

19 July 2022

Hon David Parker, Attorney-General

Consistency with the New Zealand Bill of Rights Act 1990: Supplementary Order Paper for the Fair Pay Agreements Bill

Purpose

1. The Minister for Workplace Relations and Safety is seeking to present the House with a Supplementary Order Paper for the Fair Pay Agreements Bill (the Bill). The Bill was vetted prior to its introduction in March 2022 and found to be consistent with the New Zealand Bill of Rights Act 1990 (the Bill of Rights Act).
2. There is no statutory requirement for Supplementary Order Papers (SOPs) moved after a Bill's introduction to be formally vetted for consistency with the Bill of Rights Act, however it is possible for you to present a paper to the House (Standing Order 381(1)). You have requested advice on the consistency of this SOP with the Bill of Rights Act. Therefore, we have considered whether the SOP is consistent with the rights and freedoms affirmed in the Bill of Rights Act.
3. We have not yet received a final version of the SOP. This advice has been prepared in relation to the latest version of the SOP (PCO 21869-1/9.0). We will provide you with further advice if the final version includes amendments that affect the conclusions in this advice.
4. We have concluded that the SOP 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 SOP with s 14 (freedom of expression), s 17 (right to justice) and s 21 (the right to be secure against unreasonable search and seizure). Our analysis is set out below.

The SOP

5. The Bill was introduced in March 2022 and sets out a framework for bargaining for fair pay agreements (FPAs), which will specify industry-wide or occupation specific minimum employment terms.
6. The FPA system generally relies on union and employer representatives to bargain and agree minimum terms. However, there may be circumstances where there is no willing and suitable representative on one side. The Bill currently requires BusinessNZ or the New Zealand Council of Trade Unions (NZCTU) to become the default representative in the absence of a willing employer or employee representative respectively.
7. The SOP removes the mandatory requirement for these entities to operate as default representatives. Instead, BusinessNZ or the NZCTU may elect to undertake this role in the absence of a bargaining party. If they do not elect to be involved in the FPA, and as a result one side has no bargaining party, the SOP provides a 'backstop determination' process, where the Employment Relations Authority (the Authority) will set the terms of the FPA. The Authority already has a role setting terms for an FPA if parties cannot reach agreement on the terms, and the SOP provides for the Authority to use a similar process if the backstop determination process is triggered.

8. The SOP proposes to strike a balance between providing a reasonable opportunity for parties to bargain without excessive delay in finalising an FPA, while ensuring an FPA is produced once the initiation threshold (to commence FPA bargaining) is met.

Consistency of the SOP with the Bill of Rights Act

Section 14 – Freedom of expression

9. Section 14 of the Bill of Rights Act affirms the right to freedom of expression, including the freedom to seek, receive, and impart information and opinions of any kind in any form. Section 14 has been interpreted as including the freedom not to be compelled to say certain things or to be compelled to provide certain information.¹
10. The SOP sets out several requirements for the chief executive, default bargaining parties, and the Authority to notify each other at various stages of the bargaining process, including when the ‘backstop determination’ process is triggered and when a determination is set. For example, if BusinessNZ or NZCTU elects to step in as bargaining party, clause 71A of the SOP requires them to notify their election to the chief executive in writing within a specified time period. Alternatively, if the default bargaining party does not elect to be involved, subclause 80A (1) – (4) sets out specified information that the chief executive is required to provide to the lead advocate of the opposite bargaining party.
11. There are several similar provisions for required information sharing in the Bill. While we considered that these provisions *prima facie* engaged s 14 of the Bill of Rights Act, we concluded they were justified under s 5 of the Bill of Rights Act.
12. A limit on a right or freedom may be justified where the limit is rationally connected to a sufficiently important objective; impairs the right or freedom no more than reasonably necessary to achieve the objective; and is otherwise in proportion to the importance of the objective.² For completeness, we have now considered the relevant provisions in the SOP independently from those of the Bill.
13. The objective of the ‘backstop determination’ process is to ensure that where the initiation threshold is met to commence bargaining, but one party fails to provide a bargaining party, an FPA can still be achieved. We consider this to be sufficiently important objective which is rationally connected to the new notification requirements. We also consider the limit on the freedom of expression to be minor, requiring no more information to be shared than is reasonably necessary to progress bargaining and/or trigger the backstop process. This minor limit is in due proportion to the importance of the SOP’s objective of minimising any excessive delays to finalising an FPA. We therefore conclude these provisions are justified in terms of s 5 of the Bill of Rights Act.

