

Walking Access Bill

2 April 2008

Attorney-General

LEGAL ADVICE

CONSISTENCY WITH THE NEW ZEALAND BILL OF RIGHTS ACT 1990: WALKING ACCESS BILL

1. We have considered the Walking Access Bill (PCO 12901/8) ('the Bill') for consistency with the New Zealand Bill of Rights Act 1990 ('the Bill of Rights Act'). We understand that the Bill is likely to be considered by the Cabinet Legislation Committee at its meeting on 3 April 2008.
2. We have concluded that the Bill appears to be consistent with the rights and freedoms affirmed in the Bill of Rights Act. In reaching this conclusion we have considered possible inconsistencies with sections 19(1) (freedom from discrimination), 21 (unreasonable search and seizure) and 25(c) (presumption of innocence) of that Act. Our analysis under those sections is set out below.

PURPOSE OF THE BILL

3. The Bill establishes a new Crown entity called the New Zealand Walking Access Commission ('the Commission'). The purpose of the Commission is to provide leadership and co-ordination in the provision of public access to the outdoors, the provision of information about the location of existing public access, the provision of a code of responsible conduct for the guidance of the public and landholders in respect of recreational access to the outdoors, and facilitating and funding the negotiation of new public access across private land.

POSSIBLE INCONSISTENCIES WITH THE BILL OF RIGHTS ACT

Freedom from Discrimination

4. Section 19(1) of NZBORA affirms the freedom from discrimination on prohibited grounds set out section 21 of the Human Rights Act 1993 including race. In determining whether a provision is inconsistent with section 19(1) we consider whether:
 - a) the provision draws a distinction on one of the prohibited grounds in section 21 of the Human Rights Act; and

b) that distinction gives rise to disadvantage of a particular group.

5. Clause 8(3) of the Bill requires the Minister to appoint at least one member to the Commission who has knowledge of Tikanga Māori. This provision appears to draw a distinction indirectly on the basis of race because a person of Māori descent is more likely to have the skills necessary for appointment under this provision. However, it is arguable whether any disadvantage would arise because people who do not have knowledge of Tikanga Māori can still be appointed to the Commission if they possess other relevant skills.
6. If some disadvantage does arise the provision would nevertheless be justified under section 5 of the Bill of Rights Act. A limitation on a right or freedom might be justifiable where:
 - the provision serves an important and significant objective; and
 - there is a rational and proportionate connection between the provision and that objective.^[1]

☐ The purpose of the provision is to ensure that the Commission has the full range of expertise necessary to exercise its functions under the Act. Several functions of the Commission could require knowledge of Tikanga Māori such as negotiating access over private land including Māori land. We also note that clause 30 of the Bill requires the Commission to comply with Te Ture Whenua Māori Act 1993.

☐ Requiring the Minister to appoint at least one member with the necessary knowledge in Tikanga Māori is rationally connected to the goal of ensuring that the Commission has the relevant expertise. We have also concluded that it is proportionate because the Commission must have at least five members (and may have up to eight) and the Minister is not precluded from appointing people who do not possess knowledge of Tikanga Māori.

Search and Seizure

☐ Section 21 of the Bill of Rights Act provides the right to be secure against unreasonable search and seizure. Clause 54 of the Bill empowers an enforcement officer who believes, on reasonable grounds, that a person has committed, is committing, or is about to commit, an offence to provide:

- a) his or her full name, residential address, and date of birth; and
- b) evidence of his or her full name, residential address, and date of birth.

☐ Arguably, the requirement to provide personal details, as well as evidence of those details, could constitute a search for the purposes of section 21. In considering the reasonableness of the provision, we note that the circumstances in which the power may be exercised are limited to situations where the enforcement officer has a reasonable belief an

offence has been, is being, or is about to be committed. This means that, in situations where the belief is not based on reasonable grounds, it could be found to be unlawful. Secondly, the information which the person is required to provide is narrowly prescribed by the Bill and its purpose is closely linked to the practicalities of enforcement.

☐ For these reasons, we have concluded that the search power set out in clause 54 is reasonable for the purposes of section 21.

Presumption of Innocence

☐ Section 25(c) of the Bill of Rights Act affirms the right of everyone to be presumed innocent until proven guilty. Strict liability offences engage the presumption of innocence because, once the prosecution proves the defendant committed the act in question, the defendant must prove a reasonable excuse or some other defence on the balance of probabilities to escape liability. Where a defendant is unable to prove the defence, he or she could be convicted even if reasonable doubt exists as to his or her guilt. The presumption of innocence requires the Crown to prove all the elements of an offence beyond reasonable doubt.

☐ Clause 57 of the Bill creates several strict liability offences:

a) taking any plant (other than a noxious weed) from a walkway or from land adjacent to a walkway;

b) possessing a firearm while on a walkway;

c) discharging a firearm on a walkway or on land adjacent to a walkway;

d) bringing a horse or dog (other than a guide dog) on to a walkway;

e) setting a net, trap, or snare, or places poison or explosives on a walkway or on land adjacent to a walkway (except a net or trap set for fishing in a water body or lake adjacent to a walkway);

f) lighting a fire on a walkway (other than in a fireplace provided by the controlling authority responsible for the walkway);

g) failing to extinguish a fire before leaving the walkway;

h) using a vehicle (except a bicycle) on a walkway; or

i) erecting a structure on or over a walkway.

☐ We consider a number of factors in determining whether strict liability offences can be justified under section 5 of the NZ Bill of Rights Act:

a) the nature and context of the conduct to be regulated;

b) the penalty level; and

c) the ability of the defendant to exonerate themselves.

☐ The offences in question could be described as regulatory in nature. In some cases (such as possession of a firearm) items brought onto the walkway could be used for the commission of more serious offences but, in such cases, a prosecution would proceed under another enactment.

☐ A reversal of the burden of proof is less of a concern where the penalty is relatively low and therefore has a less significant impact on the accused. As a general principle, strict liability offences should carry penalties at the lower end of the scale. Clause 61 of the Bill sets out the penalties for strict liability and mens rea offences (offences which require a mental element to be proved). The penalty for committing an offence under clause 57 is \$5000, compared to \$10,000 for a mens rea offence under clause 59. Given the nature of the offences in question, the penalty level appears to be consistent with strict liability.

☐ Strict liability offences can also be justified where the offence turns on a particular matter that is *peculiarly* within the knowledge of the defendant. In the situations described in clause 57, the defendant will generally be able to make out a reasonable excuse more easily than the Crown could prove the opposite (for example why it was necessary to bring a dog or a horse onto the walkway).

☐ For these reasons, we have concluded that the strict liability offences in the Bill appear to be consistent with the Bill of Rights Act.

CONCLUSION

☐ Based on the analysis set out above, we have concluded that the Bill appears to be consistent with the rights and freedoms affirmed in the Bill of Rights Act.

Michael Petherick Acting Manager, Ministerial Advice Office of Legal Counsel	Stuart Beresford Manager, Bill of Rights/Human Rights Office Public Law Group
--	--

Footnote

1 *Moonen v Film and Literature Board of Review* [2000] 2 NZLR 9

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 Walking Access 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.