

24 July 2020

Hon David Parker, Attorney-General

Consistency with the New Zealand Bill of Rights Act 1990: Incorporated Societies Bill

Purpose

1. We have considered whether the Incorporated Societies 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. This advice has been prepared in relation to the latest version of the Bill (PCO 18129/10.0). We will provide you with further advice if the final version of the Bill 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 19 (freedom from discrimination), s 21 (unreasonable search and seizure) and s 25(c) (right to be presumed innocent until proven guilty). Our analysis is set out below.

The Bill

4. This Bill repeals the Incorporated Societies Act 1908 and replaces it with a new Incorporated Societies Act. The purpose of the Bill is to put in place a modern framework of legal, governance, and accountability obligations for incorporated societies and those that run them.
5. The purposes of the Bill, as outlined in cl 3, are to:
 - a. provide for the incorporation of societies that are carried on for lawful purposes other than for the financial gain of any of their members;
 - b. provide a legislative framework that promotes high quality governance of societies;
 - c. make the law of societies more accessible; and,
 - d. recognise the principles that societies are organisations with members who have the primary responsibility for holding the society to account; that societies should operate in a manner that promotes trust and confidence of their members; that societies are private bodies that should be self-governing and free from inappropriate Government interference; and that societies should not distribute profits or financial benefits to their members.
6. The Bill also closes gaps in the 1908 Act by providing an express mechanism for societies to amalgamate with each other, and by including civil law enforcement provisions that clearly state who may apply to the court for orders in respect of an incorporated society and the type of orders that a court can make.

Consistency of the Bill with the Bill of Rights Act

Section 14 – Freedom of Expression

7. 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 The provisions of the Bill of Rights Act apply, so far as practicable, for the benefit of all legal persons as well as for the benefit of natural persons (s 29 of the Bill of Rights Act). Incorporated societies are legal persons, and accordingly benefit from the rights set out in the Bill of Rights Act.

Right not to be compelled to provide certain information

8. There are various provisions of the Bill that require an incorporated society or its members to provide information², particularly in relation to applications for incorporation, its constitution, requests from members for information, annual general meetings, financial statements, annual returns and communications. These requirements engage the right to freedom of expression affirmed in s 14 of the Bill of Rights.
9. 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:
 - 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?
10. We consider the Bill's objective of putting in place a framework of legal, governance, and accountability obligations for incorporated societies is a sufficiently important objective to justify some limit on the right to freedom of expression. We also consider that the information that is required to be provided is rationally connected to that objective, and is clearly necessary to support the regulatory regime set out in the Bill. We note that societies are only required to provide specific information in specific circumstances, such as the provision of a constitution to the Registrar when incorporating. In our view, the limits impair the freedom of expression of an incorporated society no more than is reasonably necessary and are proportionate to the objective of the Bill.

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

² Requirements to provide certain information may be found within the Bill at clauses 9, 25, 26, 31, 33, 47, 58, 60, 67, 74, 77, 80, 82, 86, 95, 97, 100, 102, 104, 109, 114, 186, 190, 219, 224; Schedule 1: 8(4); Schedule 3: 3.

