



Report of the

ATTORNEY-GENERAL

under the New Zealand Bill of Rights Act
1990 on the Local Government (Freedom of
Access) Amendment Bill

Presented to the House of Representatives pursuant to
Section 7 of the New Zealand Bill of Rights Act 1990
and Standing Order 265 of the Standing Orders of the
House of Representatives

1. I have considered whether the Local Government (Freedom of Access) 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. I have concluded the Bill appears to be inconsistent with s 22 (liberty of the person) and cannot be justified under s 5 of the Bill of Rights Act.
3. As required by s 7 of the Bill of Rights Act and Standing Order 265, I draw this to the attention of the House of Representatives.

The Bill

4. The Bill amends the Local Government Act 2002 ('the principal Act'). The purpose of the Bill is to give local councils powers to ensure occupy-style protests do not limit the public's access to council land. It primarily does this by widening the scope in which an enforcement officer may remove property. The Bill also creates warrantless arrest powers for non-compliance when a person is required to give identifying details, and for obstruction of an enforcement officer or agent of a local authority.

Inconsistency with s 22 (liberty of the person)

5. Section 22 of the Bill of Rights Act affirms that everyone has the right not to be arbitrarily arrested or detained. The right not to be arbitrarily detained protects human dignity, autonomy and liberty.¹
6. Detention is arbitrary if it is "capricious, unreasoned, without reasonable cause: if it is made without reference to an adequate determining principle or without following proper procedures."² Where a provision is found to be inconsistent with s 22, there can be no role for justification under s 5 of the Bill of Rights Act.
7. Clause 6 of the Bill amends s 178 of the Act to provide that a constable may arrest without warrant any person who fails to provide their name and address or the name, address, and whereabouts of any other person connected in any way with an alleged offence.
8. Clause 7 amends s 229 of the Act. Section 229 currently provides that it is an offence to obstruct, to refuse to give information when requested under 178, or to incite another to do either of the above. New subs 229(2) provides that any constable who has reasonable suspicion that a person has committed an offence under s 229 may arrest that person without warrant. I note that anyone arrested under s 229(2) for refusing to give information when directed to do so by an enforcement officer under section 178, or knowingly misstating that information, could also be arrested under new s 178(3).
9. I consider that the power to arrest inserted by cl 6 is arbitrary, in that it appears to be without reasonable cause. It is unclear why this power is required, as it does not appear to be directly linked to the overall purpose of the Bill (to reduce public health hazards, damage to property and restriction of the public use of and access to the affected land).

¹ *R v Briggs* [2009] NZCA 244 at [85] per Arnold J.

² *Neilsen v Attorney-General* [2001] 3 NZLR 433 (CA) at [34].

10. The power does appear to be linked to the Bill's secondary purpose, which is to prevent the obstruction of enforcement officers in their duties. However, cl 7 of the Bill also provides for an offence and an associated warrantless power of arrest for obstructing an officer in their duties, which includes refusing to give information when directed to do so by an enforcement officer under s 178, or knowingly misstating such information. Therefore, a failure to provide information may also be subject to the warrantless arrest power under cl 7.
11. I also note there is no penalty provided for the new offence in s 178(2), and the general penalty provision in s 242 of the Act does not appear to apply. It therefore appears as if the offence is punished by the arrest itself.
12. The discernible purpose of the ability to arrest someone without warrant for failing to comply with