

# Public Finance (State Sector Management) Bill

1 December 2003

Attorney-General

Legal Advice

Consistency With The New Zealand Bill Of Rights Act 1990:  
Public Finance (State Sector Management) Bill

1. On 19 November 2003, we provided you with advice on the consistency of the Public Finance (State Sector Management) Bill (PCO 5390/6) with the New Zealand Bill of Rights Act 1990 (the "Bill of Rights Act"). We concluded that the Bill, as drafted at that time, did not appear to be inconsistent with the Bill of Rights Act. We have now had the opportunity to consider the version of the Bill (PCO 4763/9) that will be introduced to the House of Representatives on Wednesday, 3 December 2003.
2. The key changes to the Bill from the earlier version that we provided advice on is that Part 8 of the Bill - which included some amendments to the Electoral Act 1993 - has been removed.
3. The following summary provides you with:
  - a brief overview of the contents of the Bill,
  - a note of the provisions of the Bill which appear to raise issues under one of the sections of the Bill of Rights Act, and
  - our conclusion as to whether the Bill are consistent 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

### Overview of the Bill

5. The Bill would consolidate and amend the law governing the use of public financial resources. To that end, the Bill specifies the principles for responsible fiscal management in the conduct of fiscal policy and provides a framework for Parliamentary scrutiny of the Government's expenditure proposals and the Government's management of its assets and liabilities. The Bill also establishes lines of responsibility for effective and efficient management of public financial resources and specifies the minimum financial and non-financial reporting obligations of Ministers, departments, Offices of Parliament and organisations specified therein. In this regard, provision is made for the application of financial management incentives and for the accountability of these organisations. The proposed amendments should

safeguard public assets by providing statutory authority and control for the borrowing of money; issuing of securities; investment of funds, operation of bank accounts and giving of guarantees.

## **Issues of Inconsistency with the Bill of Rights Act**

### **Section 14: the right to freedom of expression**

6. A number of provisions in the Bill require representatives of an agency to supply information pertaining to the agency or activities of the agency in question. In other cases members or prospective members are required to disclose their interests (for example clauses 38, 104, 133 and 174). We have concluded that statutory obligations of this nature are clearly justifiable on the face of the Bill. They accord with the purpose of the State Sector Act 1998. Further there are a range of checks and balances within the Bill limiting the nature of the information provided and the manner in which this information may be used.

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

7. The Bill proposes to extend the inspection powers of the State Services Commissioner to enable the Commissioner to gather information necessary to fulfil his or her public sector functions. We have formed the view that the extended powers fit within the ambit of section 21 of the Bill of Rights. While these powers are broad in scope, we consider - that in light of the purpose behind the powers and the fact that the Commissioner only has limited disciplinary powers where there is evidence of wrongdoing - they are reasonable for the purposes of section 21.

### **Section 25(c): the right to be presumed innocent**

8. The Bill contains an offence provision that contains a reverse onus whereby the accused must prove something in order to escape liability (clause 207). We are of the opinion that this provision constitutes a "justified limitation" on the right to be presumed innocent that is protected by section 25(c) of the Bill of Rights Act. In reaching this view, we have taken into consideration the fact that the offence in question may be described as public welfare regulatory in nature, the penalties are at the lower end of the scale and the importance of ensuring that the members of a Crown entity are aware of, and meet their bookkeeping obligations under the Bill

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

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

## **FULLER ANALYSIS: THE BILL OF RIGHTS ACT ISSUE RAISED BY THE BILL**

### **Section 14 - the right to freedom of expression**

10. The right to freedom of expression in section 14 extends to all forms of communication that attempt to express an idea or meaning.<sup>[1]</sup> The right extends to include conduct<sup>[2]</sup> as well as silence, and may apply irrespective of the content or form of the expression.<sup>[3]</sup>
11. A number of provisions in the Bill require an agency or conceivably a representative of an agency to supply information pertaining to the agency or activities of the agency in question. In other cases, members or prospective members of Crown entities or Crown entity companies are required to disclose their interests, including monetary value if quantifiable (for example, Clauses 38, 104, 133 and 174).
12. We have concluded that statutory obligations of this nature are clearly justifiable on the face of the Bill. The provisions:
  - accord with the purpose of the State Sector Act 1998 to promote responsible management and integrity in the State sector, which includes accountability and transparency;
  - are limited to information directly related to the agency in question or information pertaining to the relationship between a member's interests (pecuniary or otherwise) and those of the relevant agency; and
  - the Bill provides a number of limitations in respect of the dissemination of information, for example section 102A(1)(a) states that "a request for information can be refused if the withholding of information is necessary to protect the privacy of a person".
13. In our view such provisions are clearly justifiable.

