

18 June 2019

Hon David Parker, Attorney-General

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

### **Purpose**

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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 21864/1.12). We will provide you with further advice if the final version includes amendments that affect the conclusions in this advice.
3. We note that large portions of the Bill are analogous to existing provisions in the National Animal Identification and Tracing Act 2012 ('the principal Act') that were considered in our previous advice on the Bill that became the principal Act.<sup>1</sup> Therefore, we have reached many of the same conclusions as outlined in our previous advice. We have discussed consequential amendments and new provisions where warranted.
4. 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 (security against search and unreasonable seizure), and s 25(c) (right to be presumed innocent until proven guilty). Our analysis is set out below.

### **The Bill**

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5. This Bill amends the principal Act, which aims to protect New Zealand against biosecurity risks, ensure food safety in relation to animal products, and secure benefits to New Zealand by enhancing access to overseas markets for New Zealand animals. The Bill seeks to address issues with the National Animal Identification and Tracing (NAIT) scheme that the *Mycoplasma bovis* response identified. It makes improvements to the framework governing the national animal identification and tracing system to provide for the rapid and accurate tracing of animals and their movements that enables biosecurity management and manages risks to human health.
6. Specifically, the Bill:
  - a. amends the definition of person in charge of animals (PICA) to mean a "natural person or body corporate in day-to-day charge of a NAIT animal";
  - b. amends obligations to identify and register NAIT animals;
  - c. creates the obligation to declare animals that are not NAIT animals; and

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<sup>1</sup> Available at [www.justice.govt.nz/assets/Documents/Publications/bora-National-Animal-Identification-and-Tracing-Bill.pdf-.pdf](http://www.justice.govt.nz/assets/Documents/Publications/bora-National-Animal-Identification-and-Tracing-Bill.pdf-.pdf)

- d. replaces Schedule 2 (compliance and enforcement) of the principal Act.

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

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

7. 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.<sup>2</sup>

#### *Declaration as to non-NAIT animals*

8. Clause 13 of the Bill creates an obligation on a PICA to declare animals under their charge that are not NAIT animals. This obligation is a form of compelled speech and *prima facie* limits the right of freedom of expression.
9. A limit on a right may nevertheless be consistent with the Bill of Rights Act if the limit is justified under s 5 of the Act. This s 5 inquiry asks:
- a. does the provision service an objective sufficiently important to justify some limitation on 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?<sup>3</sup>
10. We are satisfied that the limitation arising from cl 13 is justified under s 5 of the Bill of Rights Act. The principal Act has the important objective of protecting New Zealand from biosecurity risks and improving food safety. The requirement that PICAs declare non-NAIT animals under their charge permits monitoring of other livestock which may be involved in the transmission of disease, and is rationally connected to this objective. As such a declaration must already be made for NAIT animals, and for all livestock for tax purposes, we consider that the limit is in due proportion to the objective and impairs the right no more than reasonably necessary.

#### *Prohibition against using name*

11. Clause 12(4) of Schedule 2 of the Bill makes it an offence for a person to use, during business or trade, the name, any other trading name or a logo or design of a NAIT organisation, if the action is carried out knowingly and without the prior consent of a NAIT organisation and in a manner that misleadingly suggests it was carried out with the approval of a NAIT organisation.
12. This prohibition on the use of NAIT related names, logos and designs *prima facie* limits the right to freedom of expression. However, we consider that this is justified in terms of

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<sup>2</sup> See, for example, *Slaight Communications v Davidson* 59 DLR (4<sup>th</sup>) 416; *Wooley v Maynard* 430 US 705 (1977).

<sup>3</sup> *Hansen v R* [2007] NZSC 7 at [123].

s 5 of the Bill of Rights Act. The prohibition on misrepresenting a relationship with NAIT is necessary to maintain the reputation of that association and goes no further than is required to protect the public against misrepresentation.

