

3 May 2017

Hon Christopher Finlayson QC, Attorney-General

## **Consistency with the New Zealand Bill of Rights Act 1990: Friendly Societies and Credit Unions (Regulatory Improvements) Amendment Bill**

### **Purpose**

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1. We have considered whether the Friendly Societies and Credit Unions (Regulatory Improvements) Amendment Bill ('the Bill'), a member's Bill in the name of Stuart Smith MP, 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 section 14 (freedom of expression), section 17 (freedom of association), section 19(1) (freedom from discrimination), and section 25(c) (right to be presumed innocent until proven guilty). Our analysis is set out below.

### **The Bill**

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3. The Bill amends the Friendly Societies and Credit Unions Act 1982 ('the Act'), to improve the regulatory regime for credit unions. To do this, the Bill seeks to introduce a number of changes to the regulatory regime to simplify how credit unions operate, and expand the activities that a credit union can undertake.

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

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#### **Section 14 – Freedom of expression**

4. 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.
5. For the purposes of this advice, we consider that a credit union's expression is protected under s 14, but to a lesser extent than a private individual's expression may be protected. This is consistent with the approach taken internationally, where the courts have been willing to limit commercial expression quite readily.<sup>1</sup>
6. Clause 17 of the Bill engages s 14 by proscribing limits around the name of a credit union. Specifically, cl 17 inserts new s 103(2), which states that the name of a credit union must not be identical, or almost identical, to the name of another credit union, be

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<sup>1</sup> *Markt Intern and Beerman v Germany* (1989) 12 EHHR 161 (ECtHR); *Irwin Toy Ltd v Quebec (Attorney-General)* [1989] 1 SCR 927 (SCC); *Virginia State Board of Pharmacy v Virginia Citizens Consumer Council Inc* 425 US 748 (1976) (SCOTUS). See generally A Butler and P Butler *The New Zealand Bill of Rights Act – A Commentary* (2nd ed, LexisNexis, Wellington 2015) at [13.7.27] – [13.7.34].

misleading, be offensive, or contravene any other enactment. If a credit union's name contravenes the requirements of new s 103(2), the Registrar may provide notice under new s 103(3) requiring that the name be changed.

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

7. Limitations on rights and freedoms may still be consistent with the Bill of Rights Act if they can be considered reasonable limits that are demonstrably justified under s 5 of that Act. The s 5 inquiry may be summarised as:<sup>2</sup>
  - a. does the objective serve a purpose 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?
8. There may be circumstances where ensuring that the name of a credit union is not identical, misleading, offensive, or in contravention of any other enactment is sufficiently important to justify some limit on freedom of expression. Existing legislation already provides such limits in comparable circumstances.<sup>3</sup> The Registrar's ability to change the names of credit unions that they consider are in contravention of new s 103(2) is rationally connected with that objective.
9. Despite the discretionary nature of new s 103(3) potentially allowing for a broad interpretation of what contravenes the requirements of new s 103(2), we also consider that the limit impairs the right no more than is reasonably necessary and is in due proportion to the importance of the objective. The Registrar must, by virtue of s 3 of the Bill of Rights Act, exercise their powers consistently with the right to freedom of expression. The decision of the Registrar is subject to the general rights of appeal in s 151 of the Act and is also judicially reviewable.
10. We consider that the Bill appears to be consistent with the right to freedom of expression affirmed in s 14 of the Bill of Rights Act

## **Section 17 – Freedom of association**

11. Section 17 of the Bill of Rights Act provides that everyone has the right to freedom of association. It recognises people's freedom to enter into consensual arrangements with others, and to promote their common interests and the objectives of the associating group.
12. However, the scope of the protected right in s 17 is not well-settled, and New Zealand courts have not considered the right in depth. The commentary by Andrew and Petra

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<sup>2</sup> *Hansen v R* [2007] NZSC 7.

<sup>3</sup> See, for example, Companies Act, s 22; Limited Partnerships Act 2008, s 34.

Butler suggest that a broad interpretation is appropriate, which encompasses the right to decide when to form or maintain an association and to decide its internal structures.<sup>4</sup>

13. Several aspects of the Bill may therefore engage s 17 of the Bill of Rights Act. For example, cl 14 establishes a process for the incorporation of a credit union, while cl 37 establishes powers for the Registrar to remove a credit union from the register. In addition, the transitional provisions in new Schedule 1AA require existing credit unions to apply for incorporation within six months of the Bill coming into force. Failure to do so will result in the credit union being deregistered.
14. To the extent that the provisions in the Bill engage and limit s 17, we consider those limits justified. The provisions appear rationally connected and proportional to achieving the Bill's primary purpose of improving the regulatory regime for credit unions and bringing that regime in line with the regulation of other financial institutions. The limitations do not create unreasonable barriers on the formation of a credit union, and the powers for deregistration of a credit union are necessary to effectively maintain the public register.
15. We therefore consider that the Bill appears to be consistent with the right to freedom of association affirmed in s 17 of the Bill of Rights Act.

