

Immigration Advisers Licensing Bill

20 May 2005

Attorney-General

LEGAL ADVICE

CONSISTENCY WITH THE NEW ZEALAND BILL OF RIGHTS ACT 1990: **IMMIGRATION ADVISERS LICENSING BILL 2005**

1. We have considered whether the Immigration Advisers Licensing Bill ("the Bill") is consistent with the New Zealand Bill of Rights Act 1990 ("the Bill of Rights Act"). We understand that the Bill is to be considered by Cabinet at its meeting on Monday, 30 May 2005.
2. We understand that the Bill is likely to be subject to further amendments before it is submitted to Cabinet, and we will provide you with further advice should this prove necessary.
3. The Bill establishes an occupational licensing framework under which only those individuals and organisations that hold licenses are authorised to provide potential migrants with advice on immigration matters, unless they are exempted.
4. The Bill is directed at ensuring that the interests of potential migrants are protected when receiving immigration advice and that New Zealand's reputation as a migration destination of choice is enhanced (see clause 3 of the Bill). The provisions of the Bill therefore extend to those providing advice both in New Zealand and overseas.
5. The Bill raises issues of potential inconsistency with section 21 (the right to be secure against unreasonable search and seizure). We have come to the conclusion that the entry and inspection powers in the Bill are reasonable and therefore appear consistent with section 21.
6. The Bill:
 - establishes the Immigration Advisers Authority, an independent statutory body that will administer the licensing regime;
 - provides that the Authority may require prospective advisers to meet minimum levels of competence before being able to provide advice;
 - requires that only persons who are considered to be "fit and proper" may qualify to be issued with a license;
 - recognises that immigration advisers can be issued with differentiated licenses depending on their qualifications, knowledge and experience;
 - establishes a code of conduct for immigration advisers that sets out standards of professional and ethical conduct that advisers are required to abide by;

- sets up a monitoring and complaint and disciplinary system under which immigration advisers may be investigated and subject to sanctions; and
- provides for a range of offences for more serious breaches of the Act.

Section 21: right to be secure against unreasonable search and seizure

7. Section 21 provides the right to be secure against unreasonable search and seizure. There are two limits 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.
8. The Bill includes two provisions conferring entry and inspection powers. As stated above the purpose of the Bill is to protect the interests of potential migrants when receiving immigration advice and to protect and enhance New Zealand's reputation as a migration destination of choice. In order to ensure the effectiveness of the licensing regime it was considered necessary to include inspection powers enabling authorised persons to ensure that the requirements under both the licensing regime and the Act are being met by licensed immigration advisers.
9. We note that significant problems can arise for potential immigrants where immigration advisers fail to provide services of an appropriate standard, are fraudulent or use unlawful practices such as retaining passports. The entry and inspection powers therefore serve an important purpose.

Entry and Inspection powers

10. Clause 41 of the Bill, which deals with the general administration of the licensing regime, provides that the Authority or any person authorised by the Authority may enter at any reasonable time any premises where any licensed immigration adviser works or has worked in the last 2 years. The Authority, or any person authorised, may also question any licensed immigration adviser and require the production of documents for inspection. The purpose of this clause is to ensure compliance with the licensing regime, including the code of conduct and competency standards for licensed immigration advisers. We consider that clause 41 constitutes a power of search and seizure for the purposes of section 21 of the Bill of Rights Act.
11. We consider that the powers of entry and inspection in clause 41 are reasonable and therefore consistent with section 21 because:
 - (a) The purposes of the inspection are limited to administering the licensing regime in respect of persons who are licensed to provide immigration advice (clause 40(1));
 - (b) The manner in which the powers can be exercised are concisely stated and limited, particularly with respect to authorisation of inspectors (clause 43(1)), the places that may be searched (clause 41(1)(a)), the requirement to produce evidence of their identity, authority to enter and the powers conferred on them (clause 43(2));

(c) A person has available to them the defence of protection from self-incrimination (clause 42A);

(d) An inspection of a dwellinghouse requires consent from the occupier or a warrant (clause 42B).

12. Clause 42 of the Bill deals with the investigation of suspected offences and provides for the Authority, or a person authorised by the Authority, to enter any premises in which a person provides immigration advice and, after informing the person of their suspicions, require a person to produce documents for inspection. The purpose of the clause is to enable investigating officers, where they have good cause to suspect that an offence under the Act is being committed or has been committed, to investigate licensed immigration advisers. Such offences include providing immigration advice without a licence, providing false or misleading information and employing an unlicensed immigration adviser. Clause 42 constitutes a search and seizure for the purposes of section 21 of the Bill of Rights Act.

13. We consider that the powers of entry and inspection in clause 42 are reasonable and therefore consistent with section 21 because:

(a) The authorised purpose, which is limited to investigating offences under the Act, is explicitly spelt out in the Act (clause 41(2));

(b) The power may only be exercised where the Authority or the person authorised by the Authority have good cause to suspect that a person is committing or has committed an offence under the Act (clause 42(a));

(c) The manner in which the powers can be exercised are concisely stated and limited, particularly with respect to authorisation of inspectors (clause 43(1)), the places that may be searched (clause 42(a)), the requirement that before an investigating officer may request documents from a person they must first inform that person of their suspicions that an offence is being committed or has been committed (clause 42(b)), the requirement to produce evidence of their identity, authority to enter and the powers conferred on them (clause 43(2));

(d) The types of information that can be seized are clearly set out in the relevant provision and restricted to achieving a specific purpose (evidence of the commission of an offence clause 42(b)(iii));

(e) A person has available to them the defence of protection from self-incrimination (clause 42A);

(f) An inspection of a dwellinghouse requires consent of the occupier or a warrant (clause 42B).

Conclusion

14. Overall, we have formed the view that the entry and inspection powers, in light of the restrictions and safeguards outlined above, are reasonable and therefore, not inconsistent with section 21 of the Bill of Rights Act.

15. In accordance with previous practice, 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 Immigration if you agree.

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