

14 November 2019

Hon David Parker, Attorney-General

Consistency with the New Zealand Bill of Rights Act 1990: Urban Development Bill

Purpose

1. We have considered whether the Urban Development 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 19983/29.0). 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 s 14 (freedom of expression), s 21 (right to be free from unreasonable search and seizure), and s 27(2) (right to judicial review). Our analysis is set out below.

The Bill

4. The Bill establishes a new Crown entity, Kāinga Ora - Homes and Communities ('Kāinga Ora'), to initiate, facilitate or undertake urban development projects. The objective of the Bill is to overcome problems with the existing urban development system by better co-ordinating the use of land, infrastructure, and public assets to maximise the public benefit from urban development projects.
5. The Bill establishes a process before a specified development project ('SDP') can be undertaken, including that:
 - a. if Kāinga Ora recommends that a project be established as an SDP, it seeks approval from the Minister of Finance and the Minister responsible for administration of the Act ('responsible Minister'), and the Ministers may recommend an Order in Council be made to establish a project as an SPD;
 - b. Kāinga Ora will prepare and publicly notify a draft development plan for an SPD for consultation, following which an independent hearing panel ('IHP') will consider the draft development plan, Kāinga Ora's recommendations on the submissions, and hold hearings on the submissions, as required;
 - c. once the hearing process is completed, the IHP will report to the responsible Minister with its recommendations on the draft development plan;
 - d. the responsible Minister will approve or decline the development plan based on the IHP's recommendation.
6. Once a development plan is approved by the responsible Minister, Kāinga Ora has certain powers including the ability to override, add to, or suspend provisions in the

Resource Management Act 1991 ('RMA') plans or policy statements that apply to the project area, and act as a consent authority and a requiring authority under the RMA.

Consistency of the Bill with the Bill of Rights Act

Section 21 – Unreasonable Search and Seizure

7. 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.¹
8. A search or seizure which is unreasonable in terms of s 21 cannot be justified in terms of s 5 of the Bill of Rights Act, as the Supreme Court has held that an unreasonable search logically cannot be reasonably justified.² The assessment to be undertaken is, first, whether what occurs is a search or seizure, and, secondly, if so, whether that search or seizure is reasonable.
9. Clause 269(1) provides for authorised persons of Kāinga Ora (appointed under clause 273) to enter any land or building, except a dwellinghouse, marae or building associated with a marae, for one or more of the following purposes:
 - a. the assessment of a potential specified development project;
 - b. the preparation, change or review of a draft development plan;
 - c. the performance or exercise of roading powers that Kāinga Ora has that provide for a power of entry, and non-roading powers that Kāinga Ora has; and
 - d. the assessment of land for transfer, acquisition or taking under the processes of a specified development plan.
10. Upon entering the land or building, under cl 269(2) the authorised person may:
 - a. carry out surveys, investigations, tests or measurements;
 - b. take samples of water, air, soil or vegetation; and
 - c. enter the land or building with any person who is reasonably required for the assessment, or with any vehicle, appliance, machinery or other equipment reasonably required for the purposes listed in paragraph 9 above.
11. Clause 274 creates an offence to intentionally obstruct or impede an authorised person from exercising these powers, with a penalty of a fine upon conviction not exceeding \$1,500.
12. We consider that the exercising of these entry and associated powers would constitute a search under s 21 of the Bill of Rights Act, but such powers are not unreasonable.
13. Kāinga Ora's power to enter land and buildings and carry out the search functions detailed in cl 269(2) are rationally connected to achieving its purpose to select, assess

¹ See, for example, *Hamed v R* [2011] NZSC 101, [2012] 2 NZLR 305 at [161] per Blanchard J.

² *Hamed v R*, above n 1, at [162].

and implement SDPs. We understand the objectives of enabling Kāinga Ora to have accurate and reliable information to exercise its functions to be sufficiently important to justify such entry powers in some circumstances.

14. We also consider that the Bill contains a number of safeguards regarding the exercise of the entry powers:
- a. authorised persons must not enter a dwelling house, marae, or building associated with a marae, and in this respect, powers of entry are likely to have a lower level of intrusion on the personal privacy and dignity of the person;
 - b. the powers may be used only to enter land or a building at reasonable times during ordinary business hours;
 - c. before entry, Kāinga Ora must give at least 10 working days' written notice of the proposed entry to the owner and the occupier of the land or building;
 - d. the written notice must state that the entry is authorised under the Bill, the reason for the entry, and how, when and by whom the entry is proposed to be made; and
 - e. the owner or occupier may apply to the District Court, within 10 working days after receiving the notice, for an order that the proposed entry must not be undertaken, or may only be undertaken in compliance with any conditions that the court thinks fit. The Court may make such an order if it considers that the proposed entry is unreasonable or unnecessary.
15. We consider that such safeguards help to ensure that the right to be secure from unreasonable search is impaired no more than is necessary. We consider that the search powers under this Bill are therefore not unreasonable for the purpose of s 21 of the Bill of Rights Act.

