

Building Bill - Preliminary

12 August 2003

Attorney-General

Preliminary Legal Advice - Building Bill
Consistency with the New Zealand Bill of Rights Act 1990

INTRODUCTION

1. We have considered whether the Building Bill (the Bill) (PCO5271/8) is consistent with the New Zealand Bill of Rights Act 1990 ("the Bill of Rights Act"). We understand that this Bill will be considered by the Cabinet Legislation Committee at its meeting on Thursday, 14 August 2003.

2. This advice is preliminary advice because:

(a) we are currently following up an outstanding issue with Ministry of Economic Development (MED) in relation to the strict liability offences contained in the Bill; and

(b) we understand that the Bill will continue to be amended up until the Cabinet Legislation Committee meeting on 14 August 2003, and before its consideration by Cabinet on 26 August 2003. We have prepared this advice on the basis of an understanding with MED that they will incorporate a number of changes previously discussed with them into the Bill. We will provide you with follow-up advice before the Cabinet meeting.

3. The following summary provides you with:

- a brief overview of the contents of the Bill,
- a note of the provision of the Bill which appears to raise issues under one of the sections of the Bill of Rights Act,
- and our conclusion as to the Bill's consistency with the Bill of Rights Act.

4. This summary is followed by a fuller analysis which discusses each of the issues raised under the Bill of Rights Act noting, where relevant, the justificatory material in each instance.

SUMMARY

Conclusion on consistency of the Bill with the Bill of Rights Act

5. The Bill (PCO5271/8) was provided to the Ministry of Justice on Friday 8 August 2003 (a draft Bill, PCO 5271/5, was first provided to the Ministry for comment on 25 July 2003). In the time available we have concluded that, although the Bill gives rise to a *prima facie* issue in relation to section 21 of

the Bill of Rights Act, the Bill appears to achieve overall consistency with the Act.

6. One outstanding issue, however, remains with section 25(c) of the Bill of Rights Act and the strict liability offences contained in the Bill. Officials from the Ministry of Justice and MED are currently working together to ensure these provisions are consistent with the Bill of Rights Act (or justifiable in terms of section 5 of the Bill of Rights Act).

Overview of the Bill

7. The purpose of the Bill is to provide for the regulation of building work, the establishment of a licensing regime for building practitioners, and the setting of performance standards for buildings, to ensure that
 - people who use buildings can do so safely and without endangering their health;
 - buildings provide an appropriate level of amenity for people who use them; and
 - people who use a building can escape from the building if it is on fire.
8. The Bill proposes to achieve this by:
 - strengthening the powers of the central regulator,
 - clarifying the roles and responsibilities of those administering, and complying with the regulatory system;
 - enhancing the capability of building certification and inspection bodies (e.g. requiring them to be accredited or certified);
 - encouraging a higher level of accountability and competence by participants in the building industry (e.g: providing for the licensing of building practitioners); and
 - improving consumer protection (e.g: providing for implied warranties and standard contract terms).

Particular clauses of the Bill considered for consistency with the Bill of Rights Act

9. We have considered the consistency of the Bill with the following sections of the Bill of Rights Act:

Section 21: the right to be secure from unreasonable search and seizure

10. The right to be secure from unreasonable search and seizure extends to inspection and monitoring powers under a regulatory regime. The Bill proposes that the building consent authorities, territorial authorities, and the Chief Executive of the Ministry [\[1\]](#) have inspection and monitoring powers to ensure that the regulatory system will be more responsive and better-managed, and to improve compliance with relevant standards. We have considered these inspection and monitoring powers for consistency with the Bill of Rights Act.

11. Overall, we have formed the view that the inspection and monitoring powers, in light of the restrictions and safeguards outlined in paragraph 17, do not appear to be prima facie inconsistent with section 21 of the Bill of Rights Act. However, if they were, we consider that these powers would be justified as a reasonable limit in terms of section 5 of the Bill of Rights Act.

Section 25(c): the right to be presumed innocent until proved guilty

12. Section 25(c) affirms the right to be presumed innocent until proved guilty. This means that the prosecution in criminal proceedings must prove, beyond reasonable doubt, that the accused is guilty. The Bill contains several strict liability offences. These strict liability offences give rise to an issue of inconsistency with section 25(c) because the accused is required to *prove* (on the balance of probabilities) the defence; whereas, in other criminal proceedings an accused must merely *raise* a defence in an effort to create reasonable doubt. This means, where an accused is unable to prove the defence, that he or she could be convicted even though reasonable doubt exists as to his or her guilt.
13. As noted in paragraph 2, we are still working through this issue with the Ministry of Economic Development.

