

23 April 2019

Hon David Parker, Attorney-General

Consistency with the New Zealand Bill of Rights Act 1990: Climate Change Response (Zero Carbon) Amendment Bill

Purpose

1. We have considered whether the Climate Change Response (Zero Carbon) 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 20801/8.2).¹ 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) and s 27(3) (right to bring civil proceedings). Our analysis is set out below.

The Bill

4. The Bill amends the Climate Change Response Act 2002 (the principal Act). Its purpose is to provide the framework for New Zealand to develop and implement clear and stable climate change policies by:
 - a. establishing a new independent Climate Change Commission (Commission), and defining the Commission's functions, duties, and powers;
 - b. setting a new greenhouse gas emissions reduction target for 2050;
 - c. establishing a series of emissions budgets with a view to meeting the 2050 target; and
 - d. establishing a range of climate change adaptation measures.

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. This right has been interpreted as including the right not to be compelled to say certain things or to provide certain information.²

¹ Note that cl 7, new ss 46A and 46B, are in a separate document from the rest of the Bill.

² See, for example, *Slaight Communications v Davidson* 59 DLR (4th) 416; *Wooley v Maynard* 430 US 705 (1977).

6. Clause 7, new s 56, provides the relevant Minister with the power to request ‘reporting organisations’ to provide certain information relating to climate change adaptation specified in this provision, and any matters specified in regulations prescribed under new s 56. Although new s 56 uses the term “request”, we note that new s 56(2) provides that the reporting organisation *must* comply with a request.
7. New s 56 is a *prima facie* limit on s 14 of the Bill of Rights Act, as it compels the provision of certain information. A provision found to limit a particular right or freedom may nevertheless be consistent with the Bill of Rights Act if it can be considered a reasonable limit that is justifiable under s 5 of that Act.
8. The s 5 inquiry may be approached as follows:
 - a. Does the provision serve an objective sufficiently important to justify some limitation of 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?³
9. The objective of the Bill is to provide a framework by which New Zealand can develop and implement clear and stable climate change policies that contribute to the global effort under the Paris Agreement.⁴ This is an objective sufficiently important to justify some limit on freedom of expression.
10. The objective of new s 56 is to help understand how climate change is affecting organisations and how they are adapting to it, in order to achieve the overall objective of the Bill.
11. We consider that any limit on freedom of expression in s 56 is rationally connected and proportionate to the objective of s 56 and the overall objective of the Bill.
12. We also note that the information-gathering power under new s 56 is limited to reporting organisations defined in new s 56(4) as the public service, local authorities, council-controlled organisations, Crown entities, non-listed companies in which the Crown is a majority or sole shareholder, state-owned enterprises, lifeline utilities, Police, and the Defence Force, rather than individuals.
13. For these reasons, we conclude that any limits to the freedom of expression imposed by the Bill are justified under s 5 of the Bill of Rights Act.

³ *Hansen v R* [2007] NZSC 7 at [123].

⁴ The Paris Agreement was adopted by Parties under the United Nations Framework Convention on Climate Change on 12 December 2015 and entered into force on 4 November 2016. New Zealand ratified the Paris Agreement on 4 October 2016 (New York time).

Section 27(3) – Right to bring civil proceedings

14. Section 27(3) of the Bill of Rights Act affirms the right to bring civil proceedings against the Crown and have those proceedings heard in the same way as proceedings between individuals.
15. The right affirmed in s 27(3) is “aimed at procedures which govern the assertion or denial of rights in the course of court or equivalent proceedings; and is not aimed at the creation of other rights in themselves.”⁵ Section 27(3) protects the procedural rights of those litigating against the Crown but does not restrict the power of the legislature to determine what substantive rights the Crown or other parties are to have.
16. Clause 7, new s 46A, provides that the 2050 target and emissions budget are not enforceable in a court of law and that no remedies or relief are available for failure to meet the 2050 target or an emissions budget. However, if the 2050 target or an emissions budget is not met, a court may make a declaration to that effect, together with costs. The relevant Minister must bring a declaration to the attention of the House of Representatives and provide advice to the House of the Government’s response to the declaration.
17. We consider that new s 46A is most properly characterised as dealing with issues of substantive, rather than procedural rights. In coming to this conclusion, we note that in some circumstances, restrictions on the range of available remedies may act as a procedural bar if they have the effect of rendering the proceedings irrelevant. The duties imposed by the Bill are “macro-level” public policy or political accountability duties, rather than duties relating to specific individuals. In this context, we consider the remedy of a declaration and costs is appropriate and does not render proceedings irrelevant.
18. We therefore consider that the Bill appears to be consistent with s 27(3) of the Bill of Rights Act.

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

⁵ *Westco Lagan Ltd v Attorney-General* [2001] 1 NZLR 40 at [63].