

1 December 2022

Hon David Parker, Attorney-General

Consistency with the New Zealand Bill of Rights Act 1990: Emergency Management Bill

Purpose

1. We have considered whether the Emergency Management 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 21875/5.7). 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), s 18 (freedom of movement), s 19 (freedom from discrimination), s 21 (freedom from unreasonable search and seizure), s 25(c) (right to be presumed innocent until proven guilty) and s 27 (right to justice). Our analysis is set out below.

The Bill

4. This Bill replaces the Civil Defence Emergency Management Act 2002 and seeks to provide a legal framework for a modern, and fit-for-purpose emergency management system.
5. The purposes of the Bill, as set out in cl 3, include:
 - a. Improving and promoting the sustainable management of hazards in a way that contributes to the social, economic, cultural and environmental well-being and safety of the public and also to the protection of property; and
 - b. Encouraging and enabling communities to achieve acceptable levels of risk; and
 - c. Providing for planning and preparation for emergencies and for response and recovery in the event of an emergency; and
 - d. Encouraging the co-ordination of emergency management between local authorities, through regional Emergency Management Committees (EMCs), and across the wide range of agencies and organisations preventing or managing emergencies;
 - e. Providing a basis for the integration of national and local emergency management planning and activity;
 - f. Providing greater recognition of the role of Māori in emergency management and enhancing Māori participation across the emergency management system; and

- g. Providing a framework for managing risks relating to critical infrastructure.

Consistency of the Bill with the Bill of Rights Act

Section 14 – Freedom of expression

6. Section 14 of the Bill of Rights 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
7. The Bill includes a power for the Director of Emergency Management (the Director) or a person acting under their authority to require any person to provide information in their possession that is reasonably necessary for the exercise of emergency management (cl 16). The power can also be exercised by a National Recovery Manager (cl 19(5)), an Emergency Management Committee (EMC) or a person acting under their authority (cl 30(3)), or an Area or Local Recovery Manager (cl 44(3)).
8. The Bill also requires critical infrastructure entities (CIEs)² to:
- a. Make plans and free technical advice available to the Director (cl 51);
 - b. Share information proactively and on request with specified public bodies for the purposes of planning and monitoring in relation to emergencies (cl 52);
 - c. Publish planning emergency levels of service online (cl 54(3)); and
 - d. Report annually on compliance and, if requested, provide information to support consideration of compliance (cl 55).
9. We consider that the requirements described in para 7 above and, to the extent that they are applied to private entities, the requirements set out in para 8 limit the right to freedom of expression.
10. Where a provision is found to limit any particular right or freedom, it may nevertheless be consistent with the Bill of Rights Act if it can be considered a reasonable limit that is demonstrably justifiable in terms of s 5 of that Act. The s 5 inquiry is approached as follows:³
- a. Does the provision serve an objective sufficiently important to justify some limitation on the right or freedom?
 - b. If so, then:

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

² Critical infrastructure entities are entities to be recognised by the Minister in the *Gazette* as providing or related to assets, systems, networks and services that are necessary for the provision of public services and essential to public safety, national security, economic security, or the functioning and stability of the country. The category corresponds to that currently described as 'lifeline utilities' in, and listed in Schedule 1 to, the Civil Defence Emergency Management Act 2002.

³ *Hansen v R* [2007] NZSC 7.

- i. is the limit rationally connected to 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?
11. The general powers to require information set out in para 7 above seek to ensure that emergency management practice is informed by all relevant information, which is an objective sufficiently important to justify some limitation on the freedom of expression. The requirement that the information must be necessary for emergency management provides a rational connection between this objective and the provisions. The provisions impair the right no more than reasonably necessary because only information that is 'reasonably necessary' for exercise of emergency management and can be given without unreasonable difficulty or expense can be required. The powers are additionally subject to provisions providing an appeals process (see cl 139), exempting personal medical or legally privileged information (cl 12 of Sch 2), and limiting the use to which the information can be put (cl 13 of Sch 2).
12. The provisions relating to CIEs serve the important objectives of assisting government, other CIEs and communities to plan for and manage disruptions caused by emergencies, and providing assurance that CIEs are complying with their responsibilities under the Bill. The criteria for the recognition of an entity as a CIE and the factors the Minister must give weight to before deciding that the criteria are met (cl 48), as well as the ability for the Minister to exempt a CIE from some or all of the requirements where appropriate (cl 50), help to ensure that the provisions limit the right no more than is reasonably necessary. The information CIEs may be required to provide under the provisions are relevant to the exercise of emergency management and there are limitations on use to which information received from CIEs under cll 51 and 52 can be put (cl 53).
13. Overall, we consider that the limits imposed by the Bill on the right to freedom of expression are in proportion to the importance of their objectives and justified under s 5 of the Bill of Rights Act.

