

4 April 2006

ATTORNEY-GENERAL

**LEGAL ADVICE  
CONSISTENCY WITH THE NEW ZEALAND BILL OF RIGHTS ACT 1990:  
LAW REFORM (EPIDEMIC PREPAREDNESS) BILL**

1. We have considered whether the Law Reform (Epidemic Preparedness) Bill (PCO 6763/16) (the "Bill") is consistent with the New Zealand Bill of Rights Act 1990 (the "Bill of Rights Act"). We understand that the Bill is likely to be considered by the Cabinet Policy Committee at its meeting on Wednesday, 5 April 2006.
2. Our view is that the Bill appears to be consistent with the rights and freedoms affirmed in the Bill of Rights Act. In reaching this conclusion, we considered potential issues of inconsistency with sections 8, 11, 14, 17, 18, 21, 22, 25(e), and 27(1) and (3) of that Act.
3. The following summary provides you with:
  - A brief overview of the contents of the Bill;
  - A note of the provisions of the Bill which appear to raise issues under the Bill of Rights Act; and
  - Our conclusion as to the Bill's consistency with the Bill of Rights Act.
4. This summary is followed by a fuller analysis which discusses each of the issues raised under the Bill of Rights Act noting, where relevant, the justificatory material in each instance.
5. The Crown Law Office has examined the proposed amendments to the Parole Act 2002, the Sentencing Act 2002, and the Summary Proceedings Act 1957, and will provide separate advice on whether these provisions are consistent with the Bill of Rights Act.

**SUMMARY OF THE BILL OF RIGHTS ACT ISSUES**

6. The Bill seeks to ensure that, should there be a human outbreak of avian influenza, or an outbreak of a similar infectious disease capable of becoming an epidemic, the Crown has powers available to it that will ensure a proper response can be made. A number of measures

proposed by the Bill raise issues of inconsistency with the Bill of Rights Act.

7. The Bill empowers the Prime Minister to issue a notice declaring that the effects of an outbreak of an infectious disease are likely to significantly disrupt essential governmental and business activity in New Zealand. The issuance of an epidemic notice enables the relaxation of certain statutory requirements. We have determined that the trigger provision is framed in a reasonable way.
8. The Director-General of Health will be authorised to set priorities for the dispensing of medicines during an epidemic. We consider that when these priorities are set, the Director-General must act consistency with section 8 of the Bill of Rights Act and, therefore, needs to ensure that patients will not be unjustifiably deprived of life-preserving medicines.
9. Under new section 97D(1)(b) the Medical Officer of Health may take a bodily sample from a person liable to quarantine. This provision appears to be inconsistent with section 11 of the Bill of Rights Act (right to refuse medical treatment). We consider that this measure is justified in terms of section 5 of that Act. In reaching this conclusion, we have noted that testing a person suspected of being exposed to a quarantinable disease will assist the identification and treatment of persons they have come into contact with, which in turn will slow down the spread of the disease.
10. Three clauses require a person to supply information to a Medical Officer. In our view, the information required is primarily factual and descriptive in nature, as opposed to expressive. This requirement does not raise an issue under section 14 of the Bill of Rights Act (freedom of expression). We note that the person may be required to provide information about their movements and recent activities, which would attract the protection of section 14. We consider that any inconsistency would be justified, having regard to the Bill's objectives.
11. The Bill allows a Medical Officer to forbid people congregating in outdoor places of amusement or recreation. We consider that any limits this provision places on the right to freedom of association (section 17 of the Bill of Rights Act) are justified given the highly infectious nature of the diseases in question.
12. The Bill contains various provisions that allow a Medical Officer to redirect aircraft, require persons to remain in quarantine, and close of premises within a health district. We consider that any limitation these provisions place on the right to freedom of movement (section 18 of the Bill of Rights Act) is justified given the Bill's purpose and the safeguards that have been put in place to ensure these measures are proportionate.
13. We considered whether the Bill raises any issues of inconsistency with section 21 of the Bill of Rights Act. Although a number of provisions authorises the search and seizure of property, we consider that these provisions are reasonable.

14. We have examined whether the quarantine provisions set out in the Bill raise an issue of inconsistency with section 22 of the Bill of Rights. Although the quarantine provisions authorise a form of detention that falls within the ambit of this section, they could not be interpreted as authorising “arbitrary detention”.
15. The Bill includes a number of amendments that relax some statutory duties set out in the Immigration Act when an epidemic notice is in effect. These include relaxing the time limit that a person may be held under a warrant of commitment, allowing a judge to consider a matter on the papers, and extending the maximum period of time that a detained person must be brought before a court. We consider that these amendments raise issues of inconsistency with sections 22, 25(e) and 27(1) of the Bill of Rights Act. However, such limitations are justified in terms of section 5 of that Act.
16. We have concluded that the Bill does not appear to be inconsistent with the Bill of Rights Act.

## **PURPOSE OF THE BILL**

17. To fully comprehend the purpose of the Bill, it is necessary to first explain the threat posed by avian influenza and then discuss the current legislative framework for preventing the outbreak or spread of an infectious disease.

