

# Building Bill - Follow up

22 August 2003

Attorney-General

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

## INTRODUCTION

1. We previously provided you with preliminary advice on 12 August 2003 as to whether the Building Bill (the "Bill") (PCO5271/8) was consistent with the New Zealand Bill of Rights Act 1990 ("the Bill of Rights Act"). The purpose of this follow-up advice is to advise you on the outcome of the consultation with the Ministry of Economic Development (MED) about the outstanding issue in relation to the strict liability offences contained in the Bill. In addition, we have now had an opportunity to view version 12 (PCO5271/12) of the Bill. We understand that Cabinet will consider the Bill at its meeting on Monday, 25 August 2003.
2. The outstanding issue in relation to the strict liability offences contained in the Bill and section 25(c) of the Bill of Rights Act has been resolved. We, therefore, consider that although the Bill gives rise to *prima facie* issues in relation to section 21 and section 25(c) of the Bill of Rights Act, the Bill appears to achieve overall consistency with the Act.
3. Additional detail on the issue in relation to the strict liability offences contained in the Bill and section 25(c) of the Bill of Rights Act is set out below.

## SECTION 25(C): THE RIGHT TO BE PRESUMED INNOCENT UNTIL PROVED GUILTY

### Strict liability offences

4. Section 25(c) affirms the right to be presumed innocent until proved guilty according to law. This means that the prosecution in criminal proceedings must prove, beyond reasonable doubt, that the accused is guilty. As we stated in our preliminary advice, strict liability offences raise a *prima facie* issue under section 25(c) of the Bill of Rights Act as the accused is required to *prove* something in order to escape liability.[\[1\]](#)
5. By virtue of section 340 (strict liability and defences), most of the offences contained in the Bill are strict liability offences. For example:
  - Clause 128 (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 186 (Requirement for compliance schedule) - liable to a fine not exceeding \$200,000 (continuing offence at \$20,000 per day).
- Clause 194 (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) - liable to a fine not exceeding \$200,000 (continuing offence at \$20,000 per day).

### **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 that Act.
7. As noted previously, the aim of the Bill is to provide for health, safety, and amenity in the construction and use of buildings. Because of the potentially hazardous outcomes, and danger posed to the health and safety of the public if the Bill or building standards code are not complied with MED considers it is crucial to have an effective enforcement regime. In considering whether the strict liability offences were justifiable we have taken into account MED's explanation that the offences have been framed as a strict liability offences because:

*... a high degree of public welfare protection is required. The consequences of failing to comply with the relevant statutory requirement could have potentially serious or even tragic results. These situations include building work carried out without a building consent; or allowing the public to use a building that has been determined to be dangerous, insanitary or earthquake-prone.*

8. It is also relevant, in terms of justification of a strict liability offence, that these are public welfare regulatory (rather than truly criminal) offences. This means that there will be an onus on individuals operating in the building industry to be aware of, and meet their obligations under the Bill (particularly in light of the need for building practitioners to be licensed, and the certification requirements for the different consent authorities).
9. We therefore consider that, on balance, the limit the strict liability provisions place on section 25(c) of the Bill of Rights Act is justifiable in terms of section 5 of that Act.

## Conclusion

10. We conclude that although the Bill gives rise to prima facie issues in relation to section 21 and section 25(c) of the Bill of Rights Act, the Bill appears to achieve overall consistency with the Act.
11. 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.

|                      |                         |
|----------------------|-------------------------|
| Stuart Beresford     | Val Sim                 |
| Senior Legal Adviser | Chief Legal Counsel     |
| Public Law Group     | Office of Legal Counsel |

Cc Minister of Justice  
Minister of Commerce

In addition to the general disclaimer for all documents on this website, please note the following: This advice was prepared to assist the Attorney-General to determine whether a report should be made to Parliament under s 7 of the New Zealand Bill of Rights Act 1990 in relation to the Building Bill. It should not be used or acted upon for any other purpose. The advice does no more than assess whether the Bill complies with the minimum guarantees contained in the New Zealand Bill of Rights Act. The release of this advice should not be taken to indicate that the Attorney-General agrees with all aspects of it, nor does its release constitute a general waiver of legal professional privilege in respect of this or any other matter. Whilst care has been taken to ensure that this document is an accurate reproduction of the advice provided to the Attorney-General, neither the Ministry of Justice nor the Crown Law Office accepts any liability for any errors or omissions.

---

## Footnotes

1. For additional detail see the advice provided on 12 August 2003.