

19 July 2018

Hon David Parker, Attorney-General

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

Purpose

1. We have considered whether the Building 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 18130/20.0). 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 18 (freedom of movement) and s 21 (right to be secure against unreasonable search and seizure). Our analysis is set out below.

Summary

4. The Bill amends the Building Act 2004 ('the Act'). It raises limitations on rights and freedoms affirmed in the Bill of Rights Act, particularly s 14 (freedom of expression), s 18 (freedom of movement), and s 21 (right to be secure against unreasonable search and seizure). These rights and freedoms are limited as the Bill provides powers to compel the provision of information, restrict access to buildings, and enter and inspect buildings and land, in order to protect people from risks to their life and safety.
5. We conclude that the Bill is consistent with the rights and freedoms affirmed in the Bill of Rights Act. In reaching that conclusion, we have considered the importance of protecting persons from risks to their life and safety following an emergency, and of investigating building failures to learn lessons which may help to prevent future harm.

The Bill

6. The Bill proposes two new sets of powers to improve the system for managing buildings after an emergency and to investigate building failures.

Managing buildings after an emergency

7. The new powers for the management of buildings after an emergency are largely contained in new subpart 6B of the Act, inserted by cl 12. These powers seek to create an end-to-end process for managing buildings after an emergency. They are designed to remedy deficiencies in the existing powers under the Act that became evident in the aftermath of the Canterbury and Kaikōura earthquakes.

8. The trigger for the application of the powers is the designation of an area for the purposes of the new subpart. If a state of emergency or transition period is in force under the Civil Defence and Emergency Management Act 2002, an area can be designated by a relevant Civil Defence and Emergency Management ('CDEM') official. Alternatively, if an emergency has arisen but no state of emergency or transition period is in force, all or part of the affected area can be designated by a territorial authority or the Minister responsible for the Act. Designations expire after three years, but may be terminated earlier or extended for up to a further three years.
9. While a designation is in force, the relevant CDEM official, a territorial authority or the Minister (depending on whether a state of emergency or transition period is in force and who designated the area) can exercise a range of powers in relation to buildings in the area. These powers include the ability to undertake post-event assessments, to evacuate, prohibit or restrict access to buildings, to require information, and to undertake works on buildings and land.

Investigating building failures

10. The second new set of powers are largely contained in new sections 207C to 207S, inserted by cl 19. These provisions provide the chief executive of the Ministry of Business, Innovation and Employment with new powers to investigate the circumstances and causes of building failures that caused, or could have led to, serious injury or death.

Consistency of the Bill with the Bill of Rights Act

Section 14 – Freedom of expression

11. Section 14 of the Bill of Rights Act affirms 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 to freedom of expression has also been interpreted as including the right not to be compelled to say certain things or to provide certain information.¹
12. New s 133BT provides that a responsible person may direct the owner of a building or land in a designated area to provide information related to that building or land to determine any risks or work needed. It is an offence to intentionally fail to comply with a direction under s 133BT.
13. New s 207M enables the chief executive to require any person to provide any information or document reasonably necessary to help determine the circumstances or causes of a building failure. It is an offence under new s 207S to wilfully fail to provide any information or document required by s 207M.
14. New ss 133BT and 207M compel the provision of information and therefore appear to limit s 14 of the Bill of Rights Act.

¹ *RJR MacDonald v Attorney-General of Canada* (1995) 127 DLR (4th) 1.

Is the limit justified and proportionate under s 5 of the Bill of Rights Act?