### ***Avian influenza***

18. The outbreak of avian influenza, which began in mid-December 2003 in south-east Asia and has spread to Europe and Africa, has become a global crisis for animal and human health. While the numbers of deaths attributable to avian influenza are still small, the appearance of the virus – which has the potential to mutate into a virulent pathogen easily transmissible from human to human – has raised the spectre of an influenza of equal ferocity to the *Spanish influenza* that killed 40-50 million people worldwide during 1918 and 1919.
19. The global threat of avian influenza has prompted the World Health Organisation to appeal to countries to join a global collaboration effort to fight the outbreak. Countries have been encouraged to develop national preparedness plans to stop, contain and treat the effect of an influenza, reduce opportunities for the influenza to emerge, improve the early warning system, delay initial international spread, and accelerate vaccine development.
20. To that end, New Zealand officials have been involved in a major whole-of-government exercise in planning New Zealand’s response to an outbreak of avian influenza. During that exercise, officials identified gaps in the legislative framework. Those gaps mean that New Zealand’s ability to respond to an outbreak of avian influenza, or an outbreak of a

similar infectious disease capable of becoming an epidemic would be constrained.

### **Structure of the Health Act**

21. Each health district in New Zealand has a Medical Officer of Health. Part 3 of the Health Act 1956 – which is supplemented by the Health (Quarantine) Regulations 1983 – sets out the powers that a Medical Officer can utilise to prevent the outbreak or spread of any infectious disease. These powers can be divided into two groups based on the premise that the management of an outbreak of infectious disease occurs first at the border, and then, if the infectious disease has presence in New Zealand, in the community.
22. The powers of a Medical Officer to manage the outbreak at the border include:
  - obliging the master or captain of a craft to notify the Medical Officer if a person on board the craft is suffering from a sickness suspected of being an infectious disease (section 76 of the Health Act and clause 3 of the Health (Quarantine) Regulations);
  - preventing a ship which may be infected with an infectious disease from entering a port (section 70(1)(g) of the Health Act) and quarantining those on board (section 70(1)(i) of the Health Act);
  - detaining for inspection, where a person on board a craft has died from or has been suffering from an illness suspected of being a quarantinable disease, the craft and the passengers and crew (clause 22 of the Health (Quarantine) Regulations);
  - examining any person who arrives in New Zealand by craft who is believed to be suffering from any quarantinable disease, and removing that person to hospital until the person no longer suffers from that disease (clause 25 of the Health (Quarantine) Regulations);
  - ordering the craft to be cleansed, fumigated, disinfected or otherwise treated (clauses 5 and 18 of the Health (Quarantine) Regulations).
23. Should efforts to prevent an infectious disease from entering New Zealand fail and the infectious disease breaks out in the community, a Medical Officer of Health has more extensive and potentially more significant powers to control the spread of the disease. These range from prohibiting the use of any land, building or thing declared to be insanitary (section 70(1)(a)) to requiring persons to be removed to a hospital or other suitable place where they can be effectively isolated (section 79(1)).
24. The powers of a Medical Officer in relation to quarantine can only be exercised in respect of a limited range of infectious diseases, specifically cholera, plague or yellow fever (clause 2 of the Health (Quarantine) Regulations). These diseases are singled out as they are considered to be extremely contagious and have a high mortality rate.

## ***The Bill***

25. The Bill seeks to ensure that the Crown has sufficient powers available to it that will ensure a proper response can be made to the threat posed by avian influenza. To this end, the Bill:
- addresses some of the gaps in the Crown's statutory powers under the Health Act 1956;
  - ensures that quarantine powers can be used for avian influenza, and that new highly infectious diseases can be quickly added to the schedule of quarantinable diseases;
  - repeals certain provisions in the Health (Quarantine) Regulations 1983 and inserts those provisions into the Health Act 1956;
  - provides for the development and implementation of a policy to prioritise scarce medical supplies in an emergency, and protections for those following that policy;
  - gives the NZ Police enforcement powers to assist a Medical Officer of Health in the exercise of his or her powers; and
  - amends a number of other enactments dealing with matters that may be disrupted by, or may need to deal specifically with the consequences of an epidemic.
26. Given their significance, it is important to clarify that the quarantine powers set out in the Bill are in three stages. First, following notification from the captain or pilot of a craft on board which a person has died or become ill from a quarantinable disease, the Medical Officer may detain for inspection the craft and its passengers and crew (new section 97B). Second, the Medical Officer may order the continued detention of any passengers and crew of the craft if he or she believes or suspects that they have been exposed to the quarantinable disease in order to ascertain whether they are capable of passing it on (new section 97(2) read in conjunction with 97A). Third, the Medical Officer may, after determining that any passengers or crew are or is likely to be capable of passing on the infectious disease, order the removal of those persons to a hospital or other suitable place so that they may be isolated from other persons (new section 97E)). This last provision can also be used to remove any person in New Zealand who is suffering from a quarantinable disease to hospital so that the person can be isolated and receive appropriate medical treatment.

