

1 February 2017

Hon Christopher Finlayson QC, Attorney-General

Consistency with the New Zealand Bill of Rights Act 1990: Conservation (Infringement System) Bill

Purpose

1. We have considered whether the Conservation (Infringement System) 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 with the latest version of the Bill (PCO 18923/7.1). 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 14 (freedom of expression), s 21 (unreasonable search or seizure), and s 25(c) (right to be presumed innocent until proved guilty). Our analysis is set out below.

Summary

4. The Bill introduces infringement offence regimes to eight conservation-related Acts.
5. Particular provisions of the Bill engage rights and freedoms affirmed by the Bill of Rights Act, specifically the right to freedom of expression, the right to be secure against unreasonable search or seizure, and the right to be presumed innocent until proven guilty.
6. To the extent that any rights and freedoms are limited by the Bill, we consider those measures are rationally connected to a sufficiently important objective, impair rights no more than is reasonably necessary, and are in due proportion to the importance of the objective.
7. We therefore conclude that the Bill is consistent with the rights and freedoms affirmed in the Bill of Rights Act.

The Bill

8. The Bill seeks to amend the following Acts by introducing infringement offence regimes:
 - a. Conservation Act 1987
 - b. Marine Mammals Protection Act 1978

- c. Marine Reserves Act 1971
 - d. National Parks Act 1980
 - e. Reserves Act 1977
 - f. Trade in Endangered Species Act 1989
 - g. Wild Animal Control Act 1977, and
 - h. Wildlife Act 1953.
9. The purpose of the amendments is to:
- a. improve the effectiveness of conservation compliance and law enforcement, to better protect conservation values
 - b. ensure that penalties for offences are commensurate with the seriousness of the offence
 - c. ensure that people do not risk criminal convictions if they commit minor offences
 - d. make the treatment of offences consistent with those in similar regimes, such as fisheries
 - e. remove unnecessary costs to the court system, and
 - f. contribute to the Government's objectives of improving government interaction with New Zealanders and delivering better public services for less cost.
10. The Bill also makes minor amendments to the Summary Proceedings Act 1957 to bring the new infringement offence regimes within the scope of that Act.

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 has also been interpreted as including the right not to be compelled to say certain things or to provide certain information.¹
12. Eight clauses in the Bill introduce provisions to six of the principal Acts compelling the disclosure of personal information. In short, the Bill provides officers² with the power to request that a person state, and provide evidence of, their full name, residential address, and date of birth, or a combination thereof ('the information'). In all cases, the power may only be exercised if the officer believes on reasonable grounds that a person has committed an offence. If a person fails to provide such information they commit an offence.

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

² Conservation compliance and law enforcement is, primarily, undertaken by warranted Department of Conservation officers, but other bodies with administrative functions in relation to lands, waters, and species protected under conservation legislation also have compliance and law enforcement roles under the principal Acts.

13. The penalties for failure to provide the information vary, depending on the principal Act. They range from a fine not exceeding \$2,000 on the lower end, to imprisonment for a term not exceeding 1 year or a fine not exceeding \$100,000, or both, on the upper end.
14. The penalties associated with failure to disclose the information introduce an element of compulsion that raises a *prima facie* issue of inconsistency with the right to freedom of expression affirmed in s 14 of the Bill of Rights Act. Accordingly, these clauses limit the right to freedom of expression.

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

15. Legislative provisions limiting a particular right or freedom may nevertheless be consistent with the Bill of Rights Act if the limit can be considered reasonable and demonstrably justified in terms of s 5 of that Act.
16. The s 5 inquiry may be approached as follows³:
 - 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?
17. The infringement offence regimes can only operate as intended if the identity of an individual suspected to have committed an offence is known, particularly where this information is required to issue an infringement notice. Failure to obtain this information may therefore render the regimes ineffective. Empowering officers to obtain identifying information about a person who is suspected of committing a conservation offence therefore appears to be sufficiently important, and the limit on the freedom of expression appears rationally connected to this objective.
18. The powers to require information are not excessively broad. They may only be exercised by an officer, and that officer must believe on reasonable grounds that the person has committed an offence. The information, while personal, is in our view factual in nature. In the context of the detection and regulation of conservation offences, we do not consider the power to require this type of information raises privacy concerns. For these reasons, the provisions limit the right to freedom of expression no more than is reasonably necessary.
19. The Department of Conservation considers that a failure or refusal to provide the information constitutes an offence against the administration of justice, the gravity of which precludes responding by way of an infringement notice. For this reason, the offences and penalties associated with failure or refusal to provide information requested by officers are of a criminal nature. While the maximum penalties may appear high, upon conviction a sentencing judge would exercise discretion in imposing

³ *Hansen v R* [2007] NZSC 7 [123].

an appropriate penalty in proportion to the particular offending at hand. It appears that the limit on the right to freedom of expression is in due proportion to the importance of the objective.