15. 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. The s 5 inquiry may be approached as follows:²
 - a. does the provision serve an objective sufficiently important to justify some limitation on 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?
16. We consider that the limitations arising from new ss 133BT and 207M are justified as the objectives of those new sections reflect the Bill's purposes of managing risks to people and property after an emergency, and enabling lessons to be learned from building failures to prevent future harm. These objectives are sufficiently important to justify some limitation on the right to freedom of expression.
17. New ss 133BT and 207M are rationally connected to the objective as:
 - a. a responsible person may only make a direction under new s 133BT if they reasonably believe that further information is reasonably necessary to determine risks or work needed; and
 - b. the chief executive may only require a person to provide information or a document under new s 207M where they reasonably consider it may help to determine the circumstances or causes of the building failure.
18. These factors also support our view that the new sections impair the right no more than is reasonably necessary. An express purpose of the Bill is to ensure that any impacts on personal and property rights are proportionate. To this end, each new set of powers in the Bill is accompanied by generally applicable safeguards which improve the Bill's overall consistency with the Bill of Rights Act. In relation to the new powers for managing buildings after emergency events:
 - a. new s 133BB introduces a paramount principle to guide the performance of functions and duties and the exercise of powers under subpart 6B. That paramount principle is the protection of persons from risks to their life and safety;
 - b. new s 133BE provides that a designation (in relation to an area) may not be made unless the person is satisfied that it is in the public interest and is necessary or desirable to protect people, buildings, public thoroughfares, or critical infrastructure;

² *Hansen v R* [2007] NZSC 7 at [123].

- c. new s 133BH requires a designation to be reviewed every 90 days, and new s 133BJ enables a designation to be terminated early if no longer in the public interest;
 - d. a responsible person using powers relating to the emergency management of buildings must have regard to the principles set out in new s 133BO. Those principles include preferring actions that result in the least restriction on an individual's ability to use and occupy their property, that actions should be proportionate and last no longer than reasonably necessary, and that powers should be exercised using up-to-date information; and
 - e. cl 16 extends the existing ability under s 177 of the Act for individuals to apply for determinations by the chief executive of the Ministry of Business, Innovation and Employment. A person may make an application for a determination in relation to the use of a power of decision under new subpart 6B that affects them.
19. In relation to the new powers to investigate building failures:
- a. new s 207C provides the chief executive may only investigate a building failure where the requirements in that section are satisfied, including that the building has failed, and that the failure resulted or could have resulted in serious injury or death;
 - b. new s 207D provides that the new powers must be exercised only for the purposes of learning from the failure, informing decisions about the performance of functions and duties and the exercise of powers under the Act, and informing decisions about any matters related to building to help prevent other failures; and
 - c. new s 207E provides that the chief executive must exercise the powers of investigation only if reasonable in the circumstances to do so, in a way that is reasonable and for no longer than is reasonable.
20. In addition to these general safeguards, there are safeguards applicable specifically to new ss 133BT and 207M which help to ensure that they impair the right to freedom of expression no more than is reasonably necessary. In particular, new s 133BT is subject to an appeals process and new s 207N places limits on the chief executive's ability to share evidence or information collected in the investigation of a building failure, including information that owners have been required to provide under new s 207M.
21. The limits in new ss 133BT and 207M are in due proportion to the importance of the objective. This view is supported by the principles for decision-making in new s 133BO, which provides that actions should be proportionate to the risks being managed. It is also supported by the limits to powers of investigation in new s 207E, which provides that investigation powers must only be used if it is reasonable in the circumstances to do so.

Conclusion

22. For the reasons above, we conclude that the limits to the freedom of expression imposed by the Bill are justified under s 5 of the Bill of Rights Act.

Section 18 – Freedom of movement

23. Section 18(1) of the Bill of Rights Act affirms that everyone lawfully in New Zealand has the right to freedom of movement and residence within New Zealand.

