

Unsolicited Electronic Messages Bill

22 June 2005

Attorney-General

LEGAL ADVICE

CONSISTENCY WITH THE NEW ZEALAND BILL OF RIGHTS ACT 1990: UNSOLICITED ELECTRONIC MESSAGES BILL

1. We have considered whether the Unsolicited Electronic Messages Bill (the "Bill") (PCO 6002/5) is consistent with the New Zealand Bill of Rights Act 1990 (the "Bill of Rights Act"). We understand that the Bill will be considered by the Cabinet Legislation Committee at its meeting on Thursday, 23 June 2005.
2. We have concluded that the Bill appears to be consistent with the Bill of Rights Act. In reaching this conclusion, we considered potential issues of consistency with sections 14, 21 and 25(c) of the Bill of Rights Act. Our analysis of these potential issues is set out below.
3. We understand that a subsequent version of the Bill with minor amendments will be provided to the Cabinet Legislation Committee for its consideration. Officials from the Ministry of Economic Development have advised us that these changes are unlikely to give rise to issues under the Bill of Rights Act. If any of the amendments do give rise to a Bill of Rights Act issue, we will advise you immediately.
4. 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 the Bill's consistency with the Bill of Rights Act.
5. 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

6. The Bill seeks to regulate electronic messages sent for certain marketing or promotional purposes in order to support efforts to curb the growth of unsolicited electronic messages (spam). The Bill proposes to achieve this by:
 - prohibiting commercial and promotional electronic messages from being sent to a person in New Zealand without that person's consent;

- requiring all commercial and promotional electronic messages to include accurate information about the person who authorised the sending of the message and a functional unsubscribe facility; and
 - restricting the supply, acquisition and use of address-harvesting software and any electronic address list produced using that software.
7. The enforcement regime under the Bill is a civil penalty regime, with the emphasis being on Internet and telecommunications service providers taking action in response to customer complaints, and with the government enforcement agency acting as the overseer and backstop:

Issues of Inconsistency with the Bill of Rights Act

Section 14: The right to freedom of expression

8. The Bill contains a number of provisions that limit the right to freedom of expression. For instance, clause 9 prohibits a person from sending unsolicited commercial electronic messages that have a New Zealand link, or causing such messages to be sent. Similarly, clause 10 prohibits a person from sending promotional electronic messages that have a New Zealand link, or causing such messages to be sent, to any person who has opted out of receiving messages from that sender. We consider that these provisions are justifiable in terms of section 5 of the Bill of Rights Act. They help curb the growth of spam in New Zealand and contain various limitations and safeguards to avoid capturing legitimate messages.

Section 21: The right to be secure from unreasonable search and seizure

9. The Bill allows the government enforcement agency to apply for and exercise a search warrant. We have concluded that this power is consistent with section 21 of the Bill of Rights Act. In reaching this conclusion, we have taken into account the process of prior authorisation for the search warrant and the limitation on the manner in which it may be executed.

Section 25(c): The right to be presumed innocent until proven guilty

10. The Bill contains a number of strict liability offences, which require the respondent to prove something in order to escape liability (clauses 9(1), 10(1), 11(1) and 12(1)). We note that there is some debate as to whether section 25(c) of the Bill of Rights Act applies to civil penalty regimes. Irrespective of this debate, we are of the opinion that these provisions would constitute a 'justified limitation' on the right to be presumed innocent. In reaching this view, we have taken into consideration the fact that the offences in question may be described as public welfare regulatory in nature. We have also considered the importance of ensuring that individuals who send commercial electronic messages or promotional electronic messages are aware of and meet their obligations under the Bill.

FULLER ANALYSIS: THE BILL OF RIGHTS ACT ISSUES RAISED BY THE BILL

Section 14: freedom of expression

11. Section 14 of the Bill of Rights Act provides:

"Everyone has the right to freedom of expression, including the freedom to seek, receive, and impart information and opinions of any kind and in any form."

12. The right to freedom of expression extends to all forms of communication that attempt to express an idea or meaning.^[1] The right has been interpreted as including the freedom to send and receive information^[2] as well as the right not to be compelled to say certain things or to provide particular information.^[3] The right extends to political and religious expression as well as commercial speech (such as advertising).^[4] Overseas case law suggests, however, that not all forms of expression are equally deserving of protection and commercial speech is considered to reside within the periphery of the right.^[5] The Courts have taken the view that commercial expression is of less importance than political or religious expression and consequently limitations on the right in this context are easier to justify.^[6]

Prohibiting unsolicited commercial electronic messages

13. Clause 9 of the Bill (unsolicited commercial electronic messages must not be sent) prohibits a person from sending unsolicited commercial electronic messages that have a New Zealand link, or causing such messages to be sent. For the purposes of the Bill, an unsolicited commercial electronic message is a message:

- sent to an electronic address using a telecommunications service;
- that has, as its primary purpose, marketing or promoting goods, services, land, an interest in land, or a business or investment opportunity, or assisting or enabling a person to obtain dishonestly a financial advantage or gain from another person;
- that the recipient has not consented to receiving.