## **ISSUES OF CONSISTENCY WITH THE BILL OF RIGHTS ACT**

27. For the purposes of determining whether any measure proposed in the Bill is inconsistent with the Bill of Rights Act we have divided our advice into four categories, namely those provisions dealing with:
- (a) the emergency powers to manage the outbreak of an infectious disease at the border;
  - (b) the emergency powers to control the spread of an infectious disease in the community;

- (c) the emergency powers to prevent the outbreak or spread of a quarantinable disease; and
  - (d) the relaxation of statutory requirements that might not be capable of being complied with, or complied with fully during an epidemic.
28. A number of the measures falling within these categories appear to raise prima facie issues of inconsistency with the Bill of Rights Act. However, where an issue arises a provision may nevertheless be consistent with the Bill of Rights Act if it can be considered a "reasonable limit" that is "justifiable" in terms of section 5 of that Act. The section 5 inquiry is essentially two-fold: whether the provision serves an important and significant objective; and whether there is a rational and proportionate connection between the provision and that objective.<sup>1</sup>

### **Emergency powers to manage infectious diseases at the border**

#### Section 22: Right not to be arbitrarily detained

29. Section 22 of the Bill of Rights Act provides that "everyone has the right not to be arbitrarily arrested or detained".
30. New section 97B enables the Medical Officer of Health to detain for inspection any craft (newly defined to include aircraft and ships) and its passengers and crew where, during its voyage, a person has died or become ill from a quarantinable disease. Although this form of detention falls within the ambit of section 22, we do not consider that the provision could be interpreted as authorising "arbitrary detentions".
31. The courts have said that a detention is arbitrary when it is "capricious, unreasoned, without reasonable cause: if it is made without reference to an adequate determining principle or without following proper procedures."<sup>2</sup> 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.
32. Applying these standards to the present case, we consider that new section 97B clearly sets out the circumstances in which the power may be used and who may affect the detention. The ability to detain the passengers and crew from a craft on which a person has died or become ill from a quarantinable disease is both necessary and reasonable as it will help identify who among them have been exposed to the disease.
33. We note that new section 97B does not specify the length of time the passengers and crew of an infected craft may be detained. The Ministry of Health has advised that during an epidemic a large number of craft may be detained under this provision and this may result in some delay in processing the passengers and crew to determine whether they are liable to quarantine under new section 97 (see paragraph 26 above).

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<sup>1</sup> See *Moonen v Film Literature Board of Review* [2000] 2 NZLR 9 and *R v Oakes* (1986) 26 DLR (4th)

<sup>2</sup> *Neilsen v Attorney-General* [2001] 3 NZLR 433 (CA) para 34

However, we note that a Medical Officer will be required by virtue of section 3 of the Bill of Rights Act to ensure that the passengers and crew are not detained for an unreasonable length of time.

## **Emergency powers to control infectious diseases in the community**

### Section 17: Right to freedom of association

34. We have considered the provisions in the Bill empowering a Medical Officer of Health to forbid people congregating in outdoor places of amusement or recreation (clause 18(4), new section 70(1)(m) of the Health Act) for consistency with the right to freedom of association.
35. We are of the view that the highly infectious nature of the diseases in question combined with the fact that this provision does not apply to any premises or part thereof used solely as a private dwellinghouse means that the limits that this provision places on the right to freedom of association are justifiable in terms of section 5 of the Bill of Rights Act.

### Section 18: Right to freedom of movement

36. Section 70(1)(h) of the Health Act currently provides that people are forbidden to leave any place in which they have been quarantined or isolated. Clause 18(3) changes the focus of this section to require people to remain in those places as opposed to forbidding them from leaving.
37. Clause 18(4) amends section 70(1)(m) of the Health Act to enable a Medical Officer of Health to close all premises of any stated kind or description within the health district for the purpose of preventing the outbreak or spread of an infectious disease.
38. These measures appear to be prima facie inconsistent with the right to freedom of movement, as affirmed by section 18 of the Bill of Rights Act. This is because they restrict a person's ability to move physically within New Zealand. We are of the view that the highly infectious nature of the diseases means that the limits that these provisions place on the right to freedom of movement are justified in terms of section 5 of that Act. When considering the justifiability of the proposed amendments, particularly that to section 70(1)(m), we took into account that these provisions do not apply to premises used solely as a private dwellinghouse. Nor do they apply to parliament, the courts, judge's chambers, or prisons.

### Section 21: Freedom from unreasonable search and seizure

39. Section 21 of the Bill of Rights Act provides the right to be secure against unreasonable search and seizure. There are two limbs to the section 21 right. First, section 21 is applicable only in respect of those activities that constitute a "search or seizure". Second, where certain actions do

constitute a search or seizure, section 21 protects only against those searches or seizures that are "unreasonable" in the circumstances.

