

28 June 2016

Hon Christopher Finlayson QC, Attorney-General

## **Consistency with the New Zealand Bill of Rights Act 1990: Fire and Emergency New Zealand Bill**

### **Purpose**

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1. We have considered whether the Fire and Emergency New Zealand 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 the final version of the Bill. The advice has been prepared with the latest version of the Bill (PCO17919/14.0). We will provide you with further advice if the final version of the Bill includes amendments that affect the conclusions in our 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 the right to freedom of expression, s 18 the right to freedom of movement, s 19 the right to freedom from discrimination and s 21 the right to be free from unreasonable search and seizure. Our analysis is set out below.

### **The Bill**

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4. The Bill repeals the two current Acts governing fire services, the Fire Service Act 1975 and the Forest and Rural Fires Act 1977, to give effect to a single, unified fire services organisation for New Zealand, called Fire and Emergency New Zealand (FENZ). The Bill introduces a range of measures for the detailed design and operational policy of FENZ, including the following:
  - a. an updated offences and penalties regime, including a new infringement offence scheme
  - b. removal of powers to recover the cost of rural fires
  - c. new powers for managing hazardous substances incidents
  - d. new measures to encourage compliance among levy-payers and to protect the integrity of the fire levy
  - e. new powers for firefighters to enter premises to investigate the causes of fires and to take samples of objects for analysis, and
  - f. new measures to ensure adequate firefighting water supplies.

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

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### Section 14 – The Right to 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 in any form. A number of provisions in the Bill appear to limit s 14 of the Bill of Rights Act by requiring individuals to provide FENZ officials with information if requested to do so, in some cases under compulsion of a penalty for non compliance, or restricting freedom of expression by placing conditions on publication and disclosure of information. The relevant clauses of the Bill are as follows:
  - a. Clause 41(1)(f) provides that an authorised person in charge of personnel engaged with a fire or other emergency may require the owner, occupier or owner's agent of a property to provide information in respect of that emergency which is reasonably necessary or desirable in order for that authorised person to perform his or her powers.
  - b. Clause 86 provides that FENZ may require a specified person to provide information within that person's knowledge, possession or control that FENZ considers is necessary or relevant for any purpose relating to the enforcement of Part 3 (the levy).
  - c. Clause 89(1) provides that FENZ may write to a person to whom any information or document is published or disclosed imposing any conditions in relation to the publication, disclosure or use of the information or document by that person.
6. These provisions provide an obligation on individuals to provide or restrict information of one kind or another. Penalties in the Bill for failure to provide information introduce an element of compulsion. This raises a *prima facie* issue of inconsistency with the right to freedom of expression affirmed in s 14 of the Bill of Rights Act.
7. Legislative provisions limiting a particular right or freedom may nevertheless be consistent with the Bill of Rights Act if the limit can be considered reasonable and demonstrably justified in terms of s 5 of that Act.
8. The s 5 inquiry may be approached as follows:<sup>1</sup>
  - 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?

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<sup>1</sup> *Hansen v R* [2007] NZSC 7 [123].

*Can the provisions be justified under s 5?*

9. The objective of disclosure under the Bill is to ensure that FENZ officials have all the information they need in order to effectively deal with situations where lives or property are at risk. Accordingly it is important that individuals are required to provide information to assist such decision making. Therefore we consider these objectives to be significant and important, and that the rationale behind the limit is connected to the objective.
10. We note that there is a form of compelled expression attached to these provisions as there is a penalty imposed if convicted for non-compliance. Without such provisions, FENZ employees and the public could be placed in considerable danger. We also note that the information required to be provided is factual and involves no or very little element of personal opinion. Therefore the provision impairs the right to freedom of expression no more than is reasonably necessary to achieve that objective.
11. Accordingly, due to the importance of FENZ officers being properly informed, we consider that any limits placed by the disclosure regime on the right to freedom of expression are in due proportion to their objectives.
12. Overall, we consider that the disclosure regime appears to be justifiable under s 5 of the Bill of Rights Act.

**Section 18 – Right to freedom of movement**

13. Section 18(1) of the Bill of Rights Act affirms that everyone lawfully in New Zealand has the right to freedom of movement and residence within New Zealand. The following clauses in the Bill appear to *prima facie* infringe on this right by limiting the freedom of movement of people who would otherwise be able to enter areas in the vicinity of an emergency:
  - a. Clause 7 of the Bill permits the rendering safe of any substance emergency by containment of that substance, potentially including containment of an area to which the public are restricted from entering
  - b. Clauses 35, 36 and 37 of the Bill permit an authorised person, in the event of alarm or report of a fire or other emergency, to direct any person to leave or prevent any person from entering the vicinity of the emergency
  - c. Clauses 41(1)(b) and (d) of the Bill permit an authorised person in charge of persons engaged in a fire or other emergency to close any nearby road or railway, and remove any person (by force if necessary) who is by his or her presence, interferes with operations or who is in danger, and
  - d. Clause 137 of the Bill permits an authorised person to prohibit access by persons to a land or building that is the site of any fire or emergency in order to preserve or record evidence relating to that fire or emergency.

