

Health (Protection) Amendment Bill

25 July 2014

Hon Christopher Finlayson QC, Attorney-General

Legal Advice

Consistency with the New Zealand Bill of Rights Act 1990: Health (Protection) Amendment Bill

Purpose

1. We have considered whether the Health (Protection) Amendment Bill (PCO 17831/3.0) ('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 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 11 (right to refuse medical treatment), s 14 (freedom of expression), s 16 (freedom of peaceful assembly), s 17 (freedom of association), s 18 (freedom of movement), s 22 (liberty of the person), and s 25(c) (right to be presumed innocent).

The Bill

3. The Bill amends the Health Act 1956. Part 1 aims to improve the range of measures to protect the public from the harm associated with certain infectious diseases. It increases the range of infectious diseases that are "notifiable", provides a series of incremental options for the management of individuals with infectious diseases, and allows the tracing of people who have, or may have, an infectious disease.

4. Part 2 aims to protect young persons from the harmful effects of artificial UV tanning by introducing a ban on the commercial provision of such services to people under 18 years of age.

Consistency with the Bill of Rights Act

Threshold and overarching principles

5. Part 1 of the Bill inserts a new Part 3A into the Health Act, which increases the range of measures available to protect the public from the harm associated with certain infectious diseases. Many of these measures give rise to prima facie inconsistencies with the Bill of Rights Act. In determining that these measures are justified under s 5 of the Bill of Rights Act, we have primarily relied on two aspects of the Bill.

6. The first aspect is the threshold for exercising the measures. The majority of the measures can only be exercised if the decision maker considers that an individual poses, or

may pose, a “public health risk”, which is defined as a substantial risk of serious harm to the health or safety of others.

7. The second aspect is the overarching principles that ensure that the measures are applied within a human rights framework. The following principles are to be taken into account by every person and court performing a function under new Part 3A: 1

- An individual should, where possible, be given the opportunity to voluntarily comply with measures to reduce the public health risk they pose before measures are imposed.
- Where alternative measures are available, preference must be given to the least restrictive measure that will achieve the objective of minimising the public health risk posed by the individual.
- An individual in respect of whom a measure is exercised is required to be treated with respect and consideration, to the extent this is possible while protecting public health.
- Individuals are required to be kept informed about the nature of any power that is exercised and its implications, any steps planned to be taken in respect of the individual, and the right to appeal or to apply for judicial review.
- Any measure should not be applied for longer than is necessary to minimise the public health risk posed by the individual.

Section 11 - Right to refuse medical treatment

8. The Bill contains new powers to require individuals to undergo a “medical examination” or “treatment”, which prima facie engage s 11 of the Bill of Rights Act (right to refuse medical treatment). Section 11 “protects the idea that every individual has the right to determine for themselves what they do or not do to their own body, free from restraint or coercion.” 2

9. A medical officer of health (MOH) may direct an individual to undergo one or more medical examinations to determine whether the individual has an infectious disease if the MOH believes, on reasonable grounds, that:

- the individual may have the infectious disease;
- the individual has failed to comply with a request by the individual’s medical practitioner or the MOH to undergo a medical examination within a specified period; and
- if the individual has the infectious disease, the individual would pose a public health risk.

10. Similarly, a District Court may, if satisfied of the same matters, make an order directing the individual to undergo whatever medical examinations the MOH considers necessary to determine whether the individual has the infectious disease.

11. A District Court may also impose, as a requirement of a public health order, that the individual be treated by a specified health provider. Public health orders can be contingent on the outcome of medical examinations being positive.

12. We consider that the potential limitations on the right to refuse medical treatment are justified under s 5 of the Bill of Rights Act because of the importance of the objective of identifying and managing public health risks, and because the threshold for exercising the measures in the Bill and the principles governing their use ensures this is the least restrictive response. In addition, we note that:

- any medical examination must be conducted in accordance with current best practice and be the least invasive necessary to establish whether the individual has the infectious disease; and
- a District Court can only impose a treatment requirement if satisfied that this is the only effective means, short of indefinite detention, of managing the public health risk posed by the individual.

