

12 November 2019

Hon David Parker, Attorney-General

## **Consistency with the New Zealand Bill of Rights Act 1990: Infrastructure Funding and Finance Bill 2019**

### **Purpose**

---

1. We have considered whether the Infrastructure Funding and Finance Bill 2019 ('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 with the latest version of the Bill (PCO 21905/7.0). 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) and 21 (unreasonable search and seizure). Our analysis is set out below.

### **The Bill**

---

4. The purpose of the Bill is to address housing affordability by reforming the system for the financing of water services, land transport, community and environmental resilience infrastructure associated with housing development.
5. The Bill's objectives are that local authority and financing constraints do not prevent or delay the timely provision of infrastructure to support housing and urban development, that urban development is supported by infrastructure that supports community needs, and that the costs of infrastructure are appropriately allocated.
6. To achieve the purpose and objectives, the Bill establishes an alternative funding and financing model for the timely and responsive provision of infrastructure to support housing demands. The Bill proposes to do this by setting a multi-year levy which is to be paid by beneficiaries of infrastructure and collected by the responsible territorial authority by way of a rate.
7. Any person may propose that a levy be authorised to fund eligible costs to support the financing of the construction of eligible infrastructure. The proposer must give the proposal to the recommender (a government agency appointed by the Governor-General on the recommendation of the responsible Minister). The Governor-General may, by Order in Council, authorise the use of a levy. The levy order will identify a Special Purpose Vehicle ("SPV") that is responsible for the financing and funding of the costs of infrastructure and provide whether that SPV is also responsible for the construction of the infrastructure. A monitor (a government agency appointed by the Governor-General on the recommendation of the responsible Minister) ensures a responsible SPV's compliance with the Act and levy order.

8. To achieve its purpose, the Bill also amends the Land Transport Management Act 2003, the Local Government Act 2002, the Local Government (Auckland Council) Act 2009, the Local Government Official Information and Meetings Act 1987, the Public Works Act 1981, the Property Law Act 2007, the Resource Management Act 1991 and the Utilities Access Act 2010.

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

---

### **Section 14: Freedom of Expression**

9. Section 14 of the Bill of Rights Act affirms that everyone has 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 has been interpreted as including the right not to be compelled to say certain things or to provide certain information.<sup>1</sup>
10. Several clauses in the Bill compel the provision of information to government related or government appointed parties, or the publication of particular information outlined in the Bill. Clauses that compel the provision or publication of information include clauses 22, 28, 32(4), 32(5), 39, 40, 43(2), 46, 47, 48, 92, 94, 105, 106, 107, 131, 132 and 153.
11. The Bill sets offences for failing to provide information. Clause 147 provides that it is an offence under the Bill to refuse or fail to give information required under the Bill, without reasonable excuse. Conviction would lead to a fine of up to \$2000 for individuals, and up to \$5000 in any other case.
12. These clauses may be seen to limit s 14 of the Bill of Rights Act, as they compel the provision of certain information. 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 a reasonable limit that is justifiable under s 5 of that Act.
13. 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?<sup>2</sup>
14. We consider that the limitations in the Bill are minimal and justified taking into account the purpose of the Bill (set out at para 4) and objectives of the provisions (set out at para 5).
15. The requirements to provide information place obligations only on actors involved in the SPV process and on governmental bodies. The requirements for information are restricted to information that will aid the bodies in their particular roles. For instance, the

---

<sup>1</sup> See, for example, *Slaight Communications v Davidson* 59 DLR (4<sup>th</sup>) 416; *Wooley v Maynard* 430 US 705 (1977).

<sup>2</sup> *Hansen v R* [2007] NZSC 7 at [123]

powers provided will help the recommender assess the proposer's proposal for levy authorisation, provide the Minister with sufficient information to assess whether it is appropriate to approve a levy proposal, assist the responsible SPV in setting the annual levy, and enable the monitor to assess compliance with the Bill and levy order. This will support the important objective of enabling the provision of infrastructure to support urban development without the delays associated with the current model of funding, and allowing for the costs of infrastructure to be appropriately allocated. It also promotes transparency of the decision-making process and levy collection. The power is limited to that which is reasonably necessary to fulfil those roles and is proportionate to the objectives.

16. Although some of this information could be commercially sensitive, the information is not of significant expressive value. Therefore, we consider that the imposition on the right to freedom of expression is minimal.
17. We therefore conclude that any limits to the freedom of expression imposed by the Bill are justified under s 5 of the Bill of Rights Act.

### **Section 21: Unreasonable search and seizure**

18. 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.<sup>3</sup>
19. Clause 5 of Schedule 2 of the Bill proposes to amend the Local Government Act 2002 by inserting new section 173A to allow a local authority to exercise the power of entry under section 173 of the Local Government Act 2002 for the purpose of doing anything that a responsible SPV is authorised to do under new section 181A. Proposed new section 181A provides that a responsible SPV may exercise the powers of a local or territorial authority under section 181 of the Local Government Act for the construction of eligible infrastructure in a levy area. Section 181 of the Local Government Act provides a local authority with powers to construct works on private land in certain circumstances.
20. The power of entry pursuant to section 173 of the Local Government Act 2002 may be exercised in cases of emergency. This section grants the local authority the power to enter occupied land or buildings without giving prior notice if there is a sudden emergency likely to cause loss of life or injury to a person, damage to property, or damage to the environment, or danger to any works or adjoining property. The effect of proposed new section 173A is to extend the powers of a local authority to exercise powers of entry in cases of emergency in respect of anything that a responsible SPV is authorised to do.
21. We consider that the exercising of these entry and associated powers would constitute a search under s 21 of the Bill of Rights Act.
22. 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 reasonably justified and therefore the inquiry does not need to be undertaken.<sup>4</sup>

---

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

<sup>4</sup> Above, n1 at [162].

Rather, the assessment to be undertaken is first, whether what occurs is a search or seizure, and, if so, whether that search or seizure was reasonable. In assessing whether the extension of the search and seizure powers in the Bill are reasonable, we have considered the place of the search, the degree of intrusiveness into privacy, and the reasons why it is necessary.<sup>5</sup>

23. Entries authorised under the Bill may take place on any occupied land or building subject to the terms of section 173 of the Local Government Act 2002. The power of entry may only be exercised where there is a sudden emergency causing or likely to cause loss of life or injury to a person, damage to property or damage to the environment or there is danger to any works or adjoining property. A local authority may also only enter for the purpose of doing anything that it is authorised to do under the Local Government Act. The power of entry is also subject to Part 4 of the Search and Surveillance Act 2012.
24. The degree of intrusiveness is high as the local authority may enter property that is private, without providing any prior notice. However, the purpose of the power, as we interpret it, is to protect adjoining land and its occupants from adverse consequences of the construction of eligible infrastructure in cases of emergency and may only do so for the purpose of doing anything that it is authorised to do under the Local Government Act. We therefore consider that the search is reasonable to prevent potential harm to people, property, or the environment.
25. We therefore conclude that any searches conducted under the Bill are reasonable, and therefore do not conflict with s 21 of the Bill of Rights Act.

## **Conclusion**

---

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

Edrick Child  
**Chief Legal Counsel**  
**Office of Legal Counsel**

---

<sup>5</sup> At [172].