#### *Requisition of property*

40. Clause 19 of the Bill amends section 71(1) of the Health Act to enable a Medical Officer of Health to requisition property in order to:
- accommodate and treat patients (new section 71(1)(a))
  - store or dispose of bodies (new section 71(1)(ab))
  - transport patients, medical personnel, medicine, food or drink, bedding and other items (new section 71(1)(b))
41. We understand that this power is necessary since the disruption caused by an outbreak of an infectious disease may place great strain on the equipment and facilities currently in the possession of the Crown. If property can be requisitioned, then the health and civil defence authorities will be in a better position to respond to the outbreak, control its spread, and deal with the social consequences that result (such as lack of food or drink). We consider that this power is reasonable in terms of section 21 of the Bill of Rights Act. In forming this view, we note that the Medical Officer must inform the owner, occupier or other person in charge of the property in writing that it is being requisitioned, and every person who suffers loss or damage as a result of the requisition of their property is entitled to compensation (section 71(2) of the Health Act).

#### *Power of the Police to enter and inspect property*

42. Clause 20 of the Bill inserts new section 71A into the Health Act which will enable a member of the Police to do any thing reasonably necessary to assist a Medical Officer of Health exercise his or her emergency powers. Subsection (2) confirms that the powers conferred on members of the Police include power to enter into and inspect any land, building, aircraft, ship, or vehicle, and any thing in or on it.
43. This power appears to be reasonable in terms of section 21 of the Bill of Rights Act. In reaching this view, we note that, although they do not have to wait until the Medical Officer requests their assistance, the powers of the Police are tied to those of the Medical Officer and therefore can only be used to prevent the outbreak or spread of an infectious disease.

#### Section 27(3): Rights of individual in civil proceedings with Crown

44. Proposed new section 71A(6) provides that a member of the police is not liable for anything done by him or her in good faith in the exercise of a power conferred by new section 71A (see paragraph 42 above). It could be argued that this proposed new section raises an issue of consistency with section 27(3) of the Bill of Rights Act, which provides:

"(3) Every person has the right to bring civil proceedings against, and to defend civil proceedings brought by, the Crown, and to have those

proceedings heard, according to law, in the same way as civil proceedings between individuals."

45. We do not consider that there is any inconsistency with the rights of individuals in civil proceedings with the Crown. We have reached this conclusion after considering the scope of section 27(3), which can be interpreted in two ways. It could be argued that section 27(3) goes to substantive liability and so impacts on Parliament's ability to determine that the Crown shall not be liable for conduct which, without the exclusion, could create liability. Alternatively, it could be said that section 27(3) was only procedural in effect, and means simply that the procedure to be adopted in any proceedings against the Crown will be the same as that applicable in litigation between private parties.
46. In *Matthews v Ministry of Defence*<sup>3</sup>, the House of Lords had to consider whether section 10 of the Crown Proceedings Act 1947 (UK), which exempted the Crown from liability in tort for injury suffered by members of the armed forces in certain circumstances, was compatible with Article 6(1) of the European Convention on Human Rights.<sup>4</sup> Their Lordships held that the Crown's exemption from liability in tort was a matter of substantive law, so that the claimant had no "civil right" to which Article 6(1) might apply. Their Lordships treated the limitation on liability in section 10 as going to the substantive claim (i.e. it did not exist), rather than creating a procedural bar. Article 6(1) was, in principle, concerned with procedural fairness and the integrity of a State's judicial system, and not with the substantive content of its national law.
47. The analysis in Their Lordships' speeches is consistent with the view that the new section 71A(6) does not infringe section 27(3). This conclusion is supported by the history of Crown liability in New Zealand and the many provisions which afford protection to officials acting in the course of their duties in good faith and, in some instances, without negligence.

## **Emergency powers to prevent outbreak of quarantinable disease**

### Section 8: Right not to be deprived of life

48. New section 74C enables the Director-General of Health to set priorities for the dispensing of medicines during an epidemic, if he or she is satisfied that there is or is likely to be a shortage of those medicines. Priorities may be set for any medicine, whether or not it can be used in relation to the disease causing the epidemic. We note that the Director-General is obliged under section 3(a) of the Bill of Rights Act to ensure that any activity he or she carries out is consistent with the rights and freedoms affirmed by that Act: in particular section 8, which protects the right not to be deprived of life. This means that the Director-General, when setting priorities for medicine, must ensure that patients will not be unjustifiably deprived of life-preserving medicines.

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<sup>3</sup> [2003] 2 WLR 435

<sup>4</sup> Article 6(1) provides that in the determination of his or her civil rights everyone is entitled to a fair hearing by an independent and impartial tribunal established by law.

