

29 March 2018

Hon David Parker, Attorney-General

## **Consistency with the New Zealand Bill of Rights Act 1990: Administration of Justice (Reform of Contempt of Court) Bill**

### **Purpose**

---

1. We have considered whether the Administration of Justice (Reform of Contempt of Court) Bill ('the Bill'), a member's Bill in the name of Hon Christopher Finlayson, 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 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 ss 14 (freedom of expression), 22 (liberty of the person), and 25 (minimum standards of criminal procedure). Our analysis is set out below.

### **The Bill**

---

3. The Bill implements the Law Commission's recommendations in its 2017 report *Reforming the Law of Contempt: A Modern Statute* and is essentially the same as the draft bill in Part 2 of the Report. The Bill replaces various statutory provisions and common law contempts and is intended to make the law more accessible, modernise its language, and ensure it keeps pace with the digital age.
4. The principal purposes of the Bill are to promote and facilitate the administration of justice and uphold the rule of law, maintain public confidence in the judicial system, and reform the law of contempt. To those ends, the Bill enables courts to make certain orders and impose certain sanctions to achieve the following objectives:
  - a. civil and criminal proceedings are heard and determined fairly by independent and impartial Judges;
  - b. jury verdicts are based only on facts admitted or proved by properly adduced evidence after free, frank, and confidential jury discussions, and the finality of verdicts is protected;
  - c. individual cases are heard and determined in a manner that is expeditious, efficient, and consistent with the principles of justice;
  - d. except in unusual circumstances, proceedings are open to the public and news media; and
  - e. the independence, integrity, and impartiality of the judiciary are protected.

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

---

### Section 14 – Freedom of expression

5. 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.
6. The Bill *prima facie* limits the right to freedom of expression by:
  - a. providing for suppression of certain pre-trial information, such as the defendant's criminal record (cls 8 – 13);
  - b. prohibiting publication of information relevant to a trial if there is a real risk that this could prejudice the defendant's right to a fair trial (cls 14 and 15);
  - c. providing for judicial officers to cite and deal with disruptive behaviour relating to court proceedings (cls 16 – 18);
  - d. prohibiting jurors from investigating and researching information relevant to the case during the trial period, or to intentionally disclose jury deliberations, subject to exceptions (cls 20 and 21); and
  - e. prohibiting publication of untrue allegations or accusations against Judges and courts where there is a real risk the publication could undermine the independence, integrity, or impartiality of the judiciary or a court (cls 24 – 27).
7. 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 justifiable in terms of s 5 of that Act. We consider these limits are justifiable because they:
  - a. fulfil the important objectives of protecting fair trial rights, the expeditious conduct of proceedings, the finality of verdicts, and public confidence in the judicial system;
  - b. are rationally connected to these objectives as they ensure trials are not prejudiced by publicity, jurors decide cases only on lawfully admitted evidence, jury deliberations remain confidential, court hearings are not disrupted, and public confidence in the judiciary and courts is not undermined by false attacks.
  - c. are proportionate to, and extend only as far as required to achieve, these objectives, given:
    - suppression orders and prohibitions on publication are time-limited, and extend only so far as required to protect fair trial rights. Suppression orders are also able to be reviewed at any time;
    - limits on jurors' freedom to seek and impart information go only as far as required to ensure jurors decide cases on lawfully admitted evidence, and that the confidentiality of jury discussions and finality of verdicts is protected; and

- publishing allegations or accusations about judges or courts are criminalised only where they are substantively untrue and there is a real risk that publication could undermine public confidence in the judiciary.<sup>1</sup>

## **Section 22 – Liberty of the person**

8. Section 22 of the Bill of Rights Act affirms that everyone has the right not to be arbitrarily arrested or detained. The Bill creates two powers to detain outside normal criminal procedure (although these largely reflect existing common law and statutory powers).
9. Clauses 16 and 17 provide that a judicial officer may order that a person be taken into custody and detained until the rising of the court if the judicial officer believes the person is wilfully obstructing the court, or wilfully and without lawful excuse disobeying an order or direction of the court in the course of proceedings.
10. If the Judge considers further punishment is required, the judge must adjourn the matter for determination. If the judge subsequently finds the person guilty, the judge may issue a warrant committing the person to imprisonment for a term not exceeding three months.
11. Clause 22 replaces the common law contempt of disobeying court orders. It provides that a court may enforce certain court orders or undertakings by issuing a warrant committing the person, or a director or officer of a body corporate, to imprisonment for a term not exceeding 6 months.
12. We do not consider these powers to detain are arbitrary given their purpose and the statutory requirements around their use.<sup>2</sup>

## **Section 25(a) – Right to a fair and public hearing by an independent and impartial court**

13. Section 25(a) of the Bill of Rights Act affirms that everyone charged with an offence has the right to a fair and public hearing by an independent and impartial court.
14. The Law Commission considered whether to require a different Judge to hear the case regarding further punishment for wilfully obstructing or disobeying the court (discussed at paragraph 10 above). On balance, the Commission decided that this was not required in order to comply with s 25(a) of the Bill of Rights Act.<sup>3</sup> We agree. Judges are required to act fairly and impartially in any proceedings, and cl 17(4)(a) requires the judge to consider whether there are exceptional circumstances that warrant a different judge hearing the matter.

## **Section 25(c) – Right to be presumed innocent until proved guilty**

15. 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

---

<sup>1</sup> In *Solicitor-General v Smith* [2004] 2 NZLR 540 (HC) at [133], the High Court considered that the common law contempt of scandalising the court was a justifiable limitation on the freedom of expression as the rights guaranteed by the Bill of Rights Act depend upon the rule of law, as upheld by the courts, which the courts can only discharge with the authority and respect of the public.

<sup>2</sup> For a list of factors going to arbitrariness of statutory powers of detention, see Andrew Butler and Petra Butler *The New Zealand Bill of Rights Act : a commentary* (2<sup>nd</sup> ed, LexisNexis, Wellington, 2015) at [19.8.6].

<sup>3</sup> See 3.36 – 3.44 of the Law Commission's report *Reforming the Law of Contempt* (NZLC R140, Wellington, May 2017).

proved guilty according to the law. The right to be presumed innocent requires the prosecution to prove an accused person's guilt beyond reasonable doubt.

16. Similar to section 211 of the Criminal Procedure Act 2011 (which relates to breach of suppression provisions or orders under that Act), the Bill creates alternative *mens rea* and strict liability offences for breaching suppression and takedown orders.<sup>4</sup> The *mens rea* offences are punishable by imprisonment and have a higher maximum fine than the strict liability offences (which are fine only).
17. Strict liability offences *prima facie* limit s 25(c) of the Bill of Rights Act by shifting the onus of proof onto a defendant. We have therefore considered whether this *prima facie* limit can be justified under s 5 of the Bill of Rights Act.
18. Suppression and takedown orders are imposed to protect the relevant person(s) from the negative effects of publication. Breach of the orders is likely to cause harm, but the culpability of the offender is higher when the offender knows or is reckless as to whether they are breaching the order, hence the difference in the available penalties. In this context, we consider the use of strict liability offences to be a justified limitation on s 25(c).

## **Conclusion**

---

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

Jeff Orr  
**Chief Legal Counsel**  
**Office of Legal Counsel**

---

<sup>4</sup> Cls 13 and 27. While the drafting of the offences in cls 13(2) and 27(2) may raise the question of absolute liability, we note the Law Commission report and draft Bill characterised these offences as strict liability. We have interpreted them accordingly.