20. The Bill therefore appears to be consistent with the right to freedom of expression affirmed in s 14 of the Bill of Rights Act.

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

21. 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.
22. The right to be secure against unreasonable search or seizure protects a number of values including personal privacy, dignity, and property.⁴ In order for a statutory power to be consistent with s 21 the intrusion into these values must be justified by a sufficiently compelling public interest. The intrusion must be proportional to that interest and accompanied by adequate safeguards to ensure it will not be exercised unreasonably.
23. If a provision is inconsistent with s 21 of the Bill of Rights Act, it cannot be demonstrably justified with reference to s 5 of that Act. The creation of an unreasonable power of search and seizure cannot be justified in a free and democratic society.
24. The Bill adds a new provision to each of the eight principal Acts authorising the seizure and forfeiture of property associated with the commission of an infringement offence. These provisions are analogous to the powers that exist in the principal Acts in relation to criminal offences.
25. These provisions require a person to be found guilty, or admit the commission of an infringement offence, before the associated property seizure is authorised. As a result, we consider that these provisions are not unreasonable for the purposes of s 21.
26. We therefore consider that the Bill appears to be consistent with the right to be secure against unreasonable search or seizure affirmed in s 21 of the Bill of Rights Act.

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

27. 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 proved guilty according to law. The prosecution in criminal proceedings must therefore prove, beyond reasonable doubt, that the accused is guilty.
28. The Bill introduces strict liability infringement offence regimes to the eight principal Acts being amended. When issued with an infringement notice, a person can choose to either pay the associated fee or request a hearing. If a hearing is requested, a defendant must prove their defence on the balance of probabilities to escape liability.
29. Strict liability offences raise a *prima facie* issue of inconsistency with s 25(c) of the Bill of Rights Act by shifting the onus of proof onto a defendant.⁵ We have therefore

⁴ See, for example, *Hamed v R* [2012] 2 NZLR 305 at [161] per Blanchard J.

⁵ *R v Hansen* at [38]-[39] per Elias CJ, [202] per McGrath J, [269] per Anderson J.

considered whether this *prima facie* inconsistency can be justified under s 5 of the Bill of Rights Act.

30. We consider the purposes of the strict liability offence regimes to be sufficiently important. The Bill seeks to improve the effectiveness of conservation compliance and law enforcement, for the purposes of protecting New Zealand's environment. The Department of Conservation has advised that the introduction of infringement offence regimes will:
- a. enable simpler, more efficient, and cost-effective law enforcement for the bulk of offending against conservation provisions, which is at the less serious end of the spectrum
 - b. ensure proportionate responses to the wide range of conduct encompassed by many conservation offences, and
 - c. create greater awareness of, and respect for, conservation values, decreasing incidences of harm to natural and historic heritage.
31. The Department of Conservation has advised that the introduction of these strict liability offences will deter offending in the first place, and fill the current gap between warnings being issued for less serious offending and the commencement of criminal prosecutions for more serious offending. We therefore consider that the limit on the right to be presumed innocent until proved guilty is rationally connected to the objective of ensuring compliance with conservation-related legislation.
32. The Department of Conservation has also advised that the introduction of strict liability infringement offence regimes enables the consequences of misconduct to better fit the circumstances and relative seriousness of offending. In particular, the Bill does this by ensuring that individuals involved in minor offending receive an infringement notice rather than a criminal conviction. We consider that the provisions limit the right to be presumed innocent until proved guilty no more than is reasonably necessary, and are in due proportion to the importance of the objective being sought through introduction of these infringement offence regimes.
33. The Bill therefore appears to be consistent with the right to be presumed innocent until proved guilty affirmed in s 25(c) 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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