

26 July 2018

Hon David Parker, Attorney-General

Consistency with the New Zealand Bill of Rights Act 1990: National Animal Identification and Tracing Amendment Bill

Purpose

1. We have considered whether the National Animal Identification and Tracing 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 21525/8.0). 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), s 21 (unreasonable search and seizure), and s 25(c) (presumption of innocence). Our analysis is set out below.

The Bill

4. The Bill amends the National Animal Identification and Tracing Act 2012 ('the principal Act'), which aims to protect New Zealand against biosecurity risks, ensure food safety in relation to animal products, and secure economic benefits to New Zealand by enhancing access to overseas markets for New Zealand animals. The Bill's objectives are to make technical amendments to the principal Act to support effective responses to biosecurity events (such as the current *Mycoplasma bovis* response and eradication programme), and to correct drafting anomalies in relation to search powers under the principal Act. Specifically, the Bill:
 - a. removes the requirement that search warrants must be in a prescribed form;
 - b. aligns the powers that can be exercised by a person conducting a warrantless search with those that can be exercised by a person conducting a search pursuant to a warrant; and
 - c. extends the requirement to declare movements of regulated animals between two registered locations to cover movements to any other location, and extends the relevant offence provision to cover failure to declare such movements.

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 the right to freedom of expression, including the freedom to seek, receive, and impart information and opinions of any kind and 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

6. Section 31(1) of the principal Act requires the person with day-to-day charge of regulated animals to declare movement of the animals between two registered locations. Clause 7(1) of the Bill re-enacts s 31(1) and extends it to require declaration of movements to any other location.
7. The requirement to declare movements *prima facie* limits the right to freedom of expression. However, we are satisfied that the potential limits are justified in terms of s 5 of the Bill of Rights Act, as they are rationally and proportionately connected to the important objectives of the principal Act.

Section 21 – unreasonable search or seizure

8. 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, property, or correspondence or otherwise. The right protects a number of values including personal privacy, dignity, and property.²
9. Clause 49 of Schedule 2 of the principal Act confers a power to enter and inspect a place without a warrant for the purposes of determining whether or not a person is complying with the Act. In our November 2010 advice on the Bill that became the principal Act, we considered this warrantless search was not unreasonable for the purposes of s 21 as:³
 - a. the livestock sector is heavily regulated and, as a result, the privacy expectations of industry participants are limited;
 - b. the power to enter and search is aimed at determining whether or not a person is complying with the principal Act, or regulations made or standards issued under it; and
 - c. the Bill provides appropriate limits and safeguards for the exercise of powers; the power may only be exercised at a reasonable time and an officer or person is not authorised to enter or inspect a dwelling-house, marae, or a building associated with a marae, unless the occupier consents or a search warrant has been issued.
10. However, despite the above, due to a drafting anomaly, “search power” under clause 1(1) of Schedule 2 of the principal Act only refers to search powers conducted under a search warrant. Clause 8 of the Bill extends the powers that may be exercised in undertaking warrantless searches to include the powers in cl 40 of Schedule 2 of the principal Act. These powers, which can be exercised currently only for searches conducted pursuant to a warrant, include:
 - a. requesting a person to assist with the entry and search;
 - b. seizing anything that can be lawfully seized;
 - c. copying documents;

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

² See, for example, *Hamed v R* [2011] NZSC 101, [2012] 2 NZLR 305 at [161] per Blanchard J.

³ www.justice.govt.nz/assets/Documents/Publications/bora-National-Animal-Identification-and-Tracing-Bill.pdf.pdf

- d. accessing material from a computer and copying it; and
 - e. taking photos or recordings.
11. All these powers are available in respect of searches conducted with or without a warrant under the Search and Surveillance Act 2012.⁴
12. We consider the extension of powers constitutes a search for the purposes of s 21 of the Bill of Rights Act. Ordinarily 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 reasonably justified in terms of s 5 of that Act. However, the Supreme Court has held that an unreasonable search logically cannot be demonstrably justified and therefore the inquiry does not need to be undertaken.⁵ In assessing whether the extension of the search and seizure powers in the Bill are reasonable, we have considered the importance of the objectives sought to be achieved and whether the provisions are rationally connected and proportionate to those objectives.
13. The Bill's extension of search and seizure powers is rationally connected to ensuring that warrantless searches are effective in detecting, and preserving evidence of, non-compliance with the requirements of the principal Act (which, in turn, is connected to achieving the objectives of the Act). The factors identified in paragraphs 6(a) to (c) above, and in particular the limits and safeguards on the use of the powers, remain to support our overall view that the powers are proportionate.
14. We therefore consider the Bill appears to be consistent with the right to be secure against unreasonable search and seizure affirmed in s 21 of the Bill of Rights Act.

Section 25(c) – presumption of innocence

15. Section 25(c) of the Bill of Rights Act provides that everyone charged with an offence has the right to be presumed innocent until proved guilty according to law. This right requires the prosecution to prove, beyond reasonable doubt, that the accused is guilty.
16. Clause 8(4) of the Bill re-enacts the strict liability offence of failing to declare movements of regulated animals between two registered locations, and extends it to cover undeclared movements to any other location.⁶ Defences to offences under the principal Act (set out in cl 94 of Schedule 2) create a reverse onus. Strict liability and reverse onus offences limit s 25(c) of the Bill of Rights Act because:
- a. for strict liability offences, the prosecution does not have to prove the defendant intended to commit the offence; and
 - b. for reverse onus offences, once the prosecution has proven the defendant committed the *actus reus*, the defendant must prove a defence (or disprove a presumption) on the balance of probabilities to escape liability.
17. We consider this limitation is justified for the reasons set out in our 2010 advice in relation to the existing strict liability offence:

⁴ See s 110 of the Search and Surveillance Act 2012.

⁵ *Ibid* at [162] per Blanchard J.

⁶ See cl 7, new s 31(1) of the principal Act, and cl 8(4), new cl 82(2)(b) of Sch 2 of the principal Act.

- a. the scheme set up under the principal Act has the important objective outlined in para 4 above;
- b. the limitation is rationally linked to this objective as it provides a strong incentive for compliance with the scheme;
- c. the offence involves straightforward issues of fact, and the relevant context is often only known to the defendant. In such cases, it is easier for the defendant to explain why he or she took (or failed to take) a course of action than it is for the Crown to prove the opposite, justifying a strict liability offence; and
- d. the prescribed penalties at cl 82(4) are at the lower end of the scale and proportionate, taking into account the potential circumstances and relative seriousness of offending.

Conclusion

- 18. 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