

1 February 2018

Hon David Parker, Attorney-General

Consistency with the New Zealand Bill of Rights Act 1990: State Sector and Crown Entities Reform Bill

Purpose

1. We have considered whether the State Sector and Crown Entities Reform 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 20910/2.3). We will provide you with further advice if the final version of the Bill includes changes that affect the conclusions of 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 25(d) (the right not to be compelled to be a witness or to confess guilt), and s 27(1) (right to justice). Our analysis is set out below.

The Bill

4. The Bill amends the Crown Entities Act 2004 ('the Crown Entities Act') and State Sector Act 1988 ('the State Sector Act'). The amendment to one section in the Crown Entities Act includes a consequential technical amendment to two schedules in the New Zealand Public Health and Disability Act 2000.
5. At present there are differing thresholds and powers applicable to investigations undertaken by the State Services Commission ('the Commission'), depending upon whether the investigation is in relation to the core Public Service or the wider State services. This Bill puts in place a single investigation package that provides a consistent approach to the investigatory and inquiry powers of the State Services Commissioner ('the Commissioner'), in relation to both the Public Service and the State services. It also aligns the Commissioner's powers with the powers in the Inquiries Act 2013 ('the Inquiries Act'), to align the Commission's procedure with other government investigations.
6. We note that while the Bill is not substantively adding to the Commissioner's investigatory powers relating to the State services, under the current Act a decision to conduct an inquiry in the wider State services must be made by the Prime Minister. The Bill removes this requirement and enables the Commissioner to decide to investigate, thereby effectively expanding the Commissioner's powers regarding the wider State services. This amendment will align the Commissioner's powers in relation to State services with those relating to the Public Service.

7. The Bill makes certain powers from the Inquiries Act available to the Commissioner. With one exception, these powers were already available to the Commissioner under the State Sector Act and the Commissions of Inquiry Act 1908. The powers relate to inquiry procedure, restriction of access to the inquiry, receiving evidence, obtaining information, and witnesses. This includes offence and penalty provisions regarding witness compliance with relevant powers and procedures. Clause 8 inserts an additional power by providing for the application of s 20(c) of the Inquiries Act, which empowers the Commissioner to determine privilege, confidentiality, and suitability for disclosure, of a document or thing.
8. The Bill clarifies that the Commissioner has no authority to make a finding of civil, criminal, or disciplinary liability against any person. However, the Commissioner may make findings of fault, and make recommendations that further steps be taken to determine such liability.
9. The Bill also amends the Crown Entities Act to require a board, when employing a chief executive, to obtain the written consent of the Commissioner to the terms and conditions of employment. It also amends the provision of the State Sector Act relating to codes of conduct for specified agencies, clarifying and expanding them to apply to board members, office holders, chief executives, and employees of those agencies.

Consistency of the Bill with the Bill of Rights Act

Section 14 – Freedom of Expression

10. 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

Power to compel information

11. Clause 8, which inserts new s 9A into the State Sector Act, applies certain provisions of the Inquiries Act to the Commissioner's investigations and inquiries.
12. As noted above, under the Bill the Commissioner will have substantially the same investigatory powers as under existing law. Under s 25(1) of the State Sector Act, for the purposes of carrying out their duties and functions, the Commissioner has the same powers and authority to summon witnesses and receive evidence as are conferred by the Commissions of Inquiry Act 1908. The powers under ss 4B and 4C of that Act are very similar to those contained in s 20 of the Inquiries Act. The Bill's only substantive addition to the Commissioner's powers is the inclusion of s 20(c) of the Inquiries Act, which provides for the power to examine a document or thing for the purposes of determining privilege or confidentiality, and suitability for disclosure.
13. While cl 8 does not substantially change the Commissioner's powers under the State Sector Act (aside from the addition of s 20(c) of the Inquiries Act), we have considered the full extent of the powers as they are effectively being re-enacted by the Bill.
14. Provisions of the Inquiries Act which will apply to the Commissioner's investigations and inquiries include ss 20, 23, 29 and 30.

¹ *RJR-MacDonald Inc. v Canada (Attorney General)* 1995 3 SCR 199.

