

Statutes Amendment Bill - 2004

2 December 2004

Attorney-General

LEGAL ADVICE

CONSISTENCY WITH THE NEW ZEALAND BILL OF RIGHTS ACT 1990:
Statutes Amendment Bill

1. In accordance with current arrangements, we have considered the non-justice items in this year's Statutes Amendment Bill (No 5) for consistency with the New Zealand Bill of Rights Act 1990 ("the Bill of Rights Act") (PCO 6088/7). The Crown Law Office has similarly considered the Justice items in the Bill. We understand that this Bill will be considered by the Cabinet Legislation Committee at its meeting scheduled for 9 December 2004.
2. For the reasons set out below we consider the Bill is consistent with the New Zealand Bill of Rights Act.

Non Justice Items

3. We have considered the proposed amendments to the following pieces of legislation which are intended to be included in the Bill, and advise that they are consistent with the Bill of Rights Act:

Department of Internal Affairs

- Gambling Act 2003

Department of Defence

- Defence Act 1990

Land Information New Zealand

- Cadastral Survey Act 2002
- Valuers Act 1948

Ministry of Agriculture and Fisheries

- Animal Welfare Act 1999
- Biosecurity Act 1993
- Dairy Industry Restructuring Act 2001
- Forests Act 1949

Ministry of Culture and Heritage

- Flags, Emblems, and Names Protections Act 1981

Ministry of Economic Development

- Commerce Act 1986
- Incorporated Societies Act 1908
- Personal Properties Securities Act 1999
- Radiocommunications Act 1989
- Receiverships Act 1993
- Trade Marks Act 2002
- Weights and Measures Act 1987 (discussed below)

Ministry of Foreign Affairs and Trade

- Continental Shelf Act 1964
- Territorial Seas, Contiguous Zone, and Exclusive Economic Zone Act 1977

Ministry of Transport

- Maritime Transport Act 1994
- Ships Registration Act 1992

Weights and Measures Act 1987

4. The only amendment that appeared to give rise to a *prima facie* issue of inconsistency was the proposed new section 30DA of the Weights and Measures Act 1987 (the Act). Under this provision, the Secretary (namely the chief executive of the department responsible for the administration of the Act) may suspend the accreditation of any person for non-compliance with regulatory measures without giving the accredited person the opportunity to be heard. In our opinion this amendment appears to give rise to a *prima facie* issue of inconsistency with section 27(1) of the Bill of Rights Act (right to natural justice).
5. For this reason, we have considered whether the provision constitutes a justified limitation on the right to freedom from discrimination in terms of section 5 of the Bill of Rights Act.

Is this a justified limitation under section 5?

6. Where a provision is found to be *prima facie* inconsistent with 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 section 5 of the Bill of Rights Act. The section 5 inquiry is essentially two-fold: whether the provision serves an important and significant objective; and whether there is a rational and proportionate connection between the provision and that objective.^[1]
7. We note that accredited persons have the authority to issue "Certificates of Accuracy" that form an element of a statutory defence under the Act for retailers

and packers. The purpose of the suspension is to prevent an accredited person from further non-compliance with regulatory measures during the period of suspension. This will protect the market, both national and those of our international trading partners, from the actions of non-compliant accredited persons, while investigations can be continued into the need to revoke the person's accreditation. It also gives the accredited person the time to receive further training or instigate remedial changes that render a revocation unnecessary. We therefore consider that an argument can be made that the proposal serves a significant and important objective and, therefore, meets the first limb of the inquiry under section 5 of the Bill of Rights Act.

8. We further consider that the proposal satisfies the second limb of the section 5 inquiry. In reaching this conclusion, we note that there are safeguards in place to prevent the abuse of the suspension power. First, the criteria for suspension are focused quite clearly on the policy objective discussed above. The Secretary must be satisfied that the accredited person:
 - a. no longer meets all the requirements for accreditation prescribed by regulations made under the Act; or
 - b. has failed to comply with any condition imposed by the Secretary in respect of that person's accreditation; or
 - c. has failed to exercise or perform the powers, functions, and duties of an accredited person to a satisfactory standard; or
 - d. has been convicted of an offence against section 32(fa) of the Act.
9. Secondly, persons who have their accreditation suspended may appeal to the District Court during the suspension period, or within such further time as a Judge may allow on application made before or after the expiration of that period (under section 30F of the Act). We also note that the suspension is temporary (28 days at the most) and, under section 30DA(4) of the Act. The Secretary may at any time of his or her own motion, revoke a suspension.
10. We therefore consider that the limitation on section 27(1), imposed by the proposal that allows the Secretary to suspend an accredited person without giving the accredited person the opportunity to be heard, appears to be justified.

Justice Items

11. The Crown Law Office has considered the proposed amendments to the following pieces of legislation, and advises that there are no inconsistencies with the Bill of Rights Act arising from these amendments:
 - Criminal Investigations (Bodily Samples) Act 1995
 - District Courts Act 1947
 - Judicature Act 1908
 - Ombudsman Act 1975

Conclusion

12. We have formed the view that the Bill appears to achieve overall consistency with the Bill of Rights Act.

13. In accordance with your instructions, we attach copies of this opinion for referral to the Minister of Justice and the Associate Minister of Justice (Hon Rick Barker), who is also the Minister in charge of the Bill.

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cc Minister of Justice
Associate Minister of Justice (Hon Rick Barker)
For your information

Footnote

1 See *Moonen v Film Literature Board of Review* [2000] 2 NZLR 9, and *R v Oakes* (1986) 26 DLR (4th)

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