Section 14 - Freedom of Expression

16. 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. Section 14 has been interpreted as including the freedom not to be compelled to say certain things or to be compelled to provide certain information.³ The Bill engages s 14 of the Bill of Rights Act in two different respects.

Requiring the provision of information

17. Clause 105(1) of the Bill empowers Kāinga Ora to request an entity, these being public sector related organisations,⁴ to supply information, other than personal information, relevant to Kāinga Ora's functions in preparing a development plan for an SDP. This includes the entity's written assessment of the likely impact of the project on the services that the entity provides, and how best to manage that impact, including the likely cost and timing implications of making changes to the entity's services. An entity to whom the request is made must comply with the request.

³ See, for example, *Slaight Communications v Davidson* 59 DLR (4th) 416; *Wooley v Maynard* 430 US 705 (1977).

⁴ A department named in Schedule 1 of the State Sector Act 1988 (other than the Government Communications Security Bureau and the New Zealand Security Intelligence Service); a departmental agency named in Schedule 1A of the State Sector Act 1988; a statutory entity named in Schedule 1 of the Crown Entities Act 2004; the New Zealand Defence Force; and a relevant local authority.

18. Clause 208 of the Bill requires Kāinga Ora to provide certain rating information to territorial authorities if land within a project area is subject to urban development rates. We understand that such information will enable these territorial authorities to fulfil their responsibilities for rates under the Bill and the Local Government (Rating) Act 2002. In addition, each relevant territorial authority must provide Kāinga Ora with access to the authority's rating information database. Kāinga Ora may use the rating information database only to perform or exercise its functions, powers or duties in relation to rates.
19. Clauses 105(1) and 208 may be seen to limit s 14 of the Bill of Rights Act, as they compel the provision of certain information. However, under s 5 of the Bill of Rights Act, a limit of a right may be justifiable where the limit serves an important objective, and where the limits on the right are rationally connected to achieving that objective and proportional to its importance.
20. We consider that the power to request information under cl 105 is rationally connected to the important objective of ensuring that Kāinga Ora is able to obtain accurate and reliable information to inform the preparation of a development plan. Information may only be requested from public sector related organisations, and excludes personal information (as defined in s 2(1) of the Privacy Act 1993). A request may be refused by a public sector organisation for reasons similar to those contained within the Official Information Act 1982 and Local Government Official Information and Meetings Act 1987, such as maintaining legal professional privilege. Further, Kāinga Ora must have prior written approval from the Minister of Finance and responsible Minister to make a request.
21. Similarly, cl 208 is rationally connected to the important objective of ensuring that territorial authorities are able to carry out their rating responsibilities if the land within a project area is subject to urban development rates, and ensuring that Kāinga Ora has up to date information from the territorial authority's database to perform or exercise its duties. We consider these powers to compel information to be proportionate in their application

Prohibiting publication of certain information

22. Under cl 21 of Schedule 3 of the Bill, when holding public submissions hearings, an IHP may, on its own motion or on the application of a submitter, prohibit publication or communication of any information supplied to, or obtained by, the IHP, and restrict public access to any part of a hearing at which the information is likely to be referred to. The IHP must be satisfied that such an order is necessary to avoid serious offence to tikanga Māori, the disclosure of the location of wāhi tapu, the disclosure of a trade secret or the causing of unreasonable prejudice to the commercial position of a person
23. We consider the criteria for ordering restrictions on public access to the hearings and prohibiting publication of sensitive information are important to ensure that the integrity of an IHP process can be maintained. Clause 21(1)(b) of Schedule 3 requires an IHP to be satisfied that the importance of avoiding the offence, disclosure, or prejudice outlined above outweighs the public interest in making that information available. We note that a party to a hearing may apply to the Environment Court for an order cancelling or varying such an order made by the IHP if they disagree with the decision to prohibit publication.
24. We consider that this limitation on the right to freedom of expression is justifiable under s 5 given the factors an IHP needs to consider before making an order, and that the power is proportionate and rationally connected to the objective set out above as it relates to a relatively confined category of information which may be subject to such an order.

25. On this basis, we conclude that any limits on the right to freedom of expression imposed by the Bill are justified under s 5 of the Bill of Rights Act.

Section 27(2) – Right to Judicial Review

26. 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.
27. The right to judicial review is intended to ensure that anyone with an interest in a decision can challenge the lawfulness of that decision. The phrase “in accordance with law” 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
28. Clause 29(2) of the Bill prohibits a person from applying for judicial review of a decision on a draft development plan and appealing to the High Court in respect of the same decision on a development plan, unless both applications are made together. We consider this prohibition 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. Such a prohibition serves the important objective of ensuring the efficiency of the planning process by reducing the likelihood of claimants constraining 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.
29. 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 the same decision in the development plan process may be questioned by an applicant. The prohibition goes no further than necessary to achieve this objective.
30. 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

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