

14 May 2019

Hon David Parker, Attorney-General

Consistency with the New Zealand Bill of Rights Act 1990: Immigration (International Visitor Conservation and Tourism Levy) Amendment Bill

Purpose

1. We have considered whether the Immigration (International Visitor Conservation and Tourism Levy) 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 21791/1.11 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 19 (freedom from discrimination). Our analysis is set out below.

The Bill

4. The Bill amends the Immigration Act 2009 ('the principal Act') to provide for the levying of a new international visitor conservation and tourism levy. The levy will apply to people who apply for a temporary entry class visa for travel to New Zealand or who seek to rely on a waiver of the requirement to hold a temporary entry class visa for travel to New Zealand. The Bill also makes minor procedural amendments to the principal Act to allow for increased electronic processing of visa waiver applications.

Consistency of the Bill with the Bill of Rights Act

Section 19- freedom from discrimination

5. Section 19 of the Bill of Rights Act affirms that everyone has the right to freedom from discrimination on the grounds of discrimination set out in the Human Rights Act 1993 ('the Human Rights Act').

6. The key questions in assessing whether there is a limit on the right to freedom from discrimination are:¹
 - a) does the legislation draw a distinction on one of the prohibited grounds of discrimination under s 21 of the Human Rights Act and, if so,
 - b) does the distinction involve disadvantage to one or more classes of individuals?
7. 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.²
8. The Bill provides for a levy to be charged for entering New Zealand on the basis of visa status. While treating groups of people differently on the basis of their visa status does not *prima facie* constitute discrimination under the Human Rights Act, we consider that in this instance visa status is acting as a proxy for national origin, which is a prohibited ground of discrimination under s 21(1)(g) of the Human Rights Act. The effect of the Bill is to levy a charge on international visitors which is not levied on domestic travellers, despite both groups having access to benefits from conservation and tourism funding.
9. Under s 5 of the Bill of Rights Act, a limit on a right may be justifiable where the limit serves an important objective, and where the limits on the right are rationally connected to achieving that objective and proportional to its importance.
10. The stated objective of the levy is to provide additional funding for conservation and tourism-related infrastructure and initiatives. We have interpreted the intent of the Bill to also include achieving this funding through a mechanism that ensures that, as far as practicable, users pay proportionately for the upkeep of these services. We consider this to be an important objective.
11. New Zealand residents already contribute through tax towards communal goods, such as conservation and tourism funding, in a number of forms that international visitors do not. For this reason, creating a levy for international visitors that is not also levied on domestic travellers is rationally connected to ensuring equity between users in funding these services.
12. The amount of the levy will be set by the Minister of Tourism through regulations. This will obviously impact on the proportionality of the measure. However, in principle we consider a levy to be a proportionate means of achieving the Bill's objective.

¹ 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.

² See, for example, *Child Poverty Action Group v Attorney-General* above n 1 at [179]; and *McAlister v Air New Zealand* above n 1 at [40] per Elias CJ, Blanchard and Wilson JJ.

13. For these reasons we consider that any limits within the Bill on the right to be free from discrimination are justified under s 5 of the Bill of Rights Act.

Conclusion

14. 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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