizure of the person. However, for the same reasons that justify the limitation that the proposed provisions place on s 11 of the Bill of Rights Act, we consider that the requirement to provide a bodily sample would be reasonable in terms of s 21 of that Act.

Sections 16, 17 and 18 – Freedom of peaceful assembly, freedom of association and freedom of movement

35. Section 16 of the Bill of Rights Act provides that everyone has the right to freedom of peaceful assembly, s 17 that everyone has the right to freedom of association, and s 18(1) that everyone lawfully in New Zealand has the right to freedom of movement and residence in New Zealand.
36. These rights are closely connected, and together they protect core aspects of civil life in New Zealand, enabling people to freely go about their daily lives. In relation to these rights (as they are affected by the Bill) we note the following:
- a. the choice of method, place, and time of peaceful assembly is integral to the free exercise of that right;⁶
 - b. the ambit of freedom of association is “broad and encompasses a wide range of associational activities...”.⁷ It has been held to include the right of an individual to associate with any other individual.⁸ Freedom of association protects informal assemblies and participation in community life generally;⁹ and
 - c. freedom of movement includes the right to use roads and move through public places.¹⁰
37. Clause 10 of the Bill sets out the range of matters and kinds of requirements that can be imposed by an order issued under cl 8A or 9 of the Bill. Clauses 18 and 19 of the Bill set out the corresponding powers enabling the enforcement of these restrictions. A number of these requirements (and corresponding powers of enforcement) appear to prima facie limit the above civil and democratic rights. Particularly by:
- a. requiring persons to stay in a specified place or refrain from going to any specified place;
 - b. requiring persons to refrain from travelling to or from any specified area;
 - c. requiring persons to be isolated or quarantined in any specified place;

⁶ *Brooker v Police* [2012] NZSC, 45 at [14] per Elias CJ.

⁷ *Turners & Growers Ltd v Zespri Group Ltd* (No 2) (2010) 9 HRNZ (HC) at [72].

⁸ *B v JM* [1997] NZFLR 529 (HC) at 532.

⁹ *Morse v Police* [2018] NZSC, 45 at [110] per McGrath J.

¹⁰ *Kerr v Attorney-General* [1996] DCR 951 (DC) at 955.

- d. requiring persons to refrain from participating in gatherings;
 - e. requiring premises or other things to be closed or only open if specified measures are complied with; and
 - f. prohibiting gatherings of any specified kind, in any specified place or in any specified circumstances.
38. Together, the potential requirements that can be imposed via orders under cl 10 of the Bill could, if applied to their fullest extent, impose arguably the most extreme and significant limitations on New Zealanders' ability to freely go about our daily lives as has occurred in modern New Zealand history. Their broad scale and scope have the potential to significantly impact on people's ability to socialise, do business, and move freely.
39. Nevertheless, and despite the potential degree of these restrictions, the Bill may be consistent with the Bill of Rights Act if the limitations are necessary and can be justified in a free and democratic society.¹¹

Do the limits serve a sufficiently important objective?

40. The purpose of these provisions is to prevent, reduce, or eliminate the risks of an outbreak of COVID-19. This occurs in the context of an extraordinary global pandemic and in respect of a virus that has been shown to have extreme impacts on public health and wellbeing. The full extent of the characteristics of the virus are not yet fully known but what we do know is:
- a. the virus is highly contagious;
 - b. it has an incubation period of up to 14 days;
 - c. asymptomatic people may be carriers; and
 - d. although the effect of contraction by any individual varies, in the worst cases the effect is very serious requiring hospital, and sometimes ICU, level care.
41. These factors mean the utmost caution must be taken to protect public health. Notably, 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.¹²

Are the limits rationally connected to the objective?

42. The restrictions on people's ability to assemble, associate and move freely is rationally connected to the purpose of the Bill: preventing, reducing, and eliminating the risks of COVID-19. The virus is transmitted through physical proximity. The restrictions target physical association and moment, and thereby limit the ability of the virus to spread between people and throughout the country.

¹¹ Section 5 of the Bill of Rights Act.

¹² Andrew Butler and Petra Butler in *New Zealand Bill of Rights Act: A Commentary* (2nd ed, LexisNexis, Wellington, 2015) at 16.6.18.

Do the limits impair the rights or freedoms no more than is reasonably necessary for sufficient achievement of the objective?

43. Parliament is entitled to appropriate latitude to achieve its objectives.¹³ The issue here is whether the means are minimally impairing of the rights, and whether the means proposed are carefully tailored to the objective.
44. The Bill is designed to enable the Crown to carry on with its precautionary elimination strategy. This requires the careful ongoing management of latent risks, even as the virus reaches lower levels of presence or transmission in New Zealand, due to the high risk that the virus poses to public health.
45. Notably, embedded within the Bill are several significant procedural and substantive safeguards (as discussed at paragraphs 19 - 26 above). These together provide a high degree of assurance that orders will be imposed only:
 - a. where a risk of transmission remains;
 - b. in consideration of the various public health concerns, rights affected, and wider social interests at stake;
 - c. through means that provide significant public and Parliamentary oversight of any order promulgated; and
 - d. for a period of time no longer than 2 years after the commencement of the Act, unless repealed earlier.
46. Notably also, the Bill does not allow orders to be made in respect of core civil and democratic institutions. No order requiring premises to close may be made in respect of a private dwelling house, Parliament, the courts, judge's chambers, or prisons.
47. Finally, the discretionary power that the Bill gives to the Minister of Health (and Director General of Health in limited circumstances) to issue orders must be exercised consistently with the Bill of Rights Act.