## Section 11: Right to refuse medical treatment

49. New sub-sections 97D(1)(a) and (b) enable a Medical Officer of Health to examine a person liable to quarantine and take a bodily sample from him or her. These provisions are supplemented by new section 97G, which makes it an offence for the person to refuse to undergo the medical examination and provide the bodily sample: the penalty for which is a fine not exceeding \$1,000 (section 72 of the Health Act).
50. We have considered whether new sub-sections 97D(1)(a) and (b) are inconsistent with section 11 of the Bill of Rights Act. This provision provides that:
- “Everyone has the right to refuse to undergo any medical treatment”.
51. We consider that the term “medical treatment” includes the non-invasive examination of a person and the taking of a bodily sample for the purpose of assessment and diagnosis. This is because “it is a part of the overall mission of treatment, and will often involve invasion of personal interests and bodily integrity, which is the goal of section 11 to protect.”<sup>5</sup>
52. The purpose of new section 97D(1) is to enable the Medical Officer to determine whether a person is suffering from a quarantinable disease and what, if any, follow-up management is required. Consequently, new section 97D(1) read in conjunction with new section 97G appears to be inconsistent with section 11 of the Bill of Rights Act.
53. The Ministry of Health has advised us that this power would be used primarily during the early stages of an epidemic, when the medical authorities are trying to keep the disease out of New Zealand, and then trying to stamp out initial cases and clusters. According to the Ministry:
- “The first period will potentially require quarantine, and we will need to be able to target the quarantine to those posing the highest risk, as capacity to quarantine people will not be infinite. This could well mean that some testing will be necessary, in which case if people refuse testing (eg if someone has symptoms which may or may not mean they have the relevant infection) then not only they but everyone on the plane would definitely need to be quarantined.”
54. The Ministry also advised that testing a person suspected of being exposed to a quarantinable disease for infection will assist the identification and treatment of persons they have come into contact with, which in turn will slow down the spread of the disease. Conversely, testing will reduce the strain that will be placed on the national stockpile of prophylactic medicines, such as Tamiflu. During the early stages of an epidemic many people will have symptoms of what may be the disease but turn out to be something else, and thus persons with whom they have come into contact will not need to be prescribed prophylactic medicine.

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<sup>5</sup> See Rishworth *et al*, *The New Zealand Bill of Rights (2003)* at 256.

55. We consider that the information provided by the Ministry of Health provides sufficient justification for the limit that new section 97D(1)(b) places on the right to refuse medical treatment.
56. In reaching this view, we considered whether any measure was available that infringed on the right to refuse medical treatment to a lesser extent: in particular voluntary isolation. In this regard, the Ministry advised that, based on what is known about quarantinable diseases generally and experiences of other countries, the use of voluntary isolation and assurances about avoiding contact with other people will not prevent local transmission of the disease.
57. We note that the taking of a bodily sample would also amount to a search or seizure of the person. However for the same reasons that justify the limitation that new section 97D(1)(b) places on section 11 of the Bill of Rights Act, we consider that the requirement to provide a bodily sample would be reasonable in terms of section 21 of that Act.

#### Section 14: Freedom of Expression

58. We have considered whether new sections 97A(1)(b), and 97E(6)(b) and (6)(d) of the Health Act raise issues in relation to section 14 (freedom of expression) of the Bill of Rights Act. New section 97A(1)(b) requires a person who is liable to quarantine to supply various pieces of information to a Medical Officer of Health that will enable the management of risks to public health. Such information includes the person's name, address, travel history and movements, and recent activities. New section 97E(6)(b) sets out a similar requirement in respect of a person who is kept under surveillance at large. New section 97E(6)(d) also requires a person who is kept under surveillance at large to provide the Medical Officer with the details of the address where he or she is going.
59. We consider that new section 97E(6)(d) is not inconsistent with the right to freedom of expression. We acknowledge that the right to freedom of expression, as protected by section 14, includes the right to say nothing or the right not to say certain things. We also acknowledge the decision of the High Court in *Duff v Communicado Ltd*<sup>6</sup> that freedom of expression should generally be defined widely and question of limits on the right should generally be determined pursuant to section 5 of the Bill of Rights Act. However, we do not consider that a statement of an individual's address is sufficiently expressive so as to attract the protection afforded by section 14.
60. The requirements of new section 97E(6)(d) do not compel any individual to disclose any opinion they hold, or to state any matter that they do not believe to be true. We note, in particular, Canadian judicial decisions holding that the Canadian Charter of Rights and Freedoms does not require the elimination of "minuscule" constitutional burdens, and

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<sup>6</sup> [1996] 2 NZLR 89

legislative action that increases the costs of exercising a right should not be invalidated if the burden is "trivial".

61. In addition, we note (while acknowledging the minor differences between section 14 of the Bill of Rights Act and section 2(b) of the Canadian Charter) the decision of the Supreme Court of Canada in *Irwin Toy Ltd v Attorney-General (Quebec)*<sup>7</sup> that "expression" has both a content and a form, and the two can be inextricably connected. Activity is expressive if it attempts to convey meaning. That meaning is its content." Here, a requirement to provide your name, address and movement details does not appear to be sufficiently "expressive" in content to attract the protection of section 14. Rather, name and address information can be described as factual and descriptive in nature as opposed to expressive or representative of expressive content.
62. In reaching this conclusion, we note the decision in *R v Holman*<sup>8</sup> that held that a person's right to freedom of expression was not infringed by being required to complete a census form.
63. With respect to new sections 97A(1)(b) and 97E(6)(b), we consider that the provision of information relating to a person's movements and recent activities could be said to attract the protection of section 14 of the Bill of Rights Act, as such information can be described as expressive or representative of expressive content. However, we consider the nature and extent of any inconsistency is such that, having regard to the Bill's objectives, it would be "justified" in terms of section 5 of that Act.

