

2 December 2016

Hon Christopher Finlayson QC, Attorney-General

## **Consistency with the New Zealand Bill of Rights Act 1990: Hurunui/Kaikōura Earthquakes Recovery Bill**

### **Purpose**

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1. We have considered whether the Hurunui/Kaikōura Earthquakes Recovery 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. This advice replaces our previous advice as we have now received a revised version of the Bill (PCO 20216/1.23) and have considered whether it is consistent with the Bill of Rights Act.
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 27(2) (right to judicial review). Our analysis is set out below.

### **Summary**

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4. The Bill provides for Orders in Council to be made to grant exemptions from, modify, or extend any provisions of an enactment to assist earthquake-affected areas respond to, and recover from, the impacts of the earthquakes that occurred on 14 November 2016.
5. The Bill raises a potentially significant limitation with the right to apply for judicial review affirmed in s 27(2) of the Bill of Rights Act. Specifically, cl 8(3) of the Bill provides that the recommendation to make an Order in Council, or related decisions of the relevant Minister, may not be challenged, reviewed, quashed, or called into question in any Court.
6. Judicial review is an essential mechanism for maintaining the rule of law. The right to apply for judicial review should therefore be limited only in the rarest of situations where there is compelling reason and after careful consideration.
7. We have also taken into account the extraordinary circumstances the Bill seeks to address and the safeguards included in the Bill.
8. In our view, the justifications for the limit imposed on the right to judicial review by cl 8(3) are finely balanced against the importance of s 27(2). We conclude, however, that the Bill is consistent with the rights and freedoms affirmed in the Bill of Rights Act.

## **The Bill**

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9. The purpose of the Bill is to provide appropriate measures to assist the earthquake-affected area and its councils and communities to respond to, and recover from, the impacts of the earthquakes that occurred on 14 November 2016 in Hurunui and Kaikōura, including their aftershocks ('the Hurunui/Kaikōura earthquakes').
10. To this end, cl 7 of the Bill provides for Orders in Council ('Orders') to be made to grant exemptions from, modify, or extend any provisions of an enactment listed in cl 12. An order is made on the recommendation of the Minister responsible for the administration of the enactment ('the relevant Minister') and can only be made in connection with the earthquake-affected area.
11. Clause 11 also requires the Minister responsible for the administration of the Bill to appoint a Hurunui/Kaikōura Earthquakes Recovery Review Panel ('the Panel') to provide advice in relation to Orders in Council that may be recommended.
12. Clause 8 of the Bill requires that, before recommending an Order, the relevant Minister must be satisfied that the order is necessary or desirable for the purpose of the Act, and that the extent of the order is not broader than reasonably necessary to address the matters that gave rise to the order. A draft of the order must have been reviewed by the Panel.
13. Clause 10 of the Bill states that an Order in Council promulgated under the Bill may not grant an exemption from, or modify a requirement or restriction imposed by the Bill of Rights 1688, the Constitution Act 1986, the Electoral Act 1993, the Judicature Amendment Act 1972, or the Bill of Rights Act. Clause 17 provides that an Order in Council may not be held invalid just because it is, or authorises any act or omission that is, inconsistent with any other Act.

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

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### **Section 27(2) - Right to judicial review**

14. Section 27(2) of the Bill of Rights Act affirms that every person whose rights, obligations, or interests protected or recognised by law have been affected by a determination of any tribunal or other public authority has the right to apply, in accordance with law, for judicial review of that determination.
15. The right to judicial review is intended to ensure that a person with an interest in a decision can challenge the lawfulness of that decision. The phrase "in accordance with law" that appears in s 27(2) recognises that limits may be imposed on the power of judicial review, but "any attempt completely to deprive the High Court of its review powers would violate the guarantee."<sup>1</sup>
16. Clause 8(3) of the Bill states that the recommendation to make an Order in Council, or other decisions of the relevant Minister, may not be challenged, reviewed, quashed, or called into question in any Court.
17. We understand the "decisions" in question to be where the relevant Minister decides not to provide a draft of an Order to the Panel, and the Regulations Review Committee

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<sup>1</sup> 'A Bill of Rights for New Zealand: A White Paper' [1984-1985] I AJHR A6 at [10.175].

or the leaders of all political parties, if a previous draft has been subject to that process and the relevant Minister is satisfied the differences between the current and previous draft are not substantial.<sup>2</sup>

*Does cl 8(3) of the Bill limit the right to judicial review?*

18. In our view, a recommendation made by the Minister under cl 7 of the Bill is not a “determination” for the purposes of s 27(2) of the Bill of Rights Act because the determination is not made in respect of a particular person’s rights, obligations, or interests protected or recognised by law.
19. Section 27(2) does not create a right to challenge Government policy decisions that have general application, such as recommendations to make Orders.<sup>3</sup> Clause 8(3) does not apply to determinations made under those Orders in Council in respect of particular cases, which would be subject to judicial review, nor does it protect the Orders in Council themselves if they are *ultra vires*. We discuss the general consistency of Orders in Council with the Bill of Rights Act below at paragraphs [39 - 41].
20. Decisions made by the relevant Minister under cls 8(2), however, could be considered determinations made in respect of a particular person’s rights, obligations, or interests protected or recognised by law. While it is unclear whether a decision not to consult on a further draft of an Order would be justiciable, for the purposes of this advice, we consider that removing the ability to challenge, review or quash a decision not to undertake further consultation appears to limit the right to judicial review under s 27(2).

*Is the limitation justified and proportionate under s 5 of the Bill of Rights Act?*

21. 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:<sup>4</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?

*Is the limit rationally connected to a sufficiently important objective?*

22. We understand the objective of cl 8(3) is to prevent the risk that Orders would be delayed in the court process, slowing the recovery by creating and prolonging legal uncertainty.

