

25 March 2019

Hon David Parker, Attorney-General

Consistency with the New Zealand Bill of Rights Act 1990: New Zealand Infrastructure Commission/Te Waihanga Bill

Purpose

1. We have considered whether the New Zealand Infrastructure Commission/Te Waihanga 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 with the latest version of the Bill (PCO 21915/10.1). 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 14 (freedom of expression). Our analysis is set out below.

The Bill

4. The Bill establishes the New Zealand Infrastructure Commission/Te Waihanga (the Commission) as a Crown entity for the purposes of the Crown Entities Act 2004. The main function of the Commission is to develop and promote a co-ordinated and strategic approach to infrastructure, and services that result from infrastructure, that improve the well-being of New Zealanders.
5. The Bill establishes the Commission, sets out its functions, establishes reporting requirements and procedure, provides the Commission with the power to obtain information, and sets out consequential amendments to other Acts.

Consistency of the Bill with the Bill of Rights Act

Section 14: Freedom of expression

6. 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
7. Clause 22 gives the Commission the power to request an entity specified in subclause (5) to supply the Commission with information, other than personal information, that is necessary or desirable to enable the Commission to perform its functions. An entity to whom the request is made must comply with the request unless one of the grounds in clause 23 apply. Clause 22 may be seen to limit s 14 of the Bill of Rights Act, as it compels the provision of certain information.

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

8. 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 a reasonable limit that is justifiable under s 5 of that Act.
9. The s 5 inquiry may be approached as follows:
 - a. Does the provision serve an objective 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?²
10. We consider that the limitations in the Bill are minimal and justified taking into account the objectives of the provision and the Bill's objectives (set out at paragraph 3 above). As set out in the Bill's Explanatory note, the Commission's ability to successfully fulfil its functions depends on its ability to gather information.
11. Further, we note these limitations apply to public service departments, departmental agencies, and Crown entities, rather than individuals. The power also precludes personal information (as defined in s 2(1) of the Privacy Act 1993) and a request for information may be refused in order to uphold legal professional privilege or if the supply of the information would limit the ability of the entity to act judicially or carry out its statutorily independent functions.
12. For these reasons, we conclude that any limits to the freedom of expression imposed by the Bill are justified under s 5 of the Bill of Rights Act.

Conclusion

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