

10 September 2019

Hon David Parker, Attorney-General

Consistency with the New Zealand Bill of Rights Act 1990: Resource Management Amendment Bill

Purpose

1. We have considered whether the Resource Management 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 21656/9.3 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 19 (freedom from discrimination), s 21 (freedom from unreasonable search and seizure) and s 27(2) (right to judicial review). Our analysis is set out below.

The Bill

4. The Bill principally amends the Resource Management Act 1991 (RMA) and the Resource Legislation Amendment Act 2017 (RLAA), with the overarching objectives of reducing complexity, increasing certainty, restoring public participation opportunities and improving RMA processes. The Bill also aims to improve freshwater management outcomes in New Zealand. The Bill includes consequential amendments to the District Court Act 2016, Judicial Conduct Commissioner and Judicial Conduct Panel Act 2004, Remuneration Authority Act 1977 and the Judicial Salaries and Allowances (2018/19) Determination 2018.
5. Specifically, the Bill repeals changes made under the RLAA in order to:
 - a. reduce the powers of the Minister for the Environment to prohibit or overturn local plan rules;
 - b. remove preclusions on public notification and appeals for certain types of subdivision and residential activity resource consents;
 - c. repeal the power to make additional "fast-track" activities or prescribe information requirements for fast-track applications;
 - d. reinstate the presumption of subdivision restriction; and
 - e. reinstate the ability of consent authorities to charge financial contributions in particular circumstances.

6. The Bill also amends the RMA to:
 - a. enable applicants to suspend processing of their non-notified resource consent applications;
 - b. enable consent authorities to suspend resource consent applications for non-payment of administrative charges;
 - c. extend the time period to lodge retrospective resource consent applications for emergency works;
 - d. enable the review of conditions of multiple resource consents concurrently;
 - e. allow for the increase of maximum infringement fees and the extension of the statutory limitation period to file charges for RMA prosecutions;
 - f. enable the Environmental Protection Authority (EPA) to take enforcement action under the RMA;
 - g. protect special advisors to the Environment Court from legal proceedings over actions taken in good faith in the course of carrying out their duties;
 - h. allow for the appointment of alternate Environment Judges; and
 - i. clarify the process for making national environmental standards.

7. Finally, the Bill institutes a new planning process for freshwater management to replace the collaborative planning process introduced by the RLAA. The new planning process provides for the Minister for the Environment to appoint panels of freshwater commissioners to provide recommendations to local councils on freshwater planning processes.

Consistency of the Bill with the Bill of Rights Act

Section 19 - freedom from discrimination

8. Section 19 of the Bill of Rights Act affirms that everyone has the right to freedom from discrimination on the grounds of discrimination set out in the Human Rights Act 1993 ('the Human Rights Act').

9. The key questions in assessing whether there is a limit on the right to freedom from discrimination are:¹
 - 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 disadvantage arises is a factual determination.²

¹ 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.

² See, for example, *Child Poverty Action Group v Attorney-General* above n 1 at [179]; and *McAlister v Air New Zealand* above n 1 at [40] per Elias CJ, Blanchard and Wilson JJ.

11. Clause 41 of the Bill allows for retired Environment Judges under the age of 75 years to be appointed as alternate Environment Judges. It also provides that a retired Environment Judge must not be appointed or reappointed for a term that extends beyond the date on which the Judge reaches the age of 75 years. Environment Judges are currently required to retire from office on attaining the age of 70 years. Clause 41 therefore allows for Judges who have retired at the age of 70 to still be eligible for appointment as an alternate Environment Judge.
12. This provision *prima facie* limits s 19 rights to the freedom from discrimination on the basis of age, which is a prohibited ground of discrimination in the Human Rights Act.
13. However, the imposition of mandatory retirement ages on the judiciary has been considered to be a justified limit on the right to freedom from discrimination. Mandatory retirement has been viewed as providing the necessary balance between upholding the principle that judges may only be removed in truly extraordinary circumstances,³ so as to protect judicial independence from any threat of arbitrary or politically motivated removal, and the acknowledgement that advancing age is, in general, associated with diminution of mental and other faculties.
14. Clause 41 goes no further than existing legislation in determining a maximum age to which retired judges may be eligible to be appointed or reappointed as alternate Environment Judges.
15. For this reason, we consider that any limits within the Bill on the right to be free from discrimination are justified under s 5 of the Bill of Rights Act.