15. Section 20 of the Inquiries Act enables inquiries to require a person to provide information, documents or things in that person's possession or control. As noted above, s 20(c) also provides that, where privilege or confidentiality are claimed, the inquiry has the power to examine the relevant document or thing to determine whether there is a justifiable reason to maintain the privilege or confidentiality.
16. Section 23 of the Inquiries Act enables the inquiry to summon witnesses, and require those witnesses to give evidence before the inquiry. Sections 29 and 30 include offence and penalty provisions relating to witnesses' compliance with the Inquiries Act.
17. We consider that cl 8 of the Bill, by applying these sections of the Inquiries Act to the Commissioner's investigations and inquiries, raises a prima facie limitation on the right to freedom of expression.
18. Where a provision is found to limit a particular right or freedom, it may nevertheless be consistent with the Bill of Rights Act if it can be considered a reasonable limit that is justifiable in terms of s 5 of that Act. The s 5 inquiry may be approached as follows:²
 - 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?
19. The objective of cl 8 is to move to a modern regime that is consistent with the approach taken to inquiries for the rest of government. More specifically, the Inquiries Act powers it implements aim to ensure the Commission can effectively carry out its investigatory role. Under s 6 of the State Sector Act, the Commissioner's powers to conduct inspections and investigations are exercised in accordance with (amongst other things) their function to promote standards of conduct and integrity and to promote transparent accountability in the Public Service. These investigations are often conducted with regard to significant issues or events of public interest and are intended to establish facts and hold people and organisations to account. Upholding the transparency and accountability of government is self-evidently an important objective in a free and democratic society.
20. The power to compel information is fundamental to the fact-finding nature of inquiries, which are inquisitorial bodies that must seek out information to assist them in answering the questions relevant to their terms of reference. On this basis, it is clear the limitation of the right is rationally connected to the objective.
21. We note that s 29(2) of the Inquiries Act provides that failure to provide information will not give rise to an offence under s 29(1) of that Act where doing so is prevented by a privilege or immunity, would be contrary to a law or court order, or would prejudice the maintenance of the law. We consider the effect of s 29(2) is to limit the impairment of the freedom of expression no more than is reasonably necessary to achieve the objective.

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

We also consider the limit on the freedom of expression is in due proportion to the importance of the objective.

22. Therefore, we consider that the limitation on the freedom of expression presented by the Commissioner's powers to compel information in cl 8 is justified under s 5 of the Bill of Rights Act. This conclusion is in accordance with our advice in 2008 regarding these provisions in the Inquiries Act.
23. Clause 9 of the Bill aligns the Commissioner's power to trigger an inquiry into State services with that in relation to the Public Service. Section 8 of the State Sector Act empowers the Commissioner to conduct inspections and investigations in respect of the Public Service of their own volition. However, at present the Commissioner may exercise these powers in respect of the State services (including Crown entities and departments with greater operational autonomy such as the Police) only if directed to by the Prime Minister or the responsible Minister. Investigations into the wider State services raise the same issues of public interest, transparency and accountability as those into the Public Service. We consider that, to the extent it limits s 14, the Commissioner's new power under cl 9 to decide to investigate the wider State services (without Ministerial direction) is justified, for the same reasons as discussed above.

Restrictions on access to inquiry

24. Clause 8 also gives the Commissioner Inquiries Act powers to impose restrictions on access to the inquiry. This includes the power to forbid publication of evidence, or information that may lead to the identification of participants in an inquiry, as well as any rulings an inquiry might make. It also provides that an inquiry may restrict public access and hold the inquiry in private.
25. We consider these powers raise a prima facie limitation on the right to freedom of expression under s 14 of the Bill of Rights Act. However, we consider that limitation can be justified under s 5 of the Bill of Rights Act, following the inquiry outlined above at paragraph 18.
26. The objective of these powers is to maintain an appropriate balance between the public interest and protection of witnesses and private information, and more broadly to ensure inquiries can have full access to the facts without compromising the administration of justice or those private and public interests. These are important objectives, which are rationally connected to the Commissioner's powers to impose restrictions on access to inquiries.
27. Section 15(2) of the Inquiries Act provides factors which must be taken into consideration before restrictions are imposed. The factors to be taken into account include the benefits of open justice and the need for the inquiry to ascertain the facts properly. This is balanced against an obligation to uphold the administration of justice, the privacy of individuals, the security, defence or economic interests of New Zealand, and any countervailing interests.
28. We consider s 15(2) ensures the freedom of expression is limited no more than reasonably necessary. Given the objective's importance and the balancing exercise to be undertaken under s 15(2), we also consider the limitation to be in due proportion to the objective. We therefore consider the limitation to be demonstrably justifiable.

Conclusion on the Bill's consistency with freedom of expression

29. For the above reasons, we consider that the Bill's limitations on freedom of expression imposed by the Bill are justified under s 5 of the Bill of Rights Act. This is consistent with the advice of 15 August 2008 regarding these provisions in the Inquiries Act.

Section 25(d) - Right not to be compelled to be a witness or confess guilt

30. As discussed above in relation to the freedom of expression, cl 8 of the Bill provides the Commissioner with powers under the Inquiries Act to require a person to attend and give evidence before an inquiry. We note for completeness that the right not to be compelled to be a witness or confess guilt under s 25(d) of the Bill of Rights Act applies only in criminal proceedings. Inquiries are not criminal proceedings, and as such the Commissioner's power to summon witnesses does not engage s 25(d) of the Bill of Rights Act. This conclusion is consistent with our 2008 advice regarding this provision in the Inquiries Act.

Section 27(1) – Right to justice

31. Section 27(1) of the Bill of Rights Act provides that every person whose interests are affected by a decision by a public authority has the right to the observance of the principles of natural justice.
32. Clause 8 applies s 14 the Inquiries Act to the Commission's investigations and inquiries. Section 14 states that in making a decision as to the procedure or conduct of an inquiry, or in making a finding that is adverse to any person, an inquiry must comply with the principles of natural justice. Given the clear acknowledgement of the role of natural justice, the Bill appears to be consistent with s 27(1) of the Bill of Rights Act. This is also consistent with our 2008 advice regarding the Inquiries Act.

Conclusion

33. 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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