Limits on name of incorporated society

11. The Bill also limits the name under which a society may incorporate itself. Under cl 11, the Registrar must refuse to incorporate a society if in the Registrar's opinion any of the following apply:
 - a. the name would contravene an enactment;
 - b. the name is identical or almost identical to the name of another society or reserved under the Companies Act;
 - c. be likely to be misleading or if the name is offensive; and,
 - d. the name does not include the word "Incorporated", "Inc" or "Manatōpū" as the last word or words of the name.
12. The Registrar may also require an incorporated society to change its name in certain circumstances (cl 112). If an incorporated society fails to change its name, the Registrar may enter a new name on the register for the incorporated society. Amalgamations may not occur if the Registrar considers that the name does not comply with the requirements (cl 192). The effect of this Bill is to restrict what incorporated societies can name themselves.
13. Additionally, cl 151 makes it an offence for a person, not being an incorporated body, whether alone or with other persons, to dishonestly operate under any name or title of which the word "Incorporated", "Inc" or "Manatōpū" or any contraction or imitation of any of those words, is the last word. This is punishable on conviction to a fine not exceeding \$10,000.00.
14. The above restrictions *prima facie* limit the right to freedom of expression. However, we consider that these limits are justified in terms of section 5 of the Bill of Rights Act. The limits serve the objective of ensuring that the names of incorporated societies are not misleading (particularly if another society or company has a similar name), offensive, or fraudulent. We also consider that the right to freedom of expression is impaired no more than reasonably necessary and the limit on freedom of expression is in due proportion to the importance of the objective. Clause 11 contains a very prescriptive list of reasons a Registrar must refuse to incorporate a society under a name, all of which are connected to the purpose of ensuring that names are appropriate.
15. For the reasons outlined above, we consider that the limits on freedom of expression imposed by the Bill are justified under s 5 of the Bill of Rights Act.

Section 19 – freedom from discrimination

16. Section 19 of the Bill of Rights Act concerns the right to be free from discrimination, on the grounds contained in the Human Rights Act 1993, which includes the ground of 'age'. Under s 21 of the Human Rights Act, 'age' means any age commencing with the age of 16 years.
17. The key questions in assessing whether there is a limit on the right to freedom from discrimination are:³

³ See, for example, *Atkinson v Minister of Health and others* [2010] NZHRRT 1; *McAlister v Air New Zealand* [2009] NZSC 78; and *Child Poverty Action Group v Attorney-General* [2008] NZHRRT 31.

- 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 a disadvantage to one or more classes of individuals?
18. A distinction will arise if the legislation treats two comparable groups of people differently based on one or more of the prohibited grounds of discrimination. Whether a disadvantage arises is a factual determination.⁴
19. The Bill provides that every society must have at least one contact person whom the Registrar can contact when needed (cls 105 – 106). Clause 107 requires a contact person to be at least 18 years of age. The Bill treats 16 and 17 year olds differently from those 18 and over, and accordingly *prima facie* gives rise to a limit on the right to be free from discrimination on the basis of age. It is arguable that this difference in treatment may give rise to a disadvantage.
20. Any limit on the non-discrimination right may be justified in terms of section 5 of the Bill of Rights Act, as outlined above. One of the objectives of the Bill is to provide a legislative framework that promotes high-quality governance of societies and to recognise the principle that societies are organisations with members who have the primary responsibility for holding the society to account. While the contact person does not have to be an officer of the society, it is still a position of responsibility. The Registrar may contact the contact person about matters relating to a society, including delivering infringement notices.
21. We consider that the age limit is intended to act as a proxy for maturity. Such bright-line age restrictions are necessarily arbitrary to a degree but can provide a level of certainty and consistency where (as here) an individual assessment of maturity is not practical. The age limit set by the Bill is one that has been generally adopted by society in a number of areas (such as voting age and alcohol consumption, for example) as an appropriate proxy for maturity.
22. To the extent that cl 107 raises an issue of discrimination under section 19 of the Bill of Rights Act, we consider that this is justified under section 5.

Section 21 – Unreasonable Search and Seizure

23. 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, correspondence or otherwise. The right protects a number of values including personal privacy, dignity, and property.⁵
24. The Bill provides the Registrar (or a person authorised by the Registrar) with the powers to inspect and take copies of documents, remove documents from where they are kept and retain them for a reasonable time if there are reasonable grounds for believing that they are evidence of the commission of an offence (cl 236). A person may be directed by the Registrar to give the documents, information or report to certain people (cl 238). We consider these to be powers of search and seizure within the meaning of s 21 of the Bill of Rights Act.

⁴ See, for example, *McAlister v Air New Zealand* [2009] NZSC 78; and *Child Poverty Action Group v Attorney-General* [2008] NZHRRT 31.