Section 21 – freedom from unreasonable search and seizure

16. 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.⁴
17. Clause 67 inserts new sections 343E-343L, which set out new enforcement functions for the EPA. Section 343F authorises the EPA to take an enforcement action either unilaterally or in partnership with a local authority. Enforcement actions may include (as per section 343E) “an inspection, investigation or other activity carried out in accordance with the Act.” We consider that the application of these powers constitutes a search under s 21 of the Bill of Rights Act.

³ *Constitution Act 1986*, s 23.

⁴ See, for example, *Hamed v R* [2011] NZSC 101, [2012] 2 NZLR 305 at [161] per Blanchard J.

18. The Bill does not expand on the range of search powers currently available under the RMA, but rather extends the use of these powers to the EPA, which must apply them in accordance with the RMA. Current RMA search powers are regarded as reasonable and proportionate based on the range of safeguards, controls and protocols set in place to manage their use.
19. On this basis, we regard searches under the Bill as being reasonable, and thus not in conflict with s 21 of the Bill of Rights Act.

Section 27(2) – right to judicial review

20. Section 27(2) of the Bill of Rights Act affirms that every person whose rights, obligations, or interests protected or recognised by law have been affected by a determination of any tribunal or other public authority has the right to apply, in accordance with law, for judicial review of that determination.
21. The right to judicial review is intended to ensure that a person with an interest in a decision can challenge the lawfulness of that decision. The phrase “in accordance with law” that appears in s 27(2) recognises that limits may be imposed on the power of judicial review, but “any attempt completely to deprive the High Court of its review powers would violate the guarantee.”⁵
22. Clause 73(2) of the Bill inserts new Part 4 into Schedule 1 of the RMA, which sets out the new freshwater planning process. Clause 54(2) of this new Part 4 prohibits a person from applying for both judicial review and appeal of a single decision made in respect of the freshwater planning process, unless applications for both appeal and judicial review are lodged together.
23. Statutes will generally impose two types of limitation on judicial review; an ouster clause, where the courts’ jurisdiction is entirely excluded (‘a substantive ouster’), or a procedural restriction regulating the courts’ power to review.⁶ Prohibiting a person from applying for both judicial review and appeal of a single decision unless these applications are lodged together is appropriately characterised as a procedural restriction on the right to judicial review, and therefore *prima facie* limits s 27(2) of the Bill of Rights Act.
24. However, limitations on rights and freedoms may still be consistent with the Bill of Rights Act if they can be considered a reasonable limit that is justifiable 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?

⁵ A Bill of Rights for New Zealand: A White Paper’ [1984-1985] I AJHR A6 at [10.175].

⁶ Legislation Advisory Committee at [13.7.1].

- 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?⁷
25. Prohibiting a person from applying for both judicial review and appeal of a single decision made in the freshwater planning process of the RMA unless these applications are lodged together serves the important objective of ensuring the efficiency of the planning process by reducing the likelihood of claimants hamstringing the process by drawn out litigation. This prohibition also rationally supports the efficiency of the court process by requiring claimants to raise all substantive objections to a planning decision at one point in time.
26. We regard this limit on the use of judicial review as a proportionate means to enhance the efficiency of the planning and court processes. This limit does not represent a substantive ouster of an individual's review options, but rather a limit on the number of times in which a single decision of the freshwater planning process may be questioned by a single individual. The prohibition reaches no further than necessary to achieve this objective.
27. For this reason, we consider that any limits within the Bill on the right to judicial review are justified under s 5 of the Bill of Rights Act.

Conclusion

28. 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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⁷ *Hansen v R* [2007] NZSC 7, [2007] 3 NZLR 1 at [102]. The test draws on the leading Canadian case of *R v Oakes* [1986] 1 SCR 103.



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