#### Section 18: Freedom of movement

64. We have considered whether new section 74D of the Health Act is inconsistent with section 18 of the Bill of Rights Act. This provision enables a Medical Officer of Health to require the pilot of an aircraft that has landed at a place in New Zealand to travel to another place in New Zealand. The right to freedom of movement is limited when a person is prevented from travelling along a chosen route, even though the person could take an alternate route to get to his or her destination.<sup>9</sup> In our opinion, new section 74D raises a prima facie issue of inconsistency with section 18.
65. We consider that the limits new section 74D place on the right to freedom of movement are justified in terms of section 5 of the Bill of Rights Act. The purpose of the provision is to ensure that the passengers and crew of the aircraft can be adequately processed to ensure that they have not been exposed to the quarantinable disease. This appears to be an important and significant objective.
66. The redirection of aircraft is a rational and proportionate response to this objective. In reaching this conclusion, we note that this power is only

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<sup>7</sup> [1989] 1 SCR 927

<sup>8</sup> (1983), 28 Alta. L.R. (2d) 35 (Alta. Prov. Ct.)

<sup>9</sup> See *Kerr v Attorney-General* [1996] DCR 951, 954 (DC)

available while an epidemic notice is in force and cannot be used unless the Medical Officer is satisfied that:

- the disease has or is likely to have broken out in a place the aircraft has come from; or
- the disease has or is likely to have broken out in the place where the aircraft has landed; or
- the aircraft is or is likely to be carrying people infected with the disease.

The Medical Officer must also be satisfied that the aircraft or anything in it is, or is likely to be, contaminated with the disease and measures necessary to deal with the situation can more practicably be carried out at the other place.

## Section 21: Freedom from unreasonable search and seizure

### *Infected baggage, cargo or stores*

67. Clause 24 of the Bill substitutes section 109 for a provision that will allow a Medical Officer of Health to do any thing in respect of baggage, bedding, cargo, clothing, drink, equipment, food, linen, luggage, stores, water or other thing that has been removed from a craft and may have been contaminated by a quarantinable disease. We consider that this power appears to be reasonable for the purposes of section 21 of the Bill of Rights Act. In forming this view, we note that the purpose of the provision is to stop the spread of an infectious disease, and the provision does not empower the Medical Officer to enter a private dwellinghouse. This restriction also applies to a member of the police acting under new section 71A (see paragraph 42 above).

### *Examination by the Medical Officer*

68. New section 97E(6)(a) obliges a person who is kept under surveillance at large to present himself or herself for any medical examination required by a Medical Officer of Health. Given that the purpose of this provision is to enable the Medical Officer to release persons from quarantine even though they have been or are suspected of having been exposed to a quarantinable disease, we consider that this requirement is consistent with the Bill of Rights Act.
69. In reaching this decision, we have examined whether the provision entitles the Medical Officer to require the person to submit to intrusive or invasive testing procedures or provide a bodily sample, and thereby raises an issue of inconsistency with section 21 of the Bill of Rights Act.
70. In *A v Council of the Auckland District Law Society*<sup>10</sup>, the High Court was asked to consider whether a provision that required a practitioner to undergo a medical examination required the practitioner to submit to

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<sup>10</sup> [2005] 3 NZLR 550 (HC)

intrusive or invasive testing procedures and provide bodily samples. Having determined that the taking of a bodily sample would amount to a search or seizure of the person, the Court held that the requirement for testing and the provision of bodily samples is unreasonable in terms of section 21 of the Bill of Rights Act.

71. In light of this decision, we consider that new section 97E(6)(a), as currently drafted, would not allow the Medical Officer to carry out intrusive or invasive testing procedures on a person or take a bodily sample from that person without his or her informed consent. Moreover, we consider that examinations may only be carried out for the purposes of determining whether the person is still capable of passing on the disease. For sake of clarity, we consider that section 97E(6)(a) should be redrafted to read “[...] any medical examination reasonably required by the Medical Officer of Health...”.

#### *Obtaining of information from departments*

72. We have also considered the consistency of new section 97A(5) with section 21 of the Bill of Rights Act. This provision allows a Medical Officer of Health to obtain information about a person who is liable to quarantine from government departments. We note that the provision is qualified by the requirement that the Medical Officer must be satisfied on reasonable grounds that the information will help trace the person’s movements and identify the people they have had contact with. The provision cannot be used to obtain information about their recent activities or other matters relating to the person.
73. We therefore consider that new section 97A(5) is consistent with the right to freedom from unreasonable search and seizure.