24. New ss 133BQ and 133BR provide for a responsible person³ (or constable in the case of s 133BQ) to evacuate a building or designated area, or put in place measures to keep people at a safe distance from or protect a building in a designated area. Further, new s 207G provides for the chief executive to restrict or prohibit access to, or to secure, all or part of an investigation site. Measures may include preventing or limiting access to a building or surrounding area. These new sections therefore limit the right to freedom of movement.
25. However, we consider the limitation justified under s 5 of the Bill of Rights Act, for substantially the same reasons discussed in relation to new ss 133BT and 207M above:
- a. the Bill's objectives, furthered by new ss 133BQ, 133BR and 207G are sufficiently important to justify some limitation on the right to freedom of movement;
 - b. new ss 133BQ, 133BR and 207G are rationally connected to these objectives, as the powers conferred under those sections may help to manage the risks to people and property following an emergency and enable lessons to be learned from building failures; and
 - c. the right is minimally limited and in due proportion to the importance of the objective as:
 - i. the powers under sections 133BQ, 133BR and 207G are subject to the general safeguards discussed in paragraphs 18 and 19 above;
 - ii. a direction for evacuation under new s 133BQ may only be made if the responsible person or constable is satisfied the evacuation is necessary to prevent the death or injury of any person in the designated area; and
 - iii. interim measures may be put in place under new s 133BR, if considered reasonably necessary to keep people at a safe distance from a building, or to protect a building from being damaged or further damaged, and must be removed after any works under ss 133BU or 133 BV have been carried out, or if no longer required.
26. For these reasons, we consider that the limits placed by the Bill on the right to freedom of movement are justified.

Section 21 – Right to be secure against unreasonable search and seizure

27. 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, their property or correspondence, or otherwise.
28. 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.⁴

³ Being a person who is authorised to exercise powers under new subpart 6B of Part 2 of the Act.

⁴ *Cropp v Judicial Committee* [2008] 2 NZLR 774 (SC) at [33].

29. The Bill introduces new powers of entry and inspection, which constitute search and seizure powers for the purposes of s 21. Section 133BP provides that a responsible person may enter a building if they have reasonable grounds for believing entry is necessary to make a post-event assessment of a building. Further, if a chief executive decides to investigate a building failure under new s 207C, they may use the powers of entry and inspection set out in ss 207H and 207J:
 - a. new s 207H enables the chief executive to enter an investigation site if they reasonably consider that it contains evidence that may help determine the circumstances or causes of the building failure; and
 - b. new s 207J enables the chief executive to take samples and evidence from the building or land, or any personal property at the investigation site if it is reasonably considered that it may help determine the circumstances or causes of the building failure.
30. In assessing whether the search and seizure powers in ss 133BP, 207H and 207J are reasonable, we have considered the importance of the objective sought to be achieved and whether the provisions are rationally connected and proportionate to that objective.
31. We consider that the powers in ss 133BP, 207H and 207J of the Bill are not unreasonable for the purposes of s 21 of the Bill of Rights Act. Powers of entry and inspection are required to assess and manage the risks posed by buildings following an emergency, and to investigate and learn from the underlying circumstances and causes of building failures. Powers of entry and inspection, therefore, help to achieve the important objective of protecting persons from risks to their life and safety.
32. The Bill also contains safeguards which help to ensure that the right to be secure from unreasonable search and seizure is impaired no more than is necessary. In addition to the general safeguards described in paragraphs 18 and 19 above:
 - a. the powers can only be used where it is reasonably considered that entry is necessary for a post-event assessment or that an investigation site contains evidence that may help determine the circumstances or causes of the building failure;
 - b. the powers of entry under s 133BP and s 207H can only be used in respect of a simple-unit residential building, or a household unit that is being used as such, with the occupier's consent or in accordance with a warrant;
 - c. the powers of entry under s 133BP can only be used in respect of any other building or land after taking reasonable steps to obtain the occupier's consent to entry;
 - d. any sample or other evidence seized under new s 207J must be returned to its owner if it is no longer required for the investigation and its return is practicable;
 - e. new s 207I provides that, where the investigation site is a household unit, a person must not use the power of entry in s 207H unless they have obtained the consent of the occupier or a warrant;
 - f. the powers to enter a simple-unit residential building or a household unit with a warrant in new ss 133BP and 207I are subject to the search warrant provisions in subpart 3 of Part 4 of the Search and Surveillance Act 2012; and

g. the power to take samples and other evidence in s 207J is subject to certain provisions of the Search and Surveillance Act 2012, including the obligation to return an original if a copy is sufficient (s 152) and the ability to apply to the District Court for the release of seized items (s 159).

33. We consider that the powers of entry and inspection are rationally connected and proportionate to the objective. We have therefore concluded that the powers are not unreasonable for the purposes of s 21 of the Bill of Rights Act.

Conclusion

34. 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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