

10 March 2023

Hon David Parker, Attorney-General

Consistency with the New Zealand Bill of Rights Act 1990: Severe Weather Emergency Legislation Bill

Purpose

1. We have considered whether the Severe Weather Emergency Legislation Bill (the Bill) is consistent with the rights and freedoms affirmed in the New Zealand Bill of Rights Act 1990 (the Bill of Rights Act).
2. We have not yet received a final version of the Bill. This advice has been prepared in relation to the latest version of the Bill (PCO 25410/5.0). We have prepared it in an extremely short timeframe due to the compressed timeframes for the Bill. We will provide you with further advice if the final version includes amendments that affect the conclusions in this advice.
3. We have concluded that the Bill appears to be consistent with the rights and freedoms affirmed in the Bill of Rights Act. In reaching that conclusion, we have considered the consistency of the Bill with s 14 (freedom of expression) and s 21 (freedom from unreasonable search and seizure). Our analysis is set out below.

The Bill

4. The Bill is an omnibus bill that aims to assist recovery and improve resilience for the areas affected by severe weather events, and their councils and communities. The Bill modifies:
 - a. the Civil Defence and Emergency Management Act 2002 (the CDEM Act) to address issues relating to concurrent declarations of states of emergency and notices of transition periods to ensure emergency powers are available when needed,
 - b. aspects of the Resource Management Act 1991 (RMA) for a limited time to deem certain emergency actions by owners or occupiers of rural land as permitted activities, and to extend timeframes for advising local authorities and applying for retrospective consents for emergency work,
 - c. the Local Government Act 2002 (the LGA) to enable meeting by audio or visual link and to enable local authorities to amend their current long-term plans in relation to water infrastructure and services, and
 - d. requirements in the Food Act 2014 and Food Regulations 2015 to allow an extended period for a food business to renew its registration and continue operating when a registration may have expired.

Consistency of the Bill with the Bill of Rights Act

Section 14 – Freedom of expression

5. Section 14 of the Bill of Rights Act affirms that 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. The right has been interpreted as including the right not to be compelled to say certain things or to provide certain information.¹
6. New s 331C of the RMA requires an owner or occupier of rural land who has taken emergency preventive or remedial actions under new s 331B (for example, to avoid or mitigate loss of life, injury, or serious damage to land) to give written notice to the relevant consent authority that the activity has been undertaken. The requirement to give notice is a prima facie limit on the right to freedom of expression.
7. A provision which limits a protected right or freedom may be consistent with the Bill of Rights Act if the limitation is reasonable and justifiable in a free and democratic society under s 5 of that Act. The s 5 inquiry may be approached as follows:
 - a. Does the provision serve an objective sufficiently important to justify some limitation of the right or freedom?
 - b. If so, then:
 - i. Is the limit rationally connected with the objective?
 - ii. Does the limit impair the right or freedom no more than is reasonably necessary for sufficient achievement of the objective?
 - iii. Is the limit in due proportion to the importance of the objective?²
8. We consider that the limit on freedom of expression in new s 331C is justifiable. The requirement to give notice:
 - a. serves the important objective of facilitating planning and decision-making by local authorities,
 - b. is rationally connected with that objective, because it will ensure that consent authorities are informed of emergency activities undertaken that could affect their planning and decision-making, and
 - c. appears a reasonable and proportionate limit on the right, because giving notice is not an onerous requirement and the owner or occupier has 60 working days to provide the notice.

Section 21 – Freedom from unreasonable search and seizure

9. Section 21 of the Bill of Rights Act affirms that everyone has the right to be secure against unreasonable search or seizure, whether of the person, property,

¹ See, for example, *Slaight Communications v Davidson* 59 DLR (4th) 416; *Wooley v Maynard* 430 US 705 (1977).

² *Hansen v R* [2007] NZSC 7, [2007] 3 NZLR 1.

correspondence or otherwise. The right protects a number of values including personal freedom, privacy, dignity, and property.³

10. The Supreme Court has held that logically, an unreasonable search cannot be demonstrably justified and therefore the s 5 inquiry does not need to be undertaken.⁴ Rather, in order for a statutory power to be consistent with s 21, engagement of the right must not be unreasonable. This turns on a number of factors, including the nature of the place or object being searched, the degree of intrusiveness into personal privacy and the rationale of the search.⁵
11. We have considered whether new s 330AA of the RMA modifies an existing power of search or seizure. New s 330AA effectively makes it easier for a local authority or consent authority who enters a place under s 330(2) of the RMA to satisfy the requirement to inform the occupier. If s 330(2) of the RMA constitutes search or seizure, we would need to assess whether the power was still reasonable in light of these modified requirements.
12. On balance, we consider it unlikely that existing s 330(2) of the RMA constitutes such a power. While it permits an authority to enter a place without notice in certain circumstances and to take or direct certain actions, it appears in the RMA alongside other provisions relating to emergency works (at ss 330-331) and not with the powers of entry and search provided for elsewhere in the principal Act (at ss 332-335). We consider that had s 330(2) been intended to include search or seizure, it would have been grouped with those provisions.
13. If s 330(2) of the RMA does constitute a power of search or seizure, we consider that it is not made unreasonable by new s 330AA. New s 330AA does not remove the requirement to provide information about entry, but rather enables it to be satisfied in a different way for a limited period. We understand that this is intended to take account of the large number of evacuations that have occurred, which may make it more difficult to inform the occupier as set out in s 330(2) of the RMA. This appears reasonable in the circumstances.

Conclusion

14. We have concluded that the Bill appears to be consistent with the rights and freedoms affirmed in the Bill of Rights Act.



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³ See, for example, *Hamed v R* [2011] NZSC 101, [2012] 2 NZLR 305 at [161] per Blanchard J.

⁴ *Ibid* at [162] per Blanchard J.

⁵ *Hamed v R* [2011] NZSC 101, [2012] 2 NZLR 305 at [172] per Blanchard J.