Section 18 – Freedom of movement

14. Section 18(1) of the Bill of Rights Act states that everyone lawfully in New Zealand has the right to freedom of movement and residence in New Zealand. Freedom of movement includes the right to use roads and move through public places.⁴
15. Three of the emergency powers in subpart 4 of Part 3 of the Bill allow for limitations to be placed on the freedom of movement. These provisions enable emergency management personnel to:
- a. Prohibit or regulate land, air and water traffic in the area or district to the extent necessary to conduct emergency management (cl 97(2)(f));
 - b. Direct the evacuation or exclusion of persons or vehicles from any premises or place if necessary for the preservation of human life (cl 98); and

⁴ *Kerr v Attorney-General* [1996] DCR 951 at 955.

- c. Totally or partially prohibit or restrict public access, with or without vehicles, to any road or public place in order to prevent, limit or reduce the extent or consequences of an emergency (cl 100).
16. These powers serve the important objective of ensuring the safety of the public and property and can be exercised in appropriately limited circumstances. The power in cl 97(2)(f) may be exercised only while a state of emergency is in force. The powers in cl 98 and cl 100 may also be used during a transition period but only if a Recovery Manager or constable is satisfied that to do so is in the public interest, necessary or desirable to ensure a timely and effective recovery, and proportionate in the circumstances. In this context, we are satisfied that the limitations on the freedom of movement are justified in terms of s 5 of the Bill of Rights Act.

Section 19 – Freedom from discrimination

17. Section 19(1) of the Bill of Rights Act affirms the right to freedom from discrimination on the grounds set out in s 21 of the Human Rights Act 1993, including race and ethnic origins. The key considerations in assessing whether there is a limit on this right are:
 - a. Whether the legislation draws a distinction based on one of the prohibited grounds; and
 - b. If so, whether the distinction involves material disadvantage to one or more classes of individuals.⁵
18. Based on this two-step approach, not all differential treatment will be discriminatory.⁶ The question of whether disadvantage arises is a factual determination.⁷
19. The Bill contains a number of provisions which seek to formally recognise the role of Māori in emergency management, enable iwi and Māori participation at all levels of the emergency management system, and give effect to the Crown's obligations as a signatory to the Tiriti o Waitangi. In particular, the Bill:
 - a. Establishes a National Māori Emergency Management Advisory Group to advise the Director on Māori interests and knowledge, as they relate to the purpose and functions of emergency management (cl 20). The persons appointed to the Advisory Group must have the appropriate knowledge, skills and experience to assist it to perform its role (cl 21).
 - b. Provides for EMCs and Emergency Management Co-ordinating Executives (EMCEs), which are advisory and implementation bodies maintained by each EMC, to have one or more Māori members (cl 25 and cl 32). The appointment processes for Māori members are to be specified in regulations, and may be locally appropriate (cills 26, 32 and 141). Before recommending the making of regulations relating to the appointment of Māori members of EMCs and EMCEs, the Minister must consult with persons who have the required expertise and ability to reflect relevant perspectives and concerns, including those of Māori (cl 141(4)).

⁵ *Ministry of Health v Atkinson* [2012] NZCA 184, [2012] 3 NZLR 456 CA at [55]; *Child Poverty Action Group Inc v Attorney-General* [2013] NZCA 402, [2013] 3 NZLR 729.

⁶ *Ministry of Health v Atkinson*, above n 5, at [75].

