

24 April 2019

Hon David Parker, Attorney-General

Consistency with the New Zealand Bill of Rights Act 1990: Partnership Law Bill

Purpose

1. We have considered whether the Partnership Law 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'). This advice has been prepared in relation to the final version of the Bill (PCO19271/4.2).
2. 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 17 (freedom of association) of the Bill of Rights Act.

The Bill

3. The Bill is a revision Bill prepared under subpart 3 of Part 2 of the Legislation Act 2012. The Bill proposes that the Partnership Act 1908 (the 1908 Act) be repealed and replaced by a Partnership Act 2019 (the 2019 Act). The purpose of the Bill is to update and modernise the 1908 Act. The Bill does not make any substantive policy changes to the 1908 Act, but does remedy minor inconsistencies, anomalies, discrepancies, and omissions.
4. The Bill seeks to provide for the ongoing recognition of business partnerships, setting out how they are formed and wound up, as well as partners' duties to third persons and each other.
5. The Bill proposes consequential amendments to several Acts. The consequential amendments only provide for the recognition of the new title of the 2019 Act, along with modernised definitions and updated cross-references.

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. The Bill includes several provisions that:
 - a. require partners to provide to each other certain relevant information that affects the partnership,² and

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

² Particularly, cls 54, 55 and 56 of the Bill.

- b. requires partners of large partnerships³ to keep accurate accounting records and prepare financial statements that comply with generally accepted accounting practice and which enable them to be readily and properly audited.⁴ As in the current Partnership Act 1908, it is an offence punishable on conviction to a fine not exceeding \$50,000 if partners fail to comply with their accounting and financial statement obligations.
8. Partners' obligations to inform each other about the matters specified in the Bill arguably do not limit the right to free expression. This is because these obligations only apply as default obligations — cl 35(1) of the Bill provides that the mutual rights and duties of partners may be varied by the consent of all partners.⁵ Consequently, partners will only be obliged to provide the specified information if they choose not to exercise their option to vary the default arrangements.
9. Similarly, the obligation of partners of large partnerships to keep accounting records and prepare financial statements—obligations which cannot be disposed of by agreement—could only amount to a minimal limitation on the right to free expression, if it amounts to a limit at all. It is arguable that the expressive value of the purely factual information that the Bill compels be recorded and produced is not sufficient to amount to “expression” under s 14 of the Bill of Rights Act. This is because the keeping of records and producing a financial report are not meant to communicate an idea or opinion to another person.⁶
10. If, however, the Bill does limit the right to free expression, we consider that these limits are justified in terms of s 5 of the Bill of Rights Act. 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?⁷
11. The provisions in the Bill requiring that partners disclose relevant information to each other provides the transparency necessary for partners to control their liability and protect their legitimate financial interests. Each partner has a direct and legitimate interest in the acts and omissions of each of their partners because they are each liable for them.

³ Large entities are defined by s 45(1) of the Financial Reporting Act 2013 as an entity with total assets of over \$60 million or revenue of over \$30 million in each of the two preceding accounting periods.

⁴ Particularly, cls 59 and 60 of the Bill. Clause 61 of the Bill also creates a requirement that the financial reports are audited, but this can be opted out of with the agreement of partners who together are entitled to at least 95% of the capital of the firm.

⁵ There are also various provisions, such as cl 44 (Rules about interests and duties of partners), which allow for some rights, interests, and duties to be subject to any agreement (express or implied) between the partners (e.g by a majority). Clause 44 does not however apply to the duties described in cls 54 – 56, which are obligations that can be changed only with the consent of all partners.

⁶ *Attorney-General v Smith* [2018] NZCA 24, 2 NZLR 899 at [44-46].

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

12. This interest arises from the rights and obligations associated with being in partnership. Partnerships provide for every partner to be bound by the acts or omissions done by other partners in the name of the partnership. Partnership also involves each partner sharing partnership profits and requires each partner to contribute to the losses of the firm. Further, third parties are entitled to enforce rights against the partnership where a partner has the apparent authority of the partnership (unless the third party has notice that the partner they were dealing with does not have the requisite authority to bind the partnership).
13. The requirement for large partnerships to keep accurate records and produce financial statements provides probity and a necessary degree of transparency. It ensures that those who have invested in the partnership have the information they require to accurately assess the health of the partnership. The requirements are limited to large partnerships where the size and complexity of the venture indicates that formal records and accounts are required for the firm to effectively comply with its obligations.

Section 17 – Freedom of association

14. Section 17 of the Bill of Rights Act affirms that everyone has the right to associate with others freely. The right recognises that people should be free to enter into consensual arrangements with others to advance the common interests of the group.
15. The Bill provides, at cls 72 and 73, for a partner (or a specified individual on behalf of a partner) to apply to the court to declare a partnership dissolved. The court must find that specified circumstances are met before dissolving a partnership. In particular:
 - a. that a partner is mentally impaired and lacks the competence to manage their own affairs, or is otherwise incapable of performing their part of the partnership agreement;
 - b. that a partner is guilty of conduct that prejudicially affects the carrying on of the business;
 - c. that a partner is wilfully or persistently breaching the partnership agreement, or otherwise acts in such a manner that it is not reasonable for the other partners to carry on the business in partnership;
 - d. that the partnership can only be carried on at a loss; or
 - e. other circumstances have arisen which make it equitable to dissolve the partnership.
16. Dissolving a partnership through an action of the court may, in certain circumstances, interfere with the partnership's ability to govern its own arrangements in accordance with the partnership agreement, and thereby limit the freedom of association. However, the Bill only allows for dissolution by the court on the application of a partner or on a partners' behalf. In effect, the Bill protects individuals' ability to withdraw their consent to being in common association with others. The Bill is therefore arguably consistent with the purpose of s 17 of the Bill of Rights Act.
17. If, however, the Bill does limit the right to freedom of association, we consider that the limit is justified. As outlined in paragraph 11 and 12, partners are liable for the actions of their partners. Clauses 72 and 73 of the Bill provide a mechanism whereby partners can release themselves from their ongoing obligations where they are incapable of continuing

their partnership or where they have been unfairly disadvantaged by the actions of their partners. Each partner has a direct and legitimate interest in ending the partnership arrangement when circumstances have changed beyond that envisaged by their partnership agreement or the relevant partner is incurring unauthorised liabilities. The limited grounds on which the court can order a partnership be dissolved ensures that the ability of partners to be a part of the partnership is limited no more than is reasonably necessary to protect themselves or the other partners against changing circumstances and abuse.

Conclusion

18. 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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