

5 December 2017

Hon David Parker, Attorney-General

Consistency with the New Zealand Bill of Rights Act 1990: Christ Church Cathedral Reinstatement Bill

Purpose

1. We have considered whether the Christ Church Cathedral Reinstatement 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. This advice replaces our previous advice as we have now received a revised version of the Bill and have considered whether it is consistent with the Bill of Rights Act. We will provide you with further advice if the final version of the Bill includes amendments that affect the conclusions in this advice.
3. We have concluded that the Bill appears to be consistent with the rights and freedoms affirmed in the Bill of Rights Act. In reaching that conclusion, we have considered the consistency of the Bill with s 27(2) (right to judicial review). Our analysis is set out below.

Summary

4. The Bill provides for the Governor-General, by Order in Council, to grant an exemption from, modify, or extend any provision of certain enactments (and any plan, programme, bylaw or rule made under the enactments) to facilitate the reinstatement of the Christ Church Cathedral ('the Cathedral'). The enactments specified in the draft Bill are:
 - a. the Resource Management Act 1991, and
 - b. the Heritage New Zealand Pouhere Taonga Act 2014.
5. The Bill appears to impose a limitation on the right to apply for judicial review affirmed in s 27(2) of the Bill of Rights Act. Specifically, cl 22 of the Bill provides that any application for review under the Judicial Review Procedure Act 2016 that relates to an order or a related recommendation or decision of the Minister must be made to the High Court within 28 days after the making of the order, recommendation, or decision.
6. Judicial review is an essential mechanism for maintaining the rule of law. The right to apply for judicial review should therefore be limited only in the rarest of situations where there is compelling reason and after careful consideration.
7. In our view, the justifications for the limit imposed on the right to judicial review by cl 8(3) are finely balanced against the importance of s 27(2). We consider, however, that the time-limit on applying for judicial review impairs s 27(2) no more than reasonably necessary and is in due proportion to the importance of the objective.

8. We therefore conclude that the Bill appears to be consistent with the rights and freedoms affirmed in the Bill of Rights Act.

The Bill

9. The purpose of the Bill is to provide appropriate measures to facilitate the reinstatement of the Cathedral.
10. To this end, cl 7 of the Bill provides for Orders in Council ('Orders') to be made to grant exemptions from, modify, or extend any provisions of an enactment referred to in Schedule 2 of the Bill. An Order is made on the recommendation of the Minister responsible for the administration of the enactment ('the relevant Minister') and can only be made in connection with the whole, or a part of, the Cathedral area.
11. Clause 12 also requires the Minister responsible for the administration of the Bill to appoint a Christ Church Cathedral Reinstatement Review Panel ('the Panel') to provide advice in relation to Orders in Council that may be recommended.
12. Clause 8 of the Bill requires that, before recommending an Order, the relevant Minister must be satisfied that the Order is necessary or desirable for the purpose of the Act, and that the extent of the Order is not broader than reasonably necessary to address the matters that gave rise to the order. A draft of the Order must have been reviewed by the Panel.
13. Clause 18 provides that an Order can be made adding Acts to the list in Schedule 2. The effect of an Order under cl 18 is to extend the application of this Bill by enabling orders to be made under cl 7 that modify provisions in the added Acts to the extent that those provisions apply to the Cathedral area. The Minister must not recommend that the order be made unless he or she is satisfied that the order is necessary or desirable for the purpose of the Bill.
14. Clause 11 of the Bill states that an Order in Council promulgated under the Bill may not grant an exemption from, or modify a requirement or restriction imposed by the Bill of Rights 1688, the Constitution Act 1986, the Electoral Act 1993, the Judicature Amendment Act 1972, or the Bill of Rights Act. Clause 17 provides that an Order in Council may not be held invalid just because it is, or authorises any act or omission that is, inconsistent with any other Act.

Consistency of the Bill with the Bill of Rights Act

Section 27(2) – Right to judicial review

15. 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.
16. The right to judicial review is intended to ensure that a person with an interest in a decision can challenge the lawfulness of that decision. The phrase "in accordance with law" that appears in s 27(2) recognises that limits may be imposed on the power of judicial

review, but “any attempt completely to deprive the High Court of its review powers would violate the guarantee”¹.

17. Clause 22 of the Bill provides that judicial review proceedings relating to the recommendation to make an Order in Council, or other decisions of the relevant Minister, must be made:
 - a. no later than 28 days after the making of the Order, recommendation or decision, or
 - b. within such further time as the High Court may allow on application made before the expiry of that 28 day period.

Does cl 22 of the Bill limit the right to judicial review?

18. Section 27(2) does not create a right to challenge Government policy decisions that have general application.² A recommendation to make an Order may arguably fall within the scope of a Government policy decision, depending on the exact nature of the recommendation.
19. We understand the “decisions” in question to be where the relevant Minister decides not to provide a draft of an Order to the Panel, and the Regulations Review Committee or the leaders of all political parties, if a previous draft has been subject to that process and the relevant Minister is satisfied the differences between the current and previous draft are not substantial.³ However, it is not clear if the restriction of judicial review is broader than those decisions.
20. In any case, both recommendations and decisions made by the relevant Minister have the potential to constitute determinations made in respect of a particular person’s rights, obligations, or interests protected or recognised by law. To the extent that they do, any limitation of judicial review in respect of them will engage s 27(2).
21. Statutes will generally impose two types of limitation on judicial review; an ouster clause, where the courts’ jurisdiction is entirely excluded (‘a substantive ouster’), or a procedural restriction regulating the courts’ power to review.⁴ The time limit on bringing proceedings in cl 22 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.