Overall, are the limits in due proportion to the importance of the objective?

48. The Bill provides for unprecedented limits on freedom of association and movement. However, this is in the context of a global pandemic and highly transmissible virus that in some of the worst cases can have very serious effects requiring ICU level care. The powers enabled under the Bill therefore reflect the significant risk that COVID-19 poses to public health and wellbeing and any orders made would need to be proportionate to that risk.
49. The Bill contains safeguards to ensure the powers are used transparently, no more than necessary, and are subject to extensive public and parliamentary scrutiny.
50. We are of the view that, for these reasons, the limits that these orders may place on the rights to freedom of movement, peaceful assembly and association are justified under s 5 of the Bill of Rights Act.

¹³ *Canada v JTI-MacDonald* [2007] 2 SCR 610 at [42]–[45].

Section 19 - Freedom from discrimination

51. We note that there is scope for orders under this Bill to have disproportionate impacts on certain groups protected from discrimination under s 21 of the Human Rights Act 1993 (for example, the elderly, or people in one person households).¹⁴
52. We consider that the power to make orders that might apply differently to different groups is clearly justifiable on public health grounds; however we would expect decision-makers under the Bill to take these impacts into account when considering whether an order is a necessary and proportionate measure to further the public health response.
53. We also note that the presence of the express provisions in the Bill that do not allow an order to modify or derogate from the requirements under the Bill of Rights Act, which includes the right to be free from discrimination in s 19.

Section 21 – Right to be free from unreasonable search and seizure

54. 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, their property or correspondence, or otherwise. The right protects a number of values including personal privacy, dignity, and property.¹⁵
55. Clause 17 of the Bill provides warrantless powers of entry:
 - a. clause 17(1) provides that an enforcement officer may enter any land, building, ship, aircraft, or any other place or thing (excluding private dwellings or marae) if they have reasonable grounds to believe that a person is failing to comply with any aspect of an order; and
 - b. clause 17(3) provides that a constable may enter a private dwelling house or marae only if they have a reasonable belief that people have congregated there in contravention of an order and entry is necessary for the purpose of giving a direction in accordance with cl 18.
56. Additionally, cl 20 enables an enforcement officer to direct any person to provide their personal identifying information, such as their full name, date of birth, and contact information.
57. In order for these search powers to be consistent with s 21 of the Bill of Rights Act they must be found to be reasonable. Logically, an unreasonable search or seizure cannot be demonstrably justified with reference to s 5 of the Bill of Rights Act.¹⁶ The reasonableness of a search can be assessed with reference to the purpose of the search and the degree of intrusion on the values which the right seeks to protect.

Clause 17(3) – entry in private dwelling houses or marae

58. The purpose of the search authorised at cl 17(3) is to ensure that any risks posed by gatherings (in breach of the requirements of an order) that are taking place in private

¹⁴ Both age and family status are prohibited grounds of discrimination under s 21 of the Human Rights Act 1993. We note that to date government orders under the Health Act 1956 have taken into account differential effects on people who live apart from their dependants.

¹⁵ *Hamed v R* [2012] 2 NZLR 305 at [161] per Blanchard J.

¹⁶ *Cropp v Judicial Committee* [2008] 3 NZLR 744 at [33]; *Hamed v R* [2012] 2 NZLR 305 at [162].

dwelling houses or marae can be identified and enforcement action taken to mitigate the risk. There is an extremely high public interest in limiting and preventing the outbreak of COVID-19 in New Zealand, which can be readily spread by large private social gatherings.

59. It is unusual for a constable to have a warrantless power of entry to a private dwelling house or marae. This is because of the high expectation of privacy that citizens place on these places. However, the exceptional nature of the risk posed by COVID-19 does justify some limits on this expectation.
60. Notably, the power of entry at cl 17(3) goes no further than is necessary to achieve the public health objective. Entry is limited to instances where a constable has a reasonable belief that people are congregating in breach of an order, and then only where the entry is necessary to issue a direction. Social gatherings in particular pose a high risk of widespread transmission (irrespective of whether they occur in a private or public place) and require careful management in the public interest. This is in contrast to other breaches of an order that might occur in a private dwelling or marae, which have less significant social consequences, and where warrantless entry is not permitted.
61. Further to this, cl 17(4) – 17(6) require a constable to report each time a warrantless power is used and detail the nature of the circumstances. This safeguard provides a check on the use of the power. For these reasons, the entry power in cl 17(3) is reasonable under s 21 of the Bill of Rights Act.