⁵ See, for example, *Hamed v R* [2011] NZSC 101, [2012] 2 NZLR 305 at [161] per Blanchard J.

25. Ordinarily, a provision found to limit a particular right or freedom may nevertheless 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 reasonably justified and therefore the inquiry does not need to be undertaken.⁶ As such, the question with respect to the search and seizure powers under the Bill is whether they are reasonable. 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.
26. We note that the search powers set out in the Bill can only be exercised for the purpose of ascertaining whether an incorporated society or officer has complied (or is complying) with the provisions of the Bill, or to ascertain whether the Registrar should exercise any of its functions under the Bill. In addition, the Registrar must be of the opinion that it is in the public interest for them to exercise these powers (cl 235). The content of the information that may be required to be provided by societies is not highly personal, and privacy expectations for an incorporated society are lower than for a private individual. We consider that the search powers are proportionate to the importance of ensuring that societies are complying with the Bill.
27. We note that the Registrar's search powers appear to be primarily aimed at ensuring compliance with the regulatory requirements of the Bill. However, to the extent that a search may relate to information that is, or could be, relevant to a criminal investigation, clause 236(4) provides additional safeguards to individuals in that every person has the same privileges in relation to producing relevant documents as witnesses have in proceedings before a court.
28. On this basis, we consider that the search and seizure powers contained in the Bill are reasonable and accordingly consistent with the Bill of Rights Act.

Section 25(c) - Right to be presumed innocent until proven guilty

29. Section 25(c) of the Bill of Rights Act affirms that everyone who is charged with an offence has, in relation to the determination of the charge, the right to be presumed innocent until proven guilty according to law. The right to be presumed innocent requires the prosecution to prove beyond reasonable doubt that the accused is guilty.
30. The Bill includes a number of offences which are strict liability offences. These offences apply to the incorporated society, an officer of a society, or a person.⁷ These offences largely relate to failures to follow regulatory requirements set out in the Bill.
31. Strict liability offences *prima facie* limit s 25(c) of the Bill of Rights Act because the accused is required to prove a defence (on the balance of probabilities) to avoid liability (in other criminal proceedings an accused need merely raise a defence in an effort to create reasonable doubt). This means that where the accused is unable to prove a defence, they could be convicted even where reasonable doubt exists as to their guilt.
32. In the specific context of strict liability offences, considerations especially relevant to the reasonableness of limits on s 25(c) are the nature and context of the conduct being regulated, the ability of the defendants to exonerate themselves and the penalty levels.

⁶ *Cropp v Judicial Committee* [2008] 3 NZLR 744 at [33]; *Hamed v R* [2012] 2 NZLR 305 at [162].

⁷ Strict liability offences can be found within the Bill at cl 114, 189, 236-238.

33. We consider the limits proposed by the Bill to the right to be presumed innocent are justified in the circumstances. The offences are rationally connected to the important objective of protecting and enforcing the new regulatory regime for incorporated societies. Strict liability offences have been considered more proportionate and justifiable where:
- a. the offence is a regulatory offence and not “truly criminal” in nature;
 - 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 penalties are solely financial in nature, are at the lower end of the scale and proportionate to the seriousness of the offence. No terms of imprisonment can be imposed.
34. We consider that these factors apply here.
35. We note that the Bill also includes a number of infringement offences (cl 153) which may be proceeded against by the filing of a charging document under section 14 of the Criminal Procedure Act 2011 or by an infringement notice. Infringement offences that are pursued in the criminal court cannot result in a conviction (see section 375(1)(a) of the Criminal Procedure Act) and therefore do not engage the right to be presumed innocent until proven guilty.
36. For the reasons outlined above, we consider any limits on the right to be presumed innocent until proven guilty imposed by the Bill to be justified under s 5 of the Bill of Rights Act.

Conclusion

37. 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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