FULLER ANALYSIS: THE BILL OF RIGHTS ACT ISSUES RAISED BY THE BUILDING BILL

Section 21: The right to be secure from unreasonable search and seizure

14. Section 21 of the Bill of Rights Act provides the right to be secure against unreasonable search and seizure. There are two limbs to the section 21 right. First, section 21 is applicable only in respect of those activities that constitute a "search or seizure". Second, where certain actions do constitute a search or seizure, section 21 protects only against those searches or seizures that are "unreasonable" in the circumstances.

Inspection and monitoring powers - Clauses 42-45, 56-65, and 178

15. To achieve the objectives underlying the Bill it was considered necessary to enhance the inspection and monitoring powers of relevant agencies to ensure that the regulatory system will be more responsive, and to improve compliance with buildings standards. To this end, the Bill confers inspection and monitoring powers on the:
- (a) Chief Executive, (clauses 42 - 45); [\[2\]](#)
 - (b) Territorial authority, (clauses 56 - 65); [\[3\]](#) and
 - (c) Building consent authorities (clause 178 - Inspections by building consent authorities).
16. Under the Bill, building consent authorities and territorial authorities will have the power to inspect buildings and building sites to ensure they comply with the Bill and relevant building compliance standards as well as the building

consent issued for that site. The Chief Executive will have the power to monitor the performance of territorial authorities, building consent authorities, and regional authorities of their functions under the Bill (this may include "re-inspecting" sites that have been inspected by the other authorities). These inspection and monitoring powers constitute search and seizure powers in terms of section 21 of the Bill of Rights Act, and have been considered for consistency with the Bill of Rights Act.

17. In determining whether the search and seizure powers are consistent with section 21, we noted and considered the following factors and safeguards that are either contained in the Bill, or are to be included in the next version of the Bill:

- (a) The purpose of the inspection powers for each agency are clearly established (e.g: a building authority is required to inspect building work to ensure it is being carried out in accordance with a building consent);
- (b) The manner in which the powers can be exercised are concisely stated and limited, particularly with respect to authorisation of inspectors, the places that may be searched, and the situations in which assistance and force may be utilised;
- (c) The types of information and items that can be seized are clearly set out in the relevant provisions and restricted to achieving specific purposes (e.g: determining compliance with a building consent);
- (d) An inspection of a household unit requires a consent or search warrant; and
- (e) In some instances additional safeguards are included that provide protection for the parties in question. For example: a notice of intended entry must be forwarded to the owner or occupier of a household unit when a territorial authority intends to exercise the inspection power (clause 62).

18. Overall, we have formed the view that the inspection and monitoring powers, in light of the restrictions and safeguards outlined above, do not appear to be prima facie inconsistent with section 21 of the Bill of Rights Act. However, if they are, then we consider that these powers would be justified as a reasonable limit in terms of section 5 of the Bill of Rights Act.

Seizure powers - Clause 55 (Recovery of costs when territorial authority carries out work on default)

19. Clause 55 allows a territorial authority to recover the costs from the owner of any building or land of carrying out any building work where the owner has defaulted. In order to carry out any work, the territorial authority must have a court order to this effect. Cost recovery may be achieved through the destruction, sale, or disposal of any materials that result from the carrying out of the work.

20. Clause 55 gives rise to an issue with section 21 of the Bill of Rights Act as it permits the confiscation, or seizure, of another person's property. The general power conferred by clause 55 will only apply where the right to recover costs has been established, and would follow a court order authorising the relevant work.^[4] In addition, an individual is able to contest the original court order that sets out the amount recoverable by the territorial authority (the amount

becomes a charge on the land on which the building is situated), and any surplus must be paid to the owner. We, therefore, consider that the power to recover costs in clause 55 would be reasonable in terms of section 21 of the Bill of Rights Act.

Section 25(c): The right to be presumed innocent until proved guilty

21. Section 25(c) of the New Zealand Bill of Rights Act provides for the right to be presumed innocent until proved guilty according to law.
22. In *R v Wholesale Travel Group*, [5] the Supreme Court of Canada held that the right to be presumed innocent until proven guilty requires at a minimum that an individual must be proven guilty beyond reasonable doubt, and that the state must bear the burden of proof and that criminal proceedings must be carried out in accordance with lawful procedures and fairness.
23. In strict liability offences, once the Crown has proved the *actus reus*, the defendant can escape liability by proving, on the balance of probabilities, either the common law defence of total absence of fault, or a statutory defence that embodies this such as "without reasonable excuse".
24. As a statutory defence reverses the onus and places the burden of proof on the defendant (i.e: he or she must prove, on the balance of probabilities, the defence). Because the burden of proof is reversed, a defendant who is able to raise doubt as to his or her fault but is not able to prove to the standard of the balance of probabilities absence of fault or a "reasonable excuse" would be convicted. This is contrary to the presumption of innocence captured by section 25(c) of the Bill of Rights Act because the defendant may be convicted even though reasonable doubt exists as to his or her guilt.

Strict liability offences contained in the Bill

25. By virtue of section 340 (strict liability and defences), most of the offences contained in the Bill are strict liability offences. For example:
 - Clause 18 (Buildings not to be constructed, altered, or demolished without consent) - liable to a fine not exceeding \$100,000 (continuing offence at \$10,000 per day).
 - Clause 197 (Territorial authority may issue notice to fix if compliance schedule not complied with) - liable to a fine not exceeding \$200,000 (continuing offence at \$20,000 per day).
 - Clause 200 (Territorial authority may issue notice to fix if change has already occurred) - liable to a fine not exceeding \$200,000 (continuing offence at \$20,000 per day).
 - Clause 213 (Prohibition on using dangerous, earthquake-prone, or insanitary building) - liable to a fine not exceeding \$200,000 (continuing offence at \$20,000 per day).
 - Clause 229 (Regional authority may issue notice to fix if compliance schedule for dam not complied with) - liable to a fine not exceeding \$200,000 (continuing offence at \$20,000 per day).

- Clause 230 Emergency action plans (pp.86-87) - liable to a fine not exceeding \$200,000 (continuing offence at \$20,000 per day).

26. We consider that these provisions give rise to a *prima facie* issue of inconsistency with section 25(c) of the Bill of Rights Act.

Ongoing consultation with Ministry of Economic Development

27. Where a provision is found to be *prima facie* inconsistent with a particular right or freedom in the Bill of Rights Act, it may nevertheless be consistent with that Act if it can be considered a "reasonable limit" that is justifiable in terms of section 5 of that Act. The Ministry of Justice is currently consulting with MED on the strict liability offences contained in the Bill with a view to ensuring that those provisions are consistent with the Bill of Rights Act .

Conclusion

28. In the time available we have concluded that, although the Bill gives rise to a *prima facie* issue in relation to section 21 of the Bill of Rights Act, the Bill appears to achieve overall consistency with the Act. One outstanding issue, however, remains with section 25(c) and the strict liability offences contained in the Bill. Ministry of Justice and MED officials are currently working together to ensure these provisions are consistent with the Bill of Rights Act (or justifiable in terms of section 5 of the Bill of Rights Act).

28. In accordance with your instructions we attach a copy of this opinion for referral to the Minister of Justice. A copy is also attached for referral to the Minister of Commerce, if you agree.

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Public Law Group	Office of Legal Counsel

Cc Minister of Justice
Minister of Commerce

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Footnotes

1. The Chief Executive of the Ministry that is responsible for the administration of the Bill
2. Clause 42 (Special powers of chief executive for monitoring performance of functions under this Act); clause 43 (Limits on power to enter a building); clause 44 (Chief executive must supply warrant); clause 45 (Duties of person supplied with warrant)
3. Clause 56 (Inspections by territorial authority); clause 57 (Duty to assist inspections); clause 58 (Warrant must be produced); clause 59 (Offence to impersonate authorised officer); clause 60 (Restriction on entry to household unit); clause 61 (District Court may authorise entry to household unit); clause 62 (Authorised officer must give notice to occupier of household unit); clause 63 (Authorisation of enforcement officers); and clause 65 (Conditions of authorisation)
4. See for example: clause 54 (Territorial authority may carry out building work on default); clause 211 (Territorial authority may carry out work); and clause 214 (Measure to avoid immediate danger or to fix insanitary conditions).
5. R v Wholesale Travel Group 84 DLR (4th) 161, 188 citing R v Oakes [1986] 1 SCR 103.