### **Section 21: 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 powers - clause 37**

15. Clause 37 of the Bill amends the State Sector Act 1988 by repealing section 8 and substituting a new provision which extends the State Services Commissioner's power to conduct inspections and investigations. Under the current section, the Commissioner can only do these things when carrying out his or her functions in respect of the Public Service departments. The proposed amendment will allow the Commissioner to also carry out inspections and investigations when he or she provides advice and guidance

to employees within the State services on matters that affect their conduct. Further, the Commissioner will be authorised to exercise these powers in response to a request from the head of a part of the State services or a ministerial direction.

16. The nature and extent of the Commissioner's inspection and investigation powers indicates they are covered by section 21 of the Bill of Rights Act. We feel, however, that these powers are reasonable, particularly as they are less invasive than a search and that the purpose of these powers is to enable the Commissioner to gather information necessary to fulfil his or her public sector functions. Further, the requirement to produce information does not override the privilege against self-incrimination. We also note that the Commissioner does not have the power to take disciplinary action against individuals of departments other than the State Services Commission. Although instances of wrongdoing may be referred to head of the part of the State services concerned, who will have the authority to take appropriate action, if necessary.

### **Section 25(c): Right to be presumed innocent**

17. Section 25(c) of the Bill of Rights Act provides for the right to be presumed innocent until proved guilty according to law. In *R v Wholesale Travel Group*,<sup>[4]</sup> the Supreme Court of Canada held that the right to be presumed innocent requires that an individual must be proven guilty beyond reasonable doubt and that the state must bear the burden of proof.
18. 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. In general, defendants should not be convicted of strict liability offences where an absence of fault or a "reasonable excuse" exists.
19. A statutory defence reverses the usual burden of proof by requiring the defendant to 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. We consider, therefore, that as the defendant is required prove something in order to escape liability, the use of strict liability offences is contrary to the presumption of innocence captured by section 25(c) of the Bill of Rights Act.

### **Clause 207 (accounting records to be kept) of the Bill**

20. Clause 207 of the Bill provides that if the board of a Crown entity fails to comply with the requirement to keep accurate accounting records, every member of the Crown entity commits an offence. However, the provision provides that the member has a defence if he or she took all reasonable and proper steps to ensure that the board complied with these requirements or, in the circumstances, he or she could not reasonably have been expected to

take such steps. By being framed as a reverse onus offence, this provision places a burden of proof on the defendant, and, therefore, gives rise to a prima facie issue under section 25(c) of the Bill of Rights Act.

21. The aim of the Bill, as stated above, is to put in place lines of responsibility for effective and efficient management of public financial resources and to specify the minimum financial reporting obligations of Crown entities. To this end, the Treasury has indicated that the offences have been framed as a strict liability offence to ensure that there is an onus on the members of a Crown entity to be aware of, and meet their bookkeeping obligations under the Bill. It is also relevant in terms of justification of a reverse onus provision that these are public welfare regulatory (rather than truly criminal) offences and that the penalties are not at the higher end of the scale. The penalty imposed by clause 207 of the Bill is a maximum fine of \$5,000.

22. We therefore consider that, on balance, the limit that the reverse onus provision in clause 207 places on section 25(c) of the Bill of Rights Act, is justifiable in terms of section 5 of that Act.

## CONCLUSION

23. We consider that the Bill does not appear to be inconsistent with the rights and freedoms contained in the Bill of Rights Act.

24. 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 State Services, if you agree.

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CC: Minister of Justice  
Minister of State Services  
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## Footnotes

1. R v Keegstra [1990] 3 SCR 697,729,826.
2. Irwin Toy Ltd v A-G (Quebec) (1989) 58 DLR (4th) 577 (SCC), at 607.
3. Jaffe v Bradshaw (1998) 16 CRNZ 122.
4. R v Wholesale Travel Group 84 DLR (4th) 161, 188 citing R v Oakes [1986] 1 SCR 103.