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

22. 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:⁵
 - a. does the provision serve an objective sufficiently important to justify some limitation of the right or freedom?
 - b. if so, then:

¹ ‘A Bill of Rights for New Zealand: A White Paper’ [1984-1985] I AJHR A6 at [10.175].

² See, for example: *Lumber Specialties Ltd v Hodgson* [2000] 2 NZLR 347 (HC), and *Graham v Hawkes Bay Power Distributions Ltd* (High Court, Napier, CP 33/95, 25 September 2000, M Thomson).

³ Refer cl 8(3).

⁴ Legislation Advisory Committee at [13.7.1].

⁵ *Hansen v R* [2007] NZSC 7 [123].

- 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?

Is the limit rationally connected to a sufficiently important objective?

23. We understand the objective of cl 22 is to prevent the risk that Orders would be delayed in the court process, slowing the reinstatement of the Cathedral by creating and prolonging legal uncertainty.
24. We understand that the rationale behind the Bill is that there has already been protracted litigation in relation to the Cathedral, and the intent is to provide certainty about this important building's future as soon as possible. We consider that the speedy reinstatement of the Cathedral constitutes a sufficiently important objective to warrant some procedural limitation on the right to judicial review.
25. Further, limiting the period in which judicial review of the recommendations and decisions of the relevant Minister may be sought is rationally connected to that objective, as cl 22 ought to enable swifter resolution of proceedings in relation to the reinstatement of the Cathedral.

Is the impairment of the right no more than reasonably necessary?

26. The question of whether the right is impaired no more than reasonably necessary involves consideration of whether the objective might be sufficiently achieved by another method involving less cost to the right to judicial review.⁶
27. Time limits provide certainty to persons affected by an administrative decision and speed up the process without denying review of unlawful action.⁷ Such limits are generally unobjectionable unless they effectively preclude access to review proceedings.⁸ We consider that the proposed time limits are reasonable and do not have the effect of precluding review.
28. We note also the Bill includes some safeguards on the process for making Orders which may lessen the impairment on the right to seek judicial review.
29. For example, to recommend an Order, the relevant Minister must be satisfied that the Order is necessary or desirable for the purpose of this Bill, that the extent of the Order is not broader than reasonably necessary, and that the Order does not breach cl 11 of the Bill. As noted above, cl 11 of the Bill states that an Order promulgated under the Bill may not grant an exemption from, or modify a requirement or restriction imposed by constitutional statutes.
30. Further, cl 21 provides that Orders made under the Bill are disallowable instruments for the purposes of the Legislation Act 2012. Orders made under the Bill are also a legislative instrument for the purposes of the Legislation Act and must be presented to Parliament under s 41 of that Act. Parliament could therefore, if it considers the Minister has made

⁶ *Hansen v R* [2007] NZSC 7 at [123].

⁷ *Ibid.*

⁸ *Cooper v Attorney-General* [1996] 3 NZLR 480, 484.

a decision to recommend an Order without proper consultation, pass a resolution to disallow that Order.⁹

31. On balance, we therefore consider that the restriction on appeal rights in judicial review proceedings in cl 22 means the right to judicial review is impaired no more than reasonably necessary to achieve the objective.

Is the limit in due proportion to the importance of the objective?

32. In considering due proportionately, the balance is between social advantage and harm to the right.¹⁰
33. Judicial review is an essential mechanism for maintaining the rule of law. The right to apply for judicial review should therefore be limited only in the rarest of situations where there is compelling reason and after careful consideration.
34. The Cathedral's symbolic importance to the rebuild and regeneration of Christchurch is readily apparent, as is the desire for certainty for the status of its reinstatement.
35. However, the urgency and extraordinary circumstances present in previous ouster provisions relating to this Order in Council mechanism (i.e. in the immediate aftermath of the Canterbury and Hurunui/Kaikōura earthquakes) is not present.
36. We acknowledge that those Acts were broader in scope and went further in their restriction on judicial review, in that they included a substantive ouster of the courts' jurisdiction. Equally, however, those Acts limited s 27(2) to enable disaster recovery efforts immediately following a major emergency where there was a clear need to act quickly to preserve life and property and restore essential services. In our view, the circumstances in this case are not analogous to those urgent emergency situations.
37. Further, we also note that the legislation will be repealed on the close of the period of 15 years beginning with the date of its commencement. This is a much longer sunset period than provided for in respect of the Acts passed to address the immediate aftermath of an emergency.
38. On balance, however, the harm to the right affirmed by s 27(2) is relatively minimal and does not appear to outweigh the social advantage being pursued. We therefore consider the limit on s 27(2) is in due proportion to the importance of the objective.

Conclusion on the right to judicial review

39. For the reasons above, we consider that the Bill appears to be inconsistent with the right to judicial review affirmed in s 27(2) of the Bill of Rights Act.

General Consistency of Orders in Council with the Bill of Rights Act

40. We have considered whether cl 11 of the Bill prevents modification to the Bill of Rights Act but nevertheless authorises Orders in Council that modify other Acts in a way that is inconsistent with the Bill of Rights Act.

⁹ Refer Legislation Act 2012, s 42.

¹⁰ Ibid at [134].

41. In our view, such an interpretation would defeat the clear intention of the Bill that Acts of constitutional importance, including the Bill of Rights Act, must not be subject to derogation. In our view, cls 11 and 16 must be read together.
42. The Bill, therefore, does not prevent a Court from finding that Orders in Council are *ultra vires* on the grounds that the Bill does not authorise delegated legislation that is inconsistent with the Bill of Rights Act.¹¹

Conclusion

43. 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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¹¹ *Drew v Attorney-General* [2002] 1 NZLR 58.