This provision appears to be prima facie inconsistent with section 14 of the Bill of Rights Act.

14. Where an issue arises a provision 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. The section 5 inquiry is essentially two-fold: whether the provision serves an important and significant objective; and whether there is a rational and proportionate connection between the provision and that objective.^[7]

15. The Ministry of Economic Development has advised that spam (which is usually sent in bulk via the Internet) is a concern as it imposes significant costs on users of the Internet and other communications mediums as well as service providers. Spam also reduces consumer confidence in the use of the Internet for the purposes of e-commerce and acts as an impediment to the effective use of e-mail. The indiscriminate sending of offensive or pornographic material through spamming is a particular concern because of the harmful effect it can have on the young and the vulnerable. The purpose of this proposal is to curb the growth of spam in New Zealand and provide a basis for this country to participate in

international regulatory arrangements to address the problem of spam. We consider that this a significant and important objective and, therefore, the first limb of the section 5 inquiry is satisfied.

16. In our view, the proposal to prohibit the sending of unsolicited commercial electronic messages is also rationally and proportionately connected to this objective. The current legislative framework for addressing issues associated with spam and technical fixes such as filters have not been successful in reducing spam traffic. The prohibition on sending unsolicited commercial electronic messages goes to the heart of the problem by targeting the problem messages.
17. We note that the Bill contains various limitations and safeguards to avoid capturing legitimate messages. For example, there is no prohibition on sending a commercial electronic message if the recipient has given his, her or its prior consent to receiving that message and consent will be inferred where the message in question is relevant to a pre-existing relationship. There are also various safeguards to avoid capturing people who unwittingly send spam. For instance, there are exemptions for Internet Service Providers because spam may fall through their filters, exemptions for persons who sent the message by mistake or did not know that the message had a New Zealand link, and exemptions for users whose computers are affected by a malicious software programme or computer virus that takes control of their e-mail programme. We also note that civil penalties will be scaled according to the number of messages sent.
18. We therefore consider that, while clause 9 of the Bill is prima facie inconsistent with section 14 of the Bill of Rights Act, it is justified in terms of section 5 of that Act.

Restricting promotional electronic messages

19. Clause 10 of the Bill (promotional electronic messages must not be sent to person who opts out) prohibits a person from sending a promotional electronic messages that has a New Zealand link, or causing such messages to be sent, to any person who has opted out of receiving messages from that sender. Again, this provision appears to be prima facie inconsistent with section 14 of the Bill of Rights Act.
20. We consider, for many of the same reasons set out in paragraphs 15 through 17 above, that this provision is justified in terms of section 5 of the Bill of Rights Act. In reaching this conclusion, we also note that additional safeguards have been inserted to avoid capturing promotional electronic messages, particularly those of a political, religious or educational nature, that are sent for a legitimate purpose. The restriction on promotional electronic messages only takes effect once an unwilling recipient has sent a message to the effect that he, she or it does not want to receive, at that electronic address, any further promotional electronic messages from the sender. Further, the opting out takes effect only at the end of a period of 5 working days from the day on which the message was sent - thereby providing sufficient time for the sender to adjust his or her mailing list.

Other provisions affecting freedom of expression

21. Clause 11 of the Bill provides that commercial electronic messages and promotional electronic messages must include accurate sender information. This measure compels the provision of information or publication of certain statements, and therefore appears to be prima facie consistent with section 14 of the Bill of Rights Act.

22. We have concluded that an obligation of this nature is clearly justifiable on the face of the Bill. The provision promotes accountability and enables people to be traced for law enforcement purposes. By doing so, it addresses a key problem with spam, namely that spammers typically hide their identities, or fake others, so they cannot be traced or contacted. This measure, therefore, goes to the heart of the problem caused by unsolicited electronic messages.
23. Clauses 15 through 17 of the Bill prohibit the supply, acquisition and use of address harvesting software and harvested address lists in connection with sending unsolicited commercial electronic messages or promotional electronic messages. These provisions impact on the right to seek and impart information. However, they impact on the right only to the extent that address harvesting software and harvested address lists provide an automated and comparatively cheap way of obtaining large address lists. The prohibition would not preclude anyone from manually compiling lists of e-mail addresses from chat rooms and Internet web-sites. For this reason, we do not consider that these provisions raise a prima facie issue with section 14 of the Bill of Rights Act.

Section 21: The right to be secure from unreasonable search and seizure

24. Clauses 48 to 52 empower the government enforcement agency to apply for and exercise a search warrant. These clauses set out the powers conferred by the search warrant, requirements when executing the search warrant, and disposal of things seized under the warrant.
25. We have concluded that these provisions are consistent with section 21 of the Bill of Rights Act, which provides that everyone has the right to be secure against unreasonable search and seizure. Key factors in reaching this conclusion include the process of prior authorisation for the search warrant and limitation on the manner in which it may be executed, such as the requirements of entry at reasonable times.