#### Section 22: Right not to be arbitrarily detained

##### *People liable for quarantine*

74. New section 97 sets out the circumstances in which a person on board a craft is liable for quarantine, namely:
- the person is on board or disembarks from a craft liable to quarantine
  - the person arrives in New Zealand from overseas and a Medical Officer of Health believes or suspects on reasonable grounds that
    - the person suffers from a quarantinable disease; or
    - the person has been exposed to the disease within the last 14 days.
75. This provision must be read with new section 97A which provides that a person liable to quarantine must comply with directions and supply information to the Medical Officer. If the person fails or refuses to comply, he or she will commit an offence and will be liable for a fine not exceeding \$1,000. For the reasons set out in paragraphs 29 to 33 above, we consider that, although this form of detention falls within the

ambit of section 22 of the Bill of Rights Act, the provision could not be interpreted as authorising “arbitrary detention”.

### *Surveillance*

76. Under new section 97E of the Health Act, a person liable to quarantine as well as a person who is suffering from a quarantinable disease may be removed to a hospital or other suitable place and kept under surveillance. This form of detention also falls within the scope of section 22 of the Bill of Rights Act and, again, in our opinion it is arguable whether the provision authorises “arbitrary detentions”.
77. In reaching this view, we have taken account of a recent ruling of the European Court of Human Rights regarding the detention of individuals suffering from an infectious disease. In *Enhorn v Sweden*<sup>11</sup>, the Court held that such detentions will only be justified if:
- the response is proportionate to the threat the disease poses to the general public;
  - the measure is a measure of last resort; and
  - the detention must be lifted as soon as possible as the person no longer poses a threat to the public.
78. We consider that these factors are met in the present case. Removing a person who has been exposed to a quarantinable disease to a hospital or other suitable place 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 disease. Similarly, it is reasonable to remove a person suffering from a quarantinable disease to hospital where the person can be isolated from other persons and receive appropriate medical treatment.
79. We note that a person must be released as soon as a Medical Officer of Health is satisfied that the person is not infected with the disease concerned or unable to pass it on (new section 97E(3)(a)(i) and (ii)). Further, a person may only be kept under surveillance for a maximum period of 14 days. Although this period may be extended by a further period of 14 days if the Medical Officer, after considering the latest information about the disease, is satisfied that the person is still likely to be capable of passing it on (new section 97E(3)).
80. We do not consider that these periods are unreasonable. The Ministry of Health has advised that a person liable to quarantine needs to be isolated for up to two incubation periods of the disease because of the possibility of the person developing asymptomatic infection and then infecting others in the cohort. While it is impossible to predict what the incubation period will be of avian influenza, the incubation period of seasonal influenza is usually 3 days, following which an adult can be infectious for a further 5 days (and a child 7 days). Fourteen days is

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<sup>11</sup> Application no 56529/00 (25 January 2005)

considered an appropriate period: although it is necessary to provide for a further period of 14 days in case the incubation period of the disease is longer than seasonal influenza.

## **Relaxation of statutory requirements during an epidemic**

### Trigger point

81. Clause 5 of the Bill empowers the Prime Minister to issue a notice in the *Gazette* declaring that he or she is satisfied that the effects of an outbreak of an infectious disease are likely to significantly disrupt essential governmental and business activity in New Zealand (epidemic notice). The issuance of an epidemic notice enables the relaxation of some statutory requirements that might not be capable of being complied with, or complied with fully during an epidemic.
82. While the trigger provision does not directly raise an issue of inconsistency with the Bill of Rights Act, the way the trigger provision is framed impacts on the proportionality of the measures available once the epidemic notice is in force. We have therefore examined whether the reasonableness of the trigger provision.
83. In our opinion, for a public health emergency to justify derogating from human rights the situation must be of an exceptional and temporary nature. Moreover, the threat posed by the emergency must be actual or imminent and affect all branches of the life of the community. These factors are extracted from the decision of Lord Bingham in *A v Secretary of State for the Home Department*<sup>12</sup>, and although that case concerned a terrorist threat we feel that the same criteria need to be satisfied in a public health emergency.
84. We consider that, in the present case, the trigger provision incorporates each of these three factors. Before issuing the epidemic notice the Prime Minister must consult the Director-General of Health (clause 5(5)) and must be satisfied that the outbreak of the infectious disease is prospective or already occurring (clause 5(2)(a)) and effects of the outbreak are likely to significantly disrupt essential governmental and business activity in New Zealand (clause 5(1)). The maximum length of the epidemic notice is three months (clause 5(3)(a)), although the Prime Minister may issue a new notice if he or she is still satisfied that governmental and business activity in New Zealand is being significantly disrupted (clause 5(4)). The Director-General must keep the situation under review, and keep the Prime Minister informed (clause 7(1)). If the Prime Minister is no longer satisfied that the effects of the outbreak are likely to disrupt essential governmental and business activity, he or she must promptly revoke the epidemic notice (clause 7(2)).
85. We therefore consider that the trigger provision is framed in a reasonable way. However, each of the measures that are available once the

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<sup>12</sup> [2004] UKHL 56

epidemic notice is made must still be a proportionate response to the disruption that is likely to be caused by the outbreak of the infectious disease.