⁷ See for example *McAlister v Air New Zealand* [2009] NZSC 78, [2010] 1 NZLR 153 at [40] per Elias CJ, Blanchard and Wilson JJ.

- c. Requires EMCs to:
 - i. identify, and develop plans to address, the emergency management needs of iwi and Māori within their area (cl 29(1)(h));
 - ii. recognise the role and contributions of iwi and Māori in emergency management and communicate this information to local authorities, communities, and others (cl 29(1)(i));
 - iii. collaborate with iwi and Māori in the development of EMC plans (cl 29(1)(l));
 - iv. include arrangements for co-ordination with iwi and Māori during all stages of emergency management in EMC plans (cl 70(1)(k)) and
 - v. ensure that EMCs have the capability and capacity to engage with, and understand the perspectives of, iwi and Māori ((cl 29(1)(m)).
- d. Provides that the national emergency management plan must provide for the role of Māori in emergency management, and may also prescribe the process for co-development of national-level planning arrangements with Māori and principles for guiding the appointment of Māori members on EMCs and EMCEs (cl 64).
- e. Requires EMCs to consult with representatives of iwi and Māori when developing a new or revised EMC plan. While this engagement obligation applies equally to representatives of other communities likely to be disproportionately affected by emergency events, there is a particular obligation to have regard to any comments from iwi and Māori regarding the proposals (cl 73).
- f. Requires the Director to consult with iwi and Māori representatives before making rules prescribing matters of details and procedure in relation to the emergency management system, if relevant (cl 144).

20. For the following reasons, we consider that these clauses in the Bill either do not draw distinctions between groups of people on the basis of race or ethnic origin, or do not involve a material disadvantage for any comparable group:

- a. The provisions providing for Māori participation at all levels of the emergency management system, by way of representation on emergency management groups and consultation on key planning documents, recognise the unique contribution Māori already make to New Zealand's emergency management system before, during and after emergency events. Iwi and Māori are often best placed to respond to an emergency in a manner that reflects local needs, and have access to important resources, including communication networks, that can be activated quickly in response to emergency events.
- b. To a large extent the provisions listed above, particularly in relation to enhancing Māori participation in the emergency management system, reflect the Crown's duties under the Tiriti o Waitangi and the unique status of Māori as the Crown's Treaty partner.
- c. Māori membership of EMCs and EMCEs is additional to the current membership of equivalent groups and does not reduce the opportunity for non-Māori to be involved in emergency management. While persons with the appropriate

knowledge, skills and experience for appointment to the National Māori Emergency Management Advisory Group may be more likely to be Māori than non-Māori, requiring these qualities of its members is necessary for the performance of its role and does not differentiate between separate groups on the basis of race or ethnic origin.

- d. The provisions requiring EMCs to collaborate with Māori to identify, and develop plans to address, the emergency management needs of Māori recognise that Māori, as a population group that experiences existing disparities, are disproportionately affected by emergencies. These provisions do not preclude consideration of the needs of other population groups, and seeking to achieve equitable outcomes for Māori does not result in disadvantage to those not already disadvantaged.
21. In addition to the provisions set out above, cl 145(b) of the Bill authorises the Crown to incur expenses for the purpose of reimbursing an iwi or Māori organisation for welfare expenses incurred in respect of emergency management activities. Under current arrangements, local authorities and Māori organisations incur and obtain reimbursement for similar welfare expenses, but reimbursement claims for expenses incurred by Māori organisations must be lodged by local authorities on their behalf. Clause 145 does not broaden the eligibility criteria for obtaining reimbursement, but rather allows Māori to access reimbursements directly, on the same basis as local authorities already do. In light of the unique role of iwi and Māori organisations in supporting their communities in an emergency, we are satisfied that the change effected by cl 145(b) does not entail any disadvantage to any comparable group.
 22. For the above reasons, we conclude that the above provisions providing for the role of Māori in emergency management do not engage the right to freedom from discrimination affirmed by s 19(1) of the Bill of Rights Act.

