

11 November 2022

Hon David Parker, Attorney-General

Consistency with the New Zealand Bill of Rights Act 1990: Health and Safety at Work (Health and Safety Representatives and Committees) Amendment Bill

Purpose

1. We have considered whether the Health and Safety at Work (Health and Safety Representatives and Committees) Amendment 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 23521/8.0). 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 25(c) (the right to be presumed innocent until proved guilty according to law). Our analysis is set out below.

The Bill

4. The purpose of the Bill is to contribute to improved health and safety outcomes in New Zealand workplaces and reduced work-related harms. It seeks to enhance worker access to formal worker engagement, participation, and representation mechanisms by removing current thresholds that limit worker access to health and safety representatives (HSRs) and health and safety committees (HSCs).
5. The Bill amends the Health and Safety at Work Act 2015 to provide that all Persons Conducting a Business or Undertaking (PCBUs) must:
 - a. hold an HSR election if requested by a worker; and
 - b. establish an HSC if requested by an HSR, or by five or more workers.

Consistency of the Bill with the Bill of Rights Act

Section 25(c)

6. Section 25(c) of the Bill of Rights Act affirms the right to be presumed innocent until proven guilty. 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.¹ In order to give full recognition to this right, a fundamental principle of criminal law, the legal burden of proving every element of an offence to the required standard of

¹ *Hamed v R* [2011] NZSC 101, [2012] 2 NZLR 305 at [172] per Blanchard J.

proof, and the onus for disproving any potentially available defence, must remain on the prosecution.

7. The Bill contains two strict liability offences:

- a. An offence for the failure of the PCBU to initiate election of an HSR within a certain timeframe of the PCBU receiving the notification (cl 62(5)); and
- b. An offence for failure of the PCBU to establish an HSC as soon as practicable after receiving a request (cl 66(4)).

8. Strict liability offences *prima facie* limit s 25(c) of the Bill of Rights Act because the accused is required to prove a defence (on the balance of probabilities), or disprove a presumption, to avoid liability. This means that where the accused is unable to prove a defence, they could be convicted even where reasonable doubt about their guilt exists.

9. Strict liability offences have been considered justifiable where:

- a. the offence is in the nature of a public welfare regulatory offence;
- b. the defendant is in the best position to justify their apparent failure to comply with the law, rather than requiring the Crown to prove the opposite; and
- c. the penalty for the offence is proportionate to the importance of the Bill's objective.

10. We consider that the limit on section 25(c) of the Bill of Rights Act appears justifiable as:

- a. the offences are rationally connected to the objective of establishing stronger worker representation and participation rights for workers, to improve health and safety outcomes, and reduce work-related harm;
- b. the offences apply in a regulatory context, in which PCBUs would be best placed to advise of any reason for their non-compliance. Although no statutory defences are provided for, the defence of total absence of fault would be available; and
- c. the penalties for the offences are relatively modest (\$5,000 for an individual and \$25,000 for any other person) and are not disproportionate to the Bill's objective.

11. For the above reasons, we consider the strict liability offences to be justified under section 5 of the Bill of Rights Act.

Conclusion

12. 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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