### **Section 21 – Unreasonable search or seizure**

13. 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.<sup>4</sup>
14. The Bill contains the following search and seizure powers:
  - a. to require the provision of information or production of documents, and to answer questions (cl 1 of Schedule 2); and
  - b. to enter and inspect a place without a warrant (cl 10 of Schedule 2).
15. Clauses 1 and 10 of Schedule 2 of the Bill are identical to the equivalent provisions (cls 2 and 49, respectively) within Schedule 2 of the principal Act as it currently stands. These provisions were assessed in our previous advice on the Bill that became the principal Act. Our advice found those powers did they not constitute unreasonable search powers primarily due to:
  - a. the appropriate limits and safeguards contained within the Bill (including the reasons for which such searches may be made, and restrictions on where they may take place);
  - b. the power under cl 1 being subject to privilege against self-incrimination, now contained within s 138 of the Search and Surveillance Act 2012;
  - c. the purpose of the power being to enable NAIT officers to establish whether persons are complying with their obligations under the NAIT scheme; and
  - d. the livestock sector being a heavily regulated commercial environment, with a lower expectation of privacy for industry participants in relation to the type of information required by NAIT officers and authorised persons.
16. We consider that this assessment continues to be correct and that the above provisions are not unreasonable for the purposes of s 21 of the Bill of Rights Act.

### **Section 25(c) – Presumption of innocence**

17. 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.
18. We have identified several strict liability offences in the Bill, as well as a defence provision that imposes a reverse onus on the defendant. These provisions give rise to a *prima facie* issue of inconsistency with s 25(c) because the accused is required to *prove* (on the balance of probabilities) a defence to avoid liability; whereas, in other criminal proceedings an accused must merely *raise* a defence in an effort to create reasonable

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<sup>4</sup> See, for example, *Hamed v R* [2011] NZSC 101, [2012] 2 NZLR 305 at [161] per Blanchard J.

doubt. This means where the accused is unable to prove the defence, he or she could be convicted even though reasonable doubt exists as to his or her guilt.

19. Schedule 2 of the Bill contains the following strict liability offences:
  - a. offences relating to registration, declarations and provision of information (cl 14);
  - b. offences relating to a declaration required by section 32A (cl 15);
  - c. offences relating to fitting NAIT devices (cl 16);
  - d. offences relating to transporting NAIT animals which are not fitted with NAIT devices (cl 17);
  - e. offences relating to alteration, removal, reuse, and supply of NAIT devices (cl 18); and
  - f. offences of failing to comply with directions (cl 19).
20. Clause 28 of Schedule 2 of the Bill provides a defence to these offences if the defendant proves:
  - a. that the defendant took all reasonable steps to avoid committing the offences; or
  - b. that the act or omission constituting the offence;
    - i. took place in circumstances of an adverse event or an emergency; and
    - ii. was necessary for the preservation, protection, or maintenance of animal or human life or for animal welfare purposes.
21. In our previous advice on the Bill that would become the principal Act we considered similar provisions to cls 14, 16, 18, 19 and 28, and considered that the limitation on s 25(c) was justified as:
  - a. the scheme set up under the principal Act has the important objective outlined in para 5 above;
  - b. the limitation is rationally linked to this objective as it provides a strong incentive for compliance with the scheme; and
  - 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.
22. The new offences contained in cls 15 and 17 relate to failure to perform the new obligations included in the Bill (at cls 13 and 11 respectively). We are satisfied that they do not raise any issues that exclude them from the assessment above.
23. We note that the penalties in the Bill are more severe than the previous provisions. As noted in our 2010 advice, it is a general principle that strict liability offences are associated with penalties at the lower end of the scale. Here the penalties associated with the offences have been increased by a factor of 10, to a maximum fine of \$100,000 for individuals and \$200,000 for body corporates.

24. However, the parties governed by these offence provisions are commercial actors and body corporates engaged in a highly regulated industry. Individual PICAs and the directors/managers of offending body corporates will be involved with NAIT animals for commercial purposes. The purpose of the principal Act is to protect New Zealand against biosecurity risks, ensure food safety in relation to animal products and secure New Zealand access to international markets. Strong incentives to comply with the NAIT scheme and its ability to track animal movements in New Zealand are logically linked to this goal. We therefore remain satisfied that the penalties are proportional to both the commercial nature of the actors and the objectives of the principal Act.
25. We further note that the increase in the penalties for these offences will make the principal Act more consistent with similar biosecurity and food safety focussed legislation, the Animal Products Act 1999 and the Biosecurity Act 1993.
26. Accordingly, we have concluded that the clauses referred to above are justified under s 5 of the Bill of Rights Act.

## **Conclusion**

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27. 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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