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<sup>2</sup> Refer cl 8(2).

<sup>3</sup> See, for example: *Lumber Specialties Ltd v Hodgson* [2000] 2 NZLR 347 (HC), and *Graham v Hawkes Bay Power Distributions Ltd* (High Court, Napier, CP 33/95, 25 September 2000, M Thomson).

<sup>4</sup> *Hansen v R* [2007] NZSC 7 [123].

23. The Legislation Advisory Committee's Guidelines ('the LAC Guidelines') indicate that "a compelling need for certainty in a non-justiciable area may justify ousting the courts' jurisdiction to review."<sup>5</sup>
24. As noted above, we consider the recommendations of the relevant Minister under cl 7 do not engage s 27(2) as they are of a non-justiciable character. While the related decisions of the relevant Minister under cl 8 may be justiciable, allowing the decisions to be challenged, reviewed or quashed would bring the certainty of an Order into question. Measures to assist councils and communities respond to, and recover from, the Hurunui/Kaikōura earthquakes are matters which require a reasonable level of certainty.
25. We therefore consider cl 8(3) seeks to achieve a sufficiently important objective. Moreover, limiting judicial review of the decisions of the relevant Minister is rationally connected to that objective.

*Is the impairment of the right no more than reasonably necessary?*

26. The question of whether the right is impaired no more than reasonably necessary involves consideration of whether the objective might be sufficiently achieved by another method involving less cost to the right to judicial review.<sup>6</sup>
27. Statutes will generally impose two types of limitation on judicial review; an ouster clause, where the courts' jurisdiction is entirely excluded, or a procedural restriction regulating the courts' power to review.<sup>7</sup> We consider cl 8(3) to be more appropriately characterised as a complete ouster of judicial review.
28. Procedural restrictions are considered more acceptable than a complete ouster. Time limits are the most common form of procedural limitation on judicial review.
29. Time limits provide certainty to persons affected by an administrative decision and speed up the process without denying review of unlawful action.<sup>8</sup> Including a period where review of a decision of the relevant Minister could be sought would therefore constitute a more minimal impairment of s 27(2) of the Bill of Rights Act.
30. However, we note that cl 8(3) is designed to deal with extraordinary circumstances which must be addressed urgently. Providing for a review, even if time limited, may impair the ability to respond to the urgency of those circumstances. However, the Bill does include some safeguards which may lessen the impairment on the right to judicial review.
31. For example, to recommend an Order, the relevant Minister must be satisfied that the Order is necessary or desirable for the purpose of this Bill, that the extent of the order is not broader than reasonably necessary, and that the order does not breach cl 10 of the Bill. As noted above, cl 10 of the Bill states that an Order promulgated under the Bill may not grant an exemption from, or modify a requirement or restriction imposed by constitutional statutes.

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<sup>5</sup> Legislation Advisory Committee, 'Legislation Advisory Committee Guidelines: Guidelines on Process and Content of Legislation' (2001 Edition and amendments) at [13.7.1].

<sup>6</sup> *Hansen v R* [2007] NZSC 7 at [123].

<sup>7</sup> Legislation Advisory Committee at [13.7.1].

<sup>8</sup> *Ibid.*

32. Further, cl 19 provides that Orders made under the Bill are disallowable instruments for the purposes of the Legislation Act 2012. Orders made under the Bill are also a legislative instrument for the purposes of the Legislation Act and must be presented to Parliament under section 41 of that Act.
33. Parliament could therefore, if it considers the Minister has made a decision to recommend an Order without proper consultation, pass a resolution to disallow that Order.<sup>9</sup> We also note that all Orders will cease to have any effect after 31 March 2018.
34. For these reasons, we consider the right to judicial review is impaired no more than reasonably necessary to achieve the objective.

*Is the limit in due proportion to the importance of the objective?*

35. Judicial review is an essential mechanism for maintaining the rule of law. The right to apply for judicial review should therefore be limited only in the rarest of situations where there is compelling reason and after careful consideration.
36. In our view, the justifications for the limit imposed on the right to judicial review by cl 8(3) are finely balanced against the importance of s 27(2). We consider, however, that responding to the impacts of the Hurunui/Kaikōura earthquakes is an example of a rare situation where the right may be limited in the manner prescribed by the Bill. As noted above, there are safeguards to ensure the right is impaired no more than reasonably necessary. We also note that the decision not to provide a draft of an Order to the relevant parties may only be made where a previous draft has been subject to that process and the relevant Minister is satisfied the differences between the current and previous draft are not substantial. Cl 8(3) therefore appears to limit the right to judicial review only in relation to the narrow ground that an additional round of consultation was not undertaken.
37. We therefore consider the limit on s 27(2) is in due proportion to the importance of the objective.

*Conclusion on the right to judicial review*

38. For the reasons above, we consider that the Bill appears to be consistent with the right to judicial review affirmed in s 27(2) of the Bill of Rights Act.

**General Consistency of Orders in Council with the Bill of Rights Act**

39. We have considered whether cl 10 of the Bill prevents modification to the Bill of Rights Act but nevertheless authorises Orders in Council that modify other Acts in a way that is inconsistent with the Bill of Rights Act.
40. In our view, such an interpretation would defeat the clear intention of the Bill that Acts of constitutional importance, including the Bill of Rights Act, must not be subject to derogation. In our view, cls 10 and 15 must be read together.
41. The Bill, therefore, does not prevent a Court from finding that Orders in Council are *ultra vires* on the grounds that the Bill does not authorise delegated legislation that is inconsistent with the Bill of Rights Act.<sup>10</sup>

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<sup>9</sup> Refer Legislation Act 2012, s 42.

## **Conclusion**

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42. 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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<sup>10</sup> *Drew v Attorney-General* [2002] 1 NZLR 58.