Section 21 – Freedom from unreasonable search and seizure

23. 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, correspondence or otherwise. The right protects a number of values including personal property, dignity, and privacy.⁸
24. Some of the emergency powers provided for in subpart 4 of Part 3 of the Bill may be seen as involving powers of search, seizure or both, and therefore engaging s 21 of the Bill of Rights Act. In particular, the powers enable emergency management personnel to:
 - a. Remove and dispose of dangerous structures and materials, and dispose of dead persons or animals if urgently necessary in the interests of public health (cl 97(2)(a)(iv) and (g));
 - b. Enter on, and if necessary break into, any premises or place to save life, prevent injury, rescue and remove injured or endangered persons, or permit or facilitate the carrying out of any urgent measure to relieve suffering or distress (cl 99);

⁸ See, for example, *Hamed v R* [2011] NZSC 101, [2012] 2 NZLR 305 at [161] per Blanchard J.

- c. Remove any vehicle or craft that is impeding emergency management, including by using force if reasonably necessary, to prevent or limit the extent of an emergency (cl 101);
 - d. Requisition any land, building, vehicle, animal, boat, apparatus, implement, earth-moving equipment, construction materials or equipment, furniture, bedding, food, medicines, medicinal supplies, or any other equipment, materials or supplies, if necessary, for the preservation of human life (cl 102);
 - e. Direct an owner of a structure to obtain and provide a copy of an assessment of the effect of an emergency on the structure, after having considered whether the structure may pose a risk of injury or to the safety of life or other property (cl 103); and
 - f. Examine, mark, seize, sample, secure, disinfect or destroy any property, animal or other thing in order to prevent or limit the extent of an emergency (cl 104).
25. In addition, clause 108 of the Bill enables a District Court Judge to, by warrant, authorise any constable to enter and search any premises, other than a dwellinghouse, to obtain information that is urgently required in order to prevent or limit the extent of the emergency and in the possession of a person who has refused to provide it.
26. Ordinarily, a provision found to limit a particular right or freedom may be consistent with the Bill of Rights Act if it can be considered reasonably justified in terms of s 5 of that Act. However, the Supreme Court has held that an unreasonable search logically cannot be demonstrably justified and therefore the inquiry does not need to be undertaken.⁹ Rather, s 21 is self-limiting in that the assessment to be undertaken is whether the search power is reasonable. The reasonableness of a search and seizure can be assessed with reference to the purpose of the search and seizure and the degree of intrusion on the values which the right seeks to protect.
27. We consider that the emergency powers in the Bill that authorise search and seizure may be reasonably necessary to effectively respond to or recover from the effects of emergencies and are available in appropriately limited circumstances. The powers may be exercised only while a state of emergency is in force or, if available for the purposes of transition periods,¹⁰ only if a Recovery Manager or constable is satisfied that their use is in the public interest, necessary or desirable to ensure a timely and effective recovery, and proportionate in the circumstances. As set out in the summary above, many are subject to further limitations on the purposes for which they can be used (for example, the indication that the power to requisition property may only be used if necessary to preserve human life). Persons with an interest in requisitioned property may apply for reasonable compensation (cl 113), and there is a further entitlement to compensation for persons who have suffered loss or damage that is out of proportion to the good done by an action or measure taken in the exercise of powers under clauses 98 to 104.
28. We further consider the power to issue warrants in cl 108 to be reasonable. The power only applies if a state of emergency is in force or an imminent threat of an emergency exists. The test for the issue of a warrant is appropriately high and the process is subject

⁹ *Hamed v R* [2011] NZSC 101, [2012] 2 NZLR 305 at [162] per Blanchard J.

¹⁰ Applicable to clauses 97(2)(a)(iv), 99 and 103 above.

to appropriate judicial supervision. Unless special conditions specify otherwise, every warrant issued under cl 108 is subject to standard conditions that require any use of force or assistants to be reasonable in the circumstances (cl 110). A warrant issued under cl 108 does not authorise the seizure of personal medical or legally privileged information (cl 110(3)) and any information seized must be returned once no longer required (cl 111).