Clause 17(1) – entry onto other premises

62. For the reasons above, and because there is a lower expectation of privacy for buildings, land, aircraft, ships, or other things that are not a private dwelling house or marae, the entry power in cl 17(1) are reasonable under s 21 of the Bill of Rights Act.

Clause 20 – power to direct people to provide information

63. The powers under cl 20 for an enforcement officer to require a person to provide identifying information supports them to efficiently carry out their enforcement functions under the Act, such as issue infringement notices in respect of breaches or to give effective directions.
64. There is only a negligible privacy interest in revealing identifying information. The information is purely factual in nature and is wholly in the knowledge of the person. It arguably has no expressive value. To the extent that the provision compels the provision of information that has some marginal expressive value (and thereby engages the right to freedom of expression protected at s 14 of the Bill of Rights Act), the limit is justified for the reasons outlined above.
65. For these reasons, the Police power to direct a person to provide information is not an unreasonable search under s 21 of the bill of Rights Act.

Section 22 – Liberty of the person

66. Section 22 of the Bill of Rights Act affirms that everyone has the right not to be arbitrarily arrested or detained. The purpose of the right not to be arbitrarily detained is the protection of human dignity, autonomy and liberty.¹⁷

¹⁷ *R v Briggs* [2009] NZCA 244 at [85] per Arnold J.

67. To trigger the concept of detention there must be a “substantial intrusion on personal liberty”,¹⁸ whether a physical deprivation or a statutory constraint. The Court of Appeal has held that:¹⁹
- “An arrest or detention is arbitrary if it is capricious, unreasoned, without reasonable cause: if it is made without reference to an adequate determining principle or without following proper procedures.”
68. For this reason, arbitrariness should not be equated with “against the law”, but should be interpreted more broadly to include elements of inappropriateness, injustice and lack of predictability.
69. Clause 10(a)(vi) authorises that orders under the Bill can require that any person be isolated or quarantined in any specific place in any specific way.
70. Where an enactment is inconsistent with s 22, there can be no role for justification under s 5. The term “arbitrarily” is intended to provide a measure of the reasonableness of statutory powers,²⁰ as well as the exercise of those powers. At issue is whether there is sufficient justification for detention and whether the Bill carefully circumscribes who may detain a person, for how long, and under what conditions.
71. In our view, cl 10(a)(vi) is not “arbitrary” for the purposes of s 22 of the Bill of Rights Act. In reaching this view, we have taken account of a ruling of the European Court of Human Rights regarding the detention of individuals suffering from an infectious disease. In *Enhorn v Sweden*,²¹ the Court held that such detentions will only be justified if:
- a. the response is proportionate to the threat the disease poses to the general public;
 - b. the measure is a measure of last resort; and
 - c. the detention must be lifted as soon as possible as the person no longer poses a threat to the public.
72. We consider that these factors are met in the present case. Requiring a person who has been exposed to COVID-19 (for example through travelling to countries where there is a high outbreak of the virus, or who is waiting for results of a test) is reasonable and necessary as it will ensure that the person is kept apart from other persons during the period that they would be capable of passing on the virus. Similarly, it is reasonable to remove a person suffering from COVID-19 to hospital where the person can be isolated from other persons and receive appropriate medical treatment (where consented to).
73. The Ministry of Health has advised that a person who may be exposed to COVID-19 (for example through international travel) needs to be self-isolated for up to 14 days which is the known incubation period of the virus. It would be reasonable for an order to require a person quarantine for this period of time in order for any symptoms of the virus to develop.
74. We therefore consider the Bill appears to be consistent with the right not to be arbitrarily arrested or detained affirmed in s 22 of the Bill of Rights Act.

¹⁸ *Police v Smith* [1994] 2 NZLR 306 (CA) at 316 per Richardson J.

¹⁹ *Neilsen v Attorney-General* [2001] 3 NZLR 433; (2001) 5 HRNZ 334 (CA) at [34].

²⁰ Butler and Butler, above n **Error! Bookmark not defined.**, at [19.8.1].

²¹ Application no 56529/00 (25 January 2005).

Section 27(3) - rights to justice in civil proceedings with the Crown

75. Section 27(3) of the Bill of Rights Act protects the ability of an individual to bring a proceeding against, or to defend civil proceedings brought by, the Crown and to have those proceedings heard in the same manner in which civil proceedings between individuals can be heard.
76. Clause 33 of the Bill imports from the Health Act 1956 the existing protection from liability for persons acting under the provisions of that enactment and applies them to the Bill. Under these provisions, an individual acting in pursuance of any of the provisions of the Act is protected from civil or criminal liability unless they have acted in bad faith or without reasonable care. We note that this means that liability can still lie against an individual, and accordingly the Crown, in cases of bad faith or negligence. We consider this immunity to be consistent with s 27(3) of the Bill of Rights Act.

Conclusion

77. 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