Section 14 – Freedom of expression

13. The Bill includes provisions requiring individuals, who are subject to supervision because of the public health risk they pose, to provide their supervisor with information on any action, occurrence, or plan that is relevant to that risk. This potentially limits the right to freedom of expression under s 14 of the Bill of Rights Act.

14. The Bill also creates a new “contact tracing” regime that allows officials to obtain information about the contacts of a person with an infectious disease for the purpose of:

- identifying the source of the disease;
- making the contacts aware that they may be infected; and
- limiting the transmission of the disease to others. 3

15. This regime allows a “contact tracer” to require individuals with infectious diseases to provide information about persons they have been in contact with, and to provide identifying information, including the names, addresses and other details of those contacts. It also allows the contact tracer to require certain other persons, such as the individual’s employer, to provide names and addresses of contacts that they are aware of. Non-compliance with a direction to provide information is an offence punishable by a fine not exceeding \$2,000.

16. We consider that the potential limitations on freedom of expression are justified under s 5 of the Bill of Rights Act. The right to freedom of expression is primarily intended to protect

the right to political speech and opinion. Persons required to provide information under the Bill are not required to express opinions or ideas but simply to provide factual information (e.g. the names and addresses of any contacts of the individual). In light of the importance of minimising public health risks, the safeguards provided by the Bill, and the limited manner in which this right is restricted, we consider that the Bill strikes a reasonable balance between potential limitations on the right to freedom of expression and the benefit of protecting public health.

17. In regard to the “contact tracing” regime, we also note that:

- there is a requirement to consider whether contact tracing is appropriate before exercising the power; and
- the contract tracer is, as far as practicable, required to keep the identity of the person with the infectious disease confidential.

Sections 16, 17 and 18 – Freedom of peaceful assembly, association and movement

18. If a MOH believes, on reasonable grounds, that an individual poses a public health risk, or a person they have been in contact with may pose a public health risk because they may have been infected, the MOH can make directions, including requiring the person to:

- stay at a specified place of residence;
- refrain from carrying out specified activities;
- be supervised by a person at a specific place; and
- refrain from going to specified places absolutely or with conditions.

19. Similarly, a District Court may, if satisfied that an individual poses a public health risk, make a public health order imposing the same requirements.

20. These provisions are prima facie inconsistent with ss 16 (the right to freedom of assembly), 17 (the right to freedom of association) and 18 (the right to freedom of movement) of the Bill of Rights Act. We have considered these rights together.

21. We note that the directions and orders are time limited to a maximum of 6 months and must be regularly reviewed by a MOH to assess whether they are still necessary. While the directions and orders can be extended, this can only be done if there continues to be a public health risk that cannot be addressed by voluntary compliance or a less restrictive measure.

22. We consider that the limitations on ss 16, 17 and 18 are justified under s 5 of the Bill of Rights Act. These rights aim to ensure that individuals are able to organise for political or ideological reasons. This is not the context in which the Bill restricts these rights, which is to effectively manage public health risks. In addition, the overarching principles ensure that the restriction of these rights is demonstrably justified in a free and democratic society.

Section 19 – Freedom from discrimination

23. Clause 13 of the Bill amends the Health Act to ban, and make it an offence to provide, commercial artificial UV tanning services to persons under 18 years of age.

24. This clause raises issues of inconsistency with s 19(1) of the Bill of Rights Act, which states that “everyone has the right to freedom from discrimination on the grounds of discrimination in the Human Rights Act 1993”. Section 21(1)(i) of the Human Rights Act prohibits discrimination by age.