#### Emergency power to relax statutory requirements imposing duties

86. Clause 9 enables the making, while an epidemic notice is in force, of Orders in Council relaxing any statutory requirement or restriction imposed by any enactment. We consider that this provision is not inconsistent with the Bill of Rights Act. The creation of an emergency power is necessary given that the circumstances of a pandemic would be truly exceptional and this option may be the best and perhaps only way to provide adequately for all the unforeseeable contingencies. We note that an order can only be made when the consequences of the epidemic are such that it is impossible or impracticable for the person on whom the requirement is imposed to comply with it, and the relaxation is no greater than is reasonably necessary in the circumstances (clause 9(2)). We also note that the emergency power will only be available while an epidemic notice is in force, and may not be used to authorise the relaxation of provisions that impact on fundamental rights and freedoms (clause 9(3)). Limitations on such provisions would need to be done by way of primary legislation, following approval by the House of Representatives.
87. We note that such an order may authorise a Judge, Registrar, or Deputy Registrar to waive or vary a requirement imposed by a rule of court (clause 9(5)). As with other provisions in the Bill, the language used in this clause is discretionary. This means that the Judge or Registrar must – in order to comply with their obligations under section 3(a) of the Bill of Rights Act – consider whether the waiver or variance of the requirement would unjustifiably limit the rights and freedoms protected by the Bill of Rights Act (in particular, the fair trial rights and the right to natural justice) and, if so, decline to waive or vary the requirement.

#### Relaxation of the duties set out in the Immigration Act 1987

##### *Section 22: Right not to be arbitrarily detained*

88. Section 60(7) of the Immigration Act provides that no person (other than certain refugee status claimants who either claimed refugee status only after a removal order was served, or whose inability to leave New Zealand arises from some action or inaction on their part) may be detained under warrants of commitment for consecutive periods of more than three months. New section 129ZG provides that, in calculating the consecutive period no account shall be taken of any periods of detention occurring while an epidemic notice is in force.
89. We do not consider that this provision is inconsistent with section 22 of the Bill of Rights Act. Section 60(7) places the onus on immigration authorities to do everything in their power to arrange for the removal of a person from New Zealand within a defined period of time. Such matters

include ensuring that the person has the appropriate documents to travel, arranging flights and entry visas, and organising a police escort, if required. If there is significant disruption to essential governmental and business activities, it is unlikely that these arrangements will be able to be made within the three month time limit. Further it is unlikely that other countries will accept travellers from a place that an epidemic notice is in force. Failing to provide for an extension to the three month time limit will mean that these persons, many of whom are subject to detention because they present a flight risk or other risk to the community, would have to be released. We also note that during the period of an epidemic notice, such persons will continue to have the ability to apply to the courts to have the warrant of commitment vacated.

*Section 25(e): Right to be present at the trial*

90. Clause 30 of the Bill will insert new section 129ZC into the Immigration Act. This provision will enable a District Court Judge or Registrar to deal with a matter for which the Immigration Act requires a person to be brought before them on the basis of documents only.
91. We note that the language used in this provision is discretionary. This means that the Judge or Registrar must – in order to comply with their obligations under section 3(a) of the Bill of Rights Act – consider whether the granting of an order to deal with a matter on the papers would deprive the person of his or her right to be present in the courtroom (as protected by section 25(e) of the Bill of Rights Act) and, if so, decline to make such an order.

*Section 27(1): Right to natural justice*

92. The Immigration Act contains a number of provisions that require a person who is detained under the Act to be brought before a court within a stated interval. For instance, a person detained under a warrant of commitments must be brought before a court every 7 days (section 128B(10)(b)). New section 129ZD provides that, while an epidemic notice is in force, these periods may be extended to an interval of not more than 28 days.
93. We have considered section 129ZD for consistency with section 27(1) of the Bill of Rights Act. Section 27(1) provides that every person whose interests are affected by a decision by a public authority has the right to the observance of the principles of natural justice. One of the fundamental principles of natural justice is the right to be heard. In our view, by reducing the frequency that a detained person must be brought before a court, new section 129ZD appears to be inconsistent with section 27(1).
94. We consider, however, that new section 129ZD is justified in terms of section 5 of the Bill of Rights Act. In reaching this view, we have taken into account the fact that this provision will only operate in circumstances where there is significant disruption to essential governmental and

business activities. It is likely that the resulting high rate of absenteeism will place great strain on the ability of the courts as well as detention facilities to function properly. In any case, the decision to extend the period that a person must be brought before a court is discretionary: that is the judge may decide that in the circumstances of a particular case a detained person should be brought before him or her within a shorter time period. Further, if the notice applies to only stated parts of New Zealand, the provision will only operate within those parts (see new section 129ZD(3)).

## **Conclusion**

95. Overall, we have formed the view that the Law Reform (Epidemic Preparedness) Bill appears to be consistent with the Bill of Rights Act. In reaching this conclusion, we have given particular emphasis to the purpose of this legislation, and the need to ensure that the Crown has appropriate powers available to it to respond to and manage the threat posed by avian influenza.

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