*Can the provisions be justified under s 5?*

14. The purpose of the restrictions in these clauses is to facilitate the practical aspects of emergency situations and, in particular, to ensure the safety of individuals. From time to time, it may be necessary to prevent access to areas because those areas are

hazardous and FENZ officers must be able to carry out their duties without being concerned for the safety of individuals who have entered the locus of an emergency situation. This purpose is sufficiently important to justify some kind of limitation on the right. There is a rational connection between restricting access to areas, buildings, public places, and roads and protecting the public from the dangers during and resulting from an emergency.

15. In assessing whether the limitation impairs the right no more than is reasonably necessary and is proportionately connected to the purpose, it is important to consider the scope of the power conferred on authorised persons under the Bill.
16. Authorised persons who are in charge of FENZ employees responding to an emergency situation may endeavour by all practicable means to extinguish or prevent the spread of a fire and save lives and property in danger. They will also wish to preserve any evidence relating to any fire or emergency. Clause 41(1)(g) states that the authorised person may take any steps they consider reasonably necessary or desirable in order to perform their functions, duties or powers.
17. For this reason, we are satisfied that the authorised person would only exercise their powers in respect of removal of a person from the vicinity, or obstruction of a person entering the area of an emergency situation (including buildings) where it is reasonably necessary to achieve the purpose outlined above. We therefore consider that the limitation is justified under s 5 of the Bill of Rights Act.

## **Section 19 – Right to freedom from discrimination**

18. Section 19(1) of the Bill of Rights Act provides that everyone has the right to freedom from discrimination on the grounds of discrimination set out in s 21 of the Human Rights Act 1993. These grounds include, *inter alia*, ‘disability’.
19. We note that cl 30 empowers the FENZ Board to require operational personnel to leave FENZ if that person is incapable of performing competently his or her duties and any other duties that may be reasonably required. Section 19 is engaged because the Bill creates a distinction based on the prohibited ground of disability, which materially disadvantages persons with disabilities, in that FENZ has the power to dismiss those persons.

*Can the provisions be justified under s 5?*

20. The Department of Internal Affairs (‘DIA’) has advised us that the objective of cl 31 is to reduce the risk of harm to the public by ensuring that employees or volunteers are capable of performing their duties competently. Any incapacity must be certified by two medical practitioners, or one medical practitioner and one other health practitioner, by reference to the standards set by the Board under cl 28. Clauses 9 to 11 of the Bill provide that FENZ’s objectives and functions involve protecting life and property from fire and other mandated emergencies.
21. These are potentially high risk situations that require FENZ personnel to meet fitness competency standards required to carry out these objectives and functions. A lack of fitness (psychiatric or physical) heightens the risk of harm to individuals and crew (unit members), the public, other responders (i.e. Police, ambulance officers, etc), as well as property.

22. DIA has advised that without such a provision it may be difficult to remove someone physically or psychologically incapable of performing their role leading to an increased risk of damage, and potentially unnecessary loss of life. The Bill also includes a provision which allows FENZ to transfer an employee deemed unfit for active duty to a non-operational role. Because the aim of the proposal is to ensure only those personnel who are fit (both physically and mentally) to undertake duties associated with emergency service response teams, the limitation on the s 19 right appears to be proportionate to the objective and does no more than is necessary to achieve it.
23. Therefore in our view this is a justified limitation on the right to freedom from discrimination under s 19 of the Bill of Rights Act.

### **Section 21 – Right to be secure against unreasonable search and seizure**

24. Section 21 of the Bill of Rights Act affirms the right of everyone to be secure against unreasonable search and seizure, whether of the person, property, correspondence or otherwise. There are two limbs to the s 21 right. First, s 21 is applicable only in respect of those activities that constitute a ‘search or seizure’. Secondly, where certain actions do constitute a search or seizure, s 21 protects only against those searches or seizures that are “unreasonable” in the circumstances.
25. Clauses 127 to 137 of the Bill detail a range of entry and search powers over any land or building. Many of these provisions have been continued from the current Fire Services Act.
26. Specifically, cl 132 provides that a FENZ inspector may enter and inspect any land or building for the purpose of obtaining any necessary information for pre-incident planning, to assess compliance with the requirements imposed on owners under any relevant fire safety legislation, and to conduct post-incident investigations. Clause 135 gives FENZ employees the power to take samples.
27. DIA advise that FENZ needs powers of entry (and sometimes inspection) in a few different situations (not all would be search and seizure powers). This includes, emergency powers, pre-incident planning, post-incident investigation, compliance checking, and for enforcement and the investigation of offences. It is clear that the activities do constitute a “search or seizure” in respect of the legislation.
28. The fire service needs access to buildings in the case of an emergency or to ensure that building owners are complying with legal requirements. Further, the power is limited in relation to homes and marae by cl 133, which provides that a FENZ inspector must not, except with the consent of an occupier or pursuant to a warrant, enter any land or building through a home or marae.
29. We consider such searches undertaken under the remit of the Bill are reasonable. We therefore consider that the Bill appears to be consistent with the right to be secure against unreasonable search and seizure under s 21 of the Bill of Rights Act.

## **Conclusion**

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30. We have concluded that the Bill appears to be consistent with the rights and freedoms affirmed in the Bill of Rights Act.

Jeff Orr

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**Office of Legal Counsel**