### **Section 19(1) – Freedom from discrimination**

16. Section 19(1) of the Bill of Rights Act affirms the right to be free from discrimination on the prohibited grounds set out in the Human Rights Act 1993 ('the Human Rights Act').
17. The key questions determining whether legislation limits the freedom from discrimination are:<sup>5</sup>
  - a. does the legislation draw a distinction on one of the prohibited grounds of discrimination under the Human Rights Act?
  - b. if so, does the distinction involve disadvantage to one or more classes of individuals?
18. A distinction will arise if the legislation treats two comparable groups of people differently on one or more of the prohibited grounds of discrimination. Whether disadvantage arises is a factual determination.<sup>6</sup>
19. Section 21(1)(i) of the Human Rights Act prohibits discrimination on the basis of age for persons over the age of 16. Clause 20 states that no person under the age of 18 years can be an officer of a credit union. This provision constitutes *prima facie* discrimination on the basis of age in respect of those under the age of 18.
20. Age restrictions necessarily involve a degree of generalisation using age as a proxy measure of maturity and capacity to act responsibly. This avoids the need to assess each individual's maturity and responsibility.

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<sup>4</sup> Butler & Butler, above n 3, at [15.7.4].

<sup>5</sup> See, for example, *Atkinson v Minister of Health and others* [2010] NZHRRT 1; *McAlister v Air New Zealand* [2009] NZSC 78; and *Child Poverty Action Group v Attorney-General* [2008] NZHRRT 31.

<sup>6</sup> See, for example, *Child Poverty Action Group v Attorney-General* above n 2 at [179]; and *McAlister v Air New Zealand* above n 2 at [40] per Elias CJ, Blanchard and Wilson JJ.

21. Officers are required to be a member of a credit union's committee of management (or otherwise hold any other office provided for in the union's rules), and are liable for the actions of the credit union. As a result of the responsibilities the position can entail, we consider that it is justifiable for the purposes of s 5 to ensure that only those who are sufficiently mature can be an officer of a credit union.
22. The limit in cl 20 is consistent with other legislation which uses age as a threshold for holding a position of responsibility. The age of 18 is often used as the age of competence. For example, only those who are aged 18 years or older can be appointed as a director of a company.<sup>7</sup> The age of 18 is also the default age of the end of childhood under the UN Convention on the Rights of the Child.
23. We therefore consider that the Bill appears to be consistent with the right to freedom from discrimination affirmed in s 19(1) of the Bill of Rights Act.

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

24. 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.
25. The purpose of s 25(c) is to protect the fundamental liberty and dignity of those accused of offences in light of the grave consequences a criminal charge and conviction may entail.<sup>8</sup> To this end, the right includes three main components:<sup>9</sup>
  - a. the onus of proof lies with the prosecution throughout
  - b. the standard of proof is “beyond reasonable doubt”, and
  - c. *mens rea* (a guilty mind) is a requirement of the offence.
26. Clause 31 of the Bill contains an offence provision that does not explicitly include a *mens rea* component. If a committee member votes in favour of amalgamation but does not sign a certificate stating that, in their opinion, the requirements for amalgamation are satisfied and the grounds for that opinion, they are liable on conviction to a fine not exceeding \$5,000.
27. Where a statute does not explicitly contain *mens rea* there may, in some circumstance, be some uncertainty as to the nature of the offence. We note, however, that when the statute does not contain express *mens rea*, the *mens rea* is usually held to be implied as an ingredient of the offence, unless there is sufficient reason to the contrary.<sup>10</sup>
28. To the extent that the offence in cl 31 lacks a *mens rea* component and limits the right protected by s 25(c), we consider this limitation justified. The objective of this offence is to ensure compliance with the requirements for amalgamation, in that they certify that the amalgamation is in the best interests of the credit union and that the credit union will continue to be solvent after amalgamation. Furthermore, the level of punishment a defendant would face is relatively low.

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<sup>7</sup> Companies Act 1993, s 151.

<sup>8</sup> See *R v Oakes* (1986) 26 DLR (4<sup>th</sup>) 200 (SCC) at [212 – 213].

<sup>9</sup> See, Butler & Butler, *The New Zealand Bill of Rights Act: A Commentary* (LexisNexis NZ Ltd, Wellington, 2015) at [23.4.19]; Paul Rishworth et al. *The New Zealand Bill of Rights* (Oxford University Press, Melbourne, 2003) at [675].

<sup>10</sup> See, for example, *R v Stevenson* [2012] NZCA 189 at [16 - 17].

29. We therefore consider that the Bill appears to be consistent with the right to be presumed innocent until proven guilty affirmed in s 25(c) of the Bill of Rights Act.

### **Conclusion**

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30. 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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