29. In addition, the provisions identified in paragraphs 7 and 8 above may be seen as engaging s 21 as well as s 14 of the Bill of Rights. If this is the case, we consider that the relevant powers are reasonable for the same reasons as those which led us to conclude that the limitations on s 14 are justified in terms of s 5.
30. For these reasons, we consider that the search and seizure provisions of the Bill are reasonable and therefore consistent with s 21 of the Bill of Rights Act.

Section 25(c) – Right to be presumed innocent until proven guilty

31. Section 25(c) of the Bill of Rights Act affirms that anyone charged with an offence has the right to be presumed innocent until proven guilty according to the law. 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.¹¹
32. Strict liability offences *prima facie* limit section 25(c) of the Bill of Rights Act. This is because a strict liability offence may be proved by a finding that certain facts occurred without proof of *mens rea*. The accused is required to prove a defence (on the balance of probabilities), or disprove a presumption, to avoid liability.
33. Two offences in the Bill do not expressly state the *mens rea* required for an offence to be committed:
 - a. Under cl 121, a person “commits an offence who, during a state of emergency or transition period, “threatens, assaults, or intentionally obstructs or hinders any person in that person’s performance or exercise of a function, duty, or power under this Act.”
 - b. Under clause 128, a person “commits an offence if they by words, conduct or demeanour pretends to be” the Director, a Controller, a Recovery Manager, a member of an EMC, a person acting under the authority of any of those persons, or any person authorised or employed for carrying out any provision of the Act or any emergency management plan.
34. Notwithstanding the targeted use of the word “intentionally” in cl 121 and the absence of an express *mens rea* element in cl 128, we note that ‘assault’ is defined in s 2(1) of the Crimes Act 1961 in terms that require intentional action and that intention is implicit in the actions of threatening or pretending to be another person. As such, we are satisfied that these provisions are implied *mens rea* offences that do not engage the presumption of innocence in s 25(c) of the Bill of Rights Act.
35. In addition, the Bill allows for regulations to be made prescribing conduct that is to constitute infringement offences and applicable infringement fees not exceeding \$1,000 (cl 140(k) to (n)). Infringement offences are a form of strict liability offence which, while

¹¹ *R v Wholesale Travel Group* (1992) 84 DLR (4th) 161, 188 citing *R v Oakes* [1986] 1 SCR 103.

not resulting in a criminal conviction,¹² can engage ss 24 and 25 of the Bill of Rights Act.¹³ Here, although the conduct that is to be subject to the infringement offence regime is not yet known, the requirement that the penalty levels be within the appropriately low statutory maximum makes it highly unlikely that regulations relating to infringement offences would give rise to issues of inconsistency with s 25(c) of the Bill of Rights Act.

Section 27 – Right to justice

36. Section 27(3) of the Bill of Rights Act includes the right to bring civil proceedings against the Crown and to have those proceedings heard, according to law, in the same way as civil proceedings between individuals.
37. Clause 119(2) of the Bill provides protection from civil liability for the Crown and a wide range of persons with emergency management functions and duties under the Bill or others acting under their direction. The protection applies to good faith actions or omissions in the performance or exercise of functions, duties or powers under the Bill relating to a state of emergency or transition period. Clause 119(4) protects any person from civil liability for any loss or damage arising from a good faith decision to issue or not issue a warning of a hazard in accordance with the Bill, including outside of a state of emergency or transition period. These provisions seek to ensure that individuals tasked with making critical decisions under the Bill are not constrained by fear of litigation.
38. Section 27(3) has been interpreted by the courts as protecting procedural rights, rather than restricting the power of the legislature to determine what substantive rights the Crown is to have.¹⁴ We consider that cl 119 affects substantive law, and therefore does not fall within the ambit of s 27(3).

Conclusion

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



Edrick Child
Acting Chief Legal Counsel
Office of Legal Counsel

¹² Section 375(1)(a) of the Criminal Procedure Act 2011.

¹³ *Henderson v Director of Land Transport New Zealand* [2006] NZAR 629 (CA).

¹⁴ *Westco Lagan Ltd v Attorney-General* [2001] 1 NZLR 40 (HC).