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

² See *Hansen v R* [2007] NZSC 7, [2007] 3 NZLR 1 (SC).

Section 27 – Right to justice

14. Section 27 of the Bill of Rights Act protects the right to justice, sometimes referred to as natural justice. Natural justice ensures procedural fairness and encompasses two ideas: the right to be heard and the rule against bias. We have considered whether elements of the ‘backstop determination’ process engage s 27.
15. Where a default bargaining party does not elect to be a bargaining party, the initiating bargaining side may apply to the Authority for a determination under the ‘backstop determination’ process³ and the Authority must make a determination that fixes the terms of the proposed agreement.⁴
16. To the extent that this may be seen to limit the right to be heard, we note the following:
 - a. An application can only be made by the initiating side where the non-initiating side does not have a bargaining party and the relevant default bargaining party does not elect to become the bargaining party.
 - b. Clauses 80H, 80I and 80J require the initiating side to alert each employer it knows to be covered by the proposed agreement, as well as the chief executive, of their intention to apply to the Authority for the determination. Clause 80K allows for the subsequent formation of a bargaining party on the non-initiating side following these notifications, providing an application for a determination has not yet been made.
 - c. When fixing the terms of the fair pay agreement, the Authority must consider those matters set out in cl 220 of the Bill and has the discretion to seek expert evidence when making a determination.⁵
 - d. The Bill also requires the Authority to comply with the principles of natural justice and aim to promote good faith behaviour in carrying out its role.⁶
17. The Bill recognises the right for anyone impacted by the Authority’s determination to apply for a judicial review of the process.⁷
18. Due to the sufficient opportunity for all parties to be involved in the bargaining process (and therefore heard) before the ‘backstop determination’ process is triggered, the subsequent safeguards around the Authority’s role and the opportunity for judicial review, we consider s 27 of the Bill of Rights Act is not engaged by the SOP.

³ Clause 80E.

⁴ Clause 228C.

⁵ Clause 228J.

⁶ Fair Pay Agreement Bill, cl 211(2)(a) and (b).

⁷ See Schedule 3, clause 19, of the Fair Pay Agreement Bill

Section 21 – Freedom from unreasonable search and seizure

19. 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 privacy, dignity, and property.⁸
20. Clause 228U of the SOP allows a representative of an employee bargaining party access to enter workplaces without the employer's consent if the primary purpose of entering the workplace is to discuss with a covered employee, or an employee who may be affected by, a determination that has been applied for. We note this is a similar provision to several provisions in the Bill that we discussed in our previous advice on the Bill.
21. As noted in our previous advice, an unreasonable search logically cannot be reasonably justified⁹ and as such, the question is one of whether the search power in the SOP is reasonable. Sub-clauses 228U(4)(a) and (b) set out that the existing conditions relating to access, when access to workplaces may be denied, issues of certificate of exemption, and duties in relation to accessing the workplace all continue to apply.
22. We continue to be of the view that while allowing access to a workplace without an employer's consent engages s 21, the provisions in the SOP conditions ensure that entry is done in a reasonable manner and the search powers do not amount to an unreasonable search under the Bill of Rights Act.

Conclusion

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



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

⁹ *Cropp v Judicial Committee* [2008] 3 NZLR 744 at [33]; *Hamed v R*, above n 4, at [162].