

Charities Bill 2004

10 March 2004

Attorney-General

LEGAL ADVICE

CONSISTENCY WITH THE NEW ZEALAND BILL OF RIGHTS ACT 1990:
Charities Bill 2004

1 We have considered whether the Charities Bill (PCO 5217/11) is consistent with the New Zealand Bill of Rights Act 1990 (the Bill of Rights Act). We understand that this Bill is to be considered by the Cabinet Legislation Committee on Thursday, 18 March 2004.

2. The purpose of this Bill is to establish a regulatory framework for charities. This framework will enable the Government to collate information about the activities and funding sources of those charities that receive tax relief. Such a framework will establish a procedure that will increase the accountability and transparency of charitable organisations. It is expected that this will lead to enhanced public confidence in charitable organisations.

3. This Bill establishes a Charities Commission. The role of the Commission will be to register and monitor charitable and approved donee organisations. Registration will be voluntary. In order to carry out its role, the Commission will:

- Register charitable entities and approved donees
- Receive annual returns and monitor the activities of charitable organisations and approved donees
- Provide advice and support to the officers and trustees of charitable organisations and approved donees
- Provide advice to the government on issues relating to charities

4. We consider that the Bill does not appear to be inconsistent with the rights and freedoms contained in the Bill of Rights Act. However, the Bill does raise issues that we wish to draw to your attention.

ISSUES OF CONSISTENCY WITH THE BILL OF RIGHTS ACT

Section 21 of the Bill of Rights Act – Unreasonable search and seizure:

5. Clauses 57, 58 and 62 of the Bill, which relate to the production and inspection of documents, have been considered in terms of section 21 of the Bill of Rights Act, which affirms the right to be secure against *unreasonable* search and seizure.

6. Clause 57 of the Bill describes the general authority of the Commission to make inquiries and examinations of any charitable entity, approved donee, or any person for the purposes of ensuring compliance with the Charities Act.

7. Clause 58 of the Bill provides that the Commission may, by notice in writing, require a person to supply copies of documents or other information that the Commission considers necessary to enable it to carry out its functions.

8. Clause 62 of the Bill empowers the Commission to supply information it obtains under clauses 57 and 58 to certain persons for certain purposes.

Search powers under clause 58

9. The requirement to produce documents under statutory authority is a search for the purposes of section 21 of the Bill of Rights Act^[1]. The specific powers of the Commission are contained in clause 58, as it is an offence under clause 61 to refuse or fail to comply with a clause 58 notice without a reasonable excuse; or to provide false or misleading information in purported compliance with a notice. We have therefore gone on to consider whether the powers under clause 58, read in conjunction with clauses 57 and 62, are reasonable for the purposes of section 21.

10. In determining whether these powers are reasonable, we have taken into account the privacy interests of those organisations that are subject to the powers in this Bill. As the Court of Appeal observed in *Tranz Rail Ltd v Wellington District Court*^[2]:

Although expectations of privacy may not be as great in the commercial world as they are in the domestic sphere, corporations as well as human beings do have legitimate privacy expectations. While the extent of those expectations must be measured against the legislative and regulatory environment in which the corporation operates, it is not appropriate to deny corporations any privacy expectations.

11. In considering the distinct legislative context within which these powers appear, we note that although there is no requirement for charitable organisations to register as a charitable entity under this Bill, the incentives for them to do so (in terms of tax relief) are not insignificant. We have also weighed this against the public interest in ensuring that charitable organisations that solicit donations from the public and obtain tax relief are held accountable for the use of those funds. It is reasonable that there is provision for the Commission to effectively monitor how charitable entities use their funds.

12. We consider that the powers under clause 58 are reasonable in terms of intrusion into the privacy expectations of charitable organisations, having regard to clause 57 (which defines the scope of the Commission's inquiry) and clause 62 (which restricts the sharing of the information with other persons). We have also taken into account the following factors:

a. The power to demand the production of documents is less of an intrusion into the expectations of privacy than a power of entry^[3].

b. The Commission is only able to issue a notice under clause 58 if it considers that this is reasonably necessary for the purposes of enabling the Commission to carry out its functions under the Act. The Court of Appeal has held that the word "necessary" in the context of search powers must be construed in such a way as to

make the legislation workable^[4]. The phrase, in this context, means that the range of information specified in the notice must be no greater than what the Commission reasonably requires to carry out its functions. It also means that the Commission must consider other reasonable means of gaining access to the information specified in the notice before notifying the person ^[5].

c. Clause 62 of the Bill, which appropriately restricts the use of information obtained under clauses 57 and 58. The clause provides that the Charities Commission has the discretion to make any information or documents that it obtains under clause 57 and 58 available to any other person for the purposes of enabling that person to carry out his or her functions under the Charities Act. The Charities Commission may also make the information available to any person for the purposes of detecting and prosecuting offences against any other Act. However, these documents cannot be used in criminal proceedings brought against the person from whom the information or documents were acquired or any person to whom the information or documents relate for breaches of other legislation.

Conclusion

13. On balance, we consider that the powers of search and seizure provided in clause 58 of the Bill are reasonable for the purposes of section 21 of the Bill of Rights Act. In reaching this conclusion, we have given particular emphasis to the purpose of this legislation, and the need to create a workable, consistent monitoring regime.

14. We have concluded that the Bill does not appear to be inconsistent with the Bill of Rights Act.

15. In accordance with your instructions, we attach a copy of this opinion for referral to the Minister of Justice.

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cc Minister of Justice

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Footnotes:

1. New Zealand Stock Exchange v Commissioner of Inland Revenue [1992] 3 NZLR 1 (PC).
2. Tranz Rail Ltd v Wellington District Court [2002] 3 NZLR 780, 790
3. Tranz Rail v Wellington District Court [2002] 3 NZLR 780, 791 - 792
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