Section 25(c): The right to be presumed innocent until proven guilty

26. Section 25(c) affirms the right to be presumed innocent until presumed guilty according to law. In *R v Wholesale Travel Group*[\[8\]](#), the Supreme Court of Canada held that the right to be presumed innocent until proven guilty requires at a minimum that an individual must be proven guilty beyond reasonable doubt, and that the state must bear the burden of proof.
27. 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 that defence. In general, defendants should not be convicted of strict liability offences where an absence of fault or a "reasonable excuse" exists.
28. 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 where the defendant is required to 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.

Strict liability offences contained in the Bill

29. The Bill contains a number of strict liability offences, which are as follows:

- clause 9(1) (Unsolicited commercial electronic messages must not be sent) - liable to a fine not exceeding \$200,000 if the perpetrator is an individual, \$500,000 if the perpetrator is an organisation.
- clause 10(1) (Promotional electronic messages must not be sent to persons who opt out) - liable to a fine not exceeding \$50,000.
- clause 11(1) (Commercial electronic messages and promotional electronic messages must include accurate sender information) - liable to a fine not exceeding \$200,000 if the perpetrator is an individual, \$500,000 if the perpetrator is an organisation.
- clause 12(1) (Commercial electronic messages and promotional electronic messages must contain functional unsubscribe facility) - liable to a fine not exceeding \$200,000 if the perpetrator is an individual, \$500,000 if the perpetrator is an organisation.

30. We note that the Bill establishes a civil penalty regime for dealing with unsolicited electronic messages. Section 25(c) is generally considered to apply only to criminal proceedings. Overseas case law, however, suggests that in proceedings that result in the imposition of civil penalties, the respondent has the protection of the various fair trial rights if that penalty has a 'punitive element'.^[9] It is possible to argue that the fines imposed for the offences listed in the paragraph above have a punitive character and, thus, the right set out in section 25(c) of the Bill of Rights could apply. We note, however, that this issue has yet to be determined in New Zealand and it is unclear whether the courts would agree that individuals facing sanctions under a civil penalty regime have the protections provided for in section 25(c) of the Bill of Rights Act.

31. Irrespective of the debate as to whether section 25(c) of the Bill of Rights Act applies to civil penalty regimes, we consider that these offences would amount to a reasonable limit on the right to be presumed innocent in terms of section 5 of that Act. The aim of the Bill is to regulate the sending of electronic messages certain marketing or promotional purposes, and to provide a disincentive to spammers who gain commercial advantage out of responses to unsolicited commercial electronic messages. To this end, the Ministry of Economic Development has indicated that the offences have been framed as strict liability offences to ensure that there is an onus on individuals who send commercial electronic messages or promotional electronic messages are aware of and meet their obligations under the Bill.

32. The penalties for these liability clauses include provisions to fine offenders up \$200,000 if the perpetrator is an individual and \$500,000 if the perpetrator is an organisation, and are therefore not at the 'lower end of the scale'. We have taken into account the Ministry of Economic Development's explanation that the penalties have been set at this level in order:

"to be commensurate with the potential commercial advantage to be gained from responses to unsolicited commercial electronic messages. The maximum amounts of \$200,000 for individuals and \$500,000 for organisations are based on the principle of setting maximum amounts which are sufficient to operate as a financial disincentive to prospective professional spammers who might look to base themselves in New Zealand."

33. We therefore consider that, on balance, the limit the strict liability offences place on the right to be presumed innocent is justifiable in terms of section 5 of the Bill of Rights Act.

Conclusion

34. For the reasons given above, we have concluded that the Bill appears to be consistent with the Bill of Rights Act.

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Footnotes

1 R v Keegstra [1990] 3 SCR 697, 729, 826

2 Federated Farmers of New Zealand v New Zealand Post [1992] 3 NZBORR 339.

3 RJR MacDonald v Attorney-General of Canada (1995) 127 DLR (4th)

4 Irwin Toy Ltd v A-G (Quebec) (1989) 58 DLR (4th) 577 (SCC)

5 RJR MacDonald v Attorney-General of Canada (1995) 127 DLR (4th) 1; see on this point the dissenting judgment of La Forest J.

6 See Richard Claydon & Hugh Tomlinson, *The Law of Human Rights* (Oxford University Press, Oxford, 2000), Vol. 1, 15.171 - 15.176.

7 See Moonen v Film Literature Board of Review [2000] 2 NZLR 9 and R v Oakes (1986) 26 DLR (4th)

8 R v Wholesale Travel Group 84 DLR (4th) 161, 188 citing R v Oakes [1986] 1 SCR 103.

9 See *Benham v the United Kingdom* (1996) 22 EHRR 293, para 56, and *Lauko v Slovakia* (1998) 33 EHRR 994, para 58

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