25. We consider that any potential inconsistency with s 19 is justified under s 5 of the Bill of Rights Act. The Ministry of Health notes that evidence shows overexposure to UV rays can increase the probability of health risks including skin cancer, especially in young people. While the distinction between young people of 17 years and 18 years is necessarily arbitrary, it is legitimate to use an age limit where it is not practical to engage in individualised assessments, as long as the restrictions are rationally connected and proportionate to the objective. The age limit in the Bill minimises the health risks of artificial tanning to individuals until adulthood, which is proportional to the objective and consistent with other age-based restrictions, such as those on the purchase of alcohol and tobacco.

Section 22 - Liberty of the person

26. A number of provisions in the Bill provide for the detention of individuals, including:

- requiring an individual to stay, at all times or at specified times, at a specified place of residence;
- where there is an urgent public health order, requiring an individual to be detained at specified premises; and
- where there is a public health order, requiring an individual to be detained, at all times or at specified times, in a hospital or other suitable place.

27. Section 22 of the Bill of Rights Act provides that “everyone has the right not to be arbitrarily arrested or detained.” Detention is arbitrary when it is “capricious, unreasoned, without reasonable cause: if it is made without reference to an adequate determining principle or without following proper procedures.” 4

28. We do not consider that the Bill authorises “arbitrary detention”. In reaching this view, we have taken account of the European Court of Human Rights ruling in *Enhorn v Sweden* 5 regarding the detention of individuals suffering from an infectious disease. In that case, the Court held that such detentions will only be justified if:

- the response is proportionate to the threat the disease poses to the general public;
- the measure is one of last resort; and

- the detention must be lifted as soon as possible once the person no longer poses a threat to the public.

29. We consider that these provisions are consistent with s 22 of the Bill of Rights Act. The powers of detention in the Bill can only be exercised if a MOH or a District Court considers that an individual poses, or may pose, a public health risk. The most significant detention powers can only be authorised by a District Court (with the exception of short-term urgent public health orders) and only if the individual is considered to actually (as opposed to potentially) pose a public health risk. In addition, the overarching principles (see para 8) will also ensure that the different forms of detention are only used where no less restrictive measure would be sufficient and that the individual is detained no longer than necessary.

Section 25(c) - Right to be presumed innocent

30. The Bill contains three strict liability offences. The Bill makes it an offence to:

- fail, without reasonable excuse, to comply with directions of a medical officer of health (cl 7, new s 92R);
- fail, without reasonable excuse, to comply with directions to provide information for “contact tracing” (cl 7, new s 92ZZC); and
- provide artificial UV tanning services to a person under the age of 18 (cl 13, new s 114).

31. The maximum penalty for the first two offences is a fine not exceeding \$2,000. The maximum penalty for the third is a fine not exceeding \$2,000 (for an individual) or \$10,000 (for a body corporate).

32. The first two offences *prima facie* engage section 25(c) (presumption of innocence) because an accused is required to raise an evidential basis for a reasonable excuse to escape liability. The third offence *prima facie* engages section 25(c) because it puts the onus on the defendant to prove that the person being supplied the UV tanning services produced a document purporting to be an approved evidence of age document indicating that the person was aged 18 or over.

33. We consider that these limitations on the presumption of innocence are justified under section 5 of the Bill of Rights Act. In reaching this conclusion, we have taken into account:

- the importance of the objectives of reducing the spread of serious infectious disease and the harm of UV tanning to young people;
- the nature of the offences and relatively low level of the maximum penalties; and
- that, where the onus is on the defendant, the defendant will usually be in the best position to provide the relevant evidence or to prove the matter.

Conclusion

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

Tania Warburton

Acting Chief Legal Counsel
Office of Legal Counsel

Footnotes

1 New ss 92B – 92F

2 Sylvia Bell (ed.) *Brookers Human Rights Law* (online looseleaf ed, Brookers) at BOR11.01.

3 Subpart 5 of new Part 3A

4 *Neilsen v Attorney-General* [2001] 3 NZLR 433 (CA) at para [34].

5 Application no 56529/00 (25 January 2005).

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