

15 May 2019

Hon David Parker, Attorney-General

Consistency with the New Zealand Bill of Rights Act 1990: Homes and Communities Bill

Purpose

1. We have considered whether the Homes and Communities 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 most recent version of the Bill (PCO22017/3.6). 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 this conclusion, we have considered the consistency of the Bill with s 14 (freedom of expression) and s 21 (unreasonable search and seizure).

The Bill

4. Broadly, this Bill creates the Housing and Urban Development Authority (HUDA) and consolidates central government's housing and urban development functions into HUDA, including the provision of state housing. More specifically the Bill:
 - a. establishes HUDA as a Crown entity and sets out HUDA's objectives, functions, and operating principles;
 - b. consolidates central government's housing and urban development functions by repealing the Housing Corporation Act 1974, disestablishing Housing New Zealand (HNZ) and its subsidiary HLC Limited, and providing for the continuation of HNZ's functions by HUDA—including the transfer of its assets, liabilities, employees, and contracts;
 - c. re-enacts for HUDA existing HNZ investigation and information-gathering powers into the circumstances of applicants for financial assistance for home ownership;
 - d. provides for the government to issue policy statements setting out the government's overall direction for housing and urban development, which HUDA must give effect to;
 - e. amends the Housing Restructuring and Tenancy Matters Act 1992 to provide for HUDA to administer the income-related rent social housing scheme, and to take over HNZ's current power to share information with the Ministry of Social Development to support it in administering the Social Security Act 2018; and
 - f. provides for consequential amendments to several legislative instruments to account for updated titles, definitions and cross-references.

Consistency of the Bill with the Bill of Rights Act

5. The key provisions of the Bill which require consideration under the Bill of Rights Act are clauses 16 – 18, which re-enact some of HNZ’s existing powers under the Housing Restructuring and Tenancy Matters Act 1992 (which the Bill renames as the Public Housing Management Act 1992).
6. Clause 16 gives HUDA the power to investigate the circumstances of people (and their partners) seeking or receiving financial assistance for home ownership administered by HUDA.
7. For the purpose of an investigation under cl 16, cl 17 allows HUDA to ask a person being investigated any relevant questions it thinks fit or to verify certain information. If a person fails or refuses to answer the questions or verify information, or gives false or misleading answers, HUDA may assess the person’s eligibility on the basis of HUDA’s own understanding of the circumstances or treat the person as not eligible for financial assistance.
8. Clause 18 applies certain provisions of the Public Housing Management Act to investigations under cl 16. In particular, it applies ss 82 (offence not to provide information or to provide false and misleading information), 83 (offence to mislead HUDA), and 86 (code of conduct applying to information required).
9. Clause 21 of the Bill prohibits anyone other than HUDA to trade, carry on business, or perform functions under a name containing or resembling the words “Housing and Urban Development Authority” or, until 2039, “Housing New Zealand”.

Section 14 - freedom of expression

10. 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. The right has been interpreted as including the right not to be compelled to say certain things or to provide certain information.¹
11. Clause 17 of the Bill provides that HUDA may ask people questions and to verify information. Clause 18 makes it an offence not to provide information or to provide false and misleading information, or to mislead HUDA. These provisions *prima facie* limit the right to freedom of expression.
12. Clause 21 of the Bill prohibits anyone other than HUDA to trade, carry on business, or perform functions under a name containing or resembling the words “Housing and Urban Development Authority” or “Housing New Zealand”. This provision also *prima facie* limits the right to freedom of expression.
13. A limit on a right may nevertheless be consistent with the Bill of Rights Act if the limit is justified under s 5 of that Act. This s 5 inquiry asks:
 - a. does the provision serve an objective sufficiently important to justify some limitation of the right or freedom?
 - b. if so, then:

¹ See, for example, *Slaight Communications v Davidson* 59 DLR (4th) 416; *Wooley v Maynard* 430 US 705 (1977).

- 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?²
14. In regard to cls 17 and 18, the objective is to ensure that HUDA has the information it needs to accurately assess eligibility for financial assistance. This is an objective sufficiently important to justify some limit on the right to freedom of expression.
 15. We also consider that cls 17 and 18 impair the right to freedom of expression no more than reasonably necessary to achieve that objective. The power to require information is limited to “relevant” questions and to verifying certain information. There will also be a code of conduct governing such requests.
 16. On this basis, we consider that any limit on the right to freedom of expression in cls 17 and 18 is proportionate to the objective and justified under s 5 of the BORA.
 17. In respect of cl 21, the prohibition on misrepresenting a relationship with HUDA is necessary to maintain the reputation of that Authority and goes no further than is required to protect the public against fraud and misunderstandings. We therefore consider that any limit on the right to freedom of expression is justified under s 5 of the BORA.

Section 21 – unreasonable search and seizure

18. Section 21 of the Bill of Rights Act affirms the right of everyone to be secure against unreasonable search and seizure, whether of the person, property, correspondence or otherwise. There are two limbs to the s 21 right. First s 21 is applicable only in respect of those activities that constitute a “search or seizure”. Secondly, where certain actions constitute a search or seizure, s 21 only protects against those searches or seizures that are “unreasonable” in the circumstances. A request for information or documents constitutes a search for the purposes of s 21 of the Bill of Rights Act.³
19. In investigating the circumstances of people (and their partners) seeking or receiving financial assistance for home ownership under cl 16, HUDA can require information for the purposes of that investigation.⁴ This constitutes a search.
20. The next question is whether the search power is reasonable. In assessing this, we have considered the place of the search, the degree of intrusiveness into privacy, and the reasons why it is necessary.⁵
21. The search power is exercised by written notice, rather than physical entry onto premises, and is limited to the purpose of the investigation, or detecting whether a person has committed or is committing an offence under ss 82 (offence not to provide information or to provide false and misleading information) or 83 (offence to mislead HUDA) of the Public Housing Management Act. There will also be a code of conduct governing such requests. We therefore consider the search power is reasonable in the circumstances.

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

³ *New Zealand Stock Exchange v Commissioner of Inland Revenue* [1992] 3 NZLR 1 (PCP).

⁴ cl 18(b) of the Bill, which applies s80 of the Public Housing Management Act 1992

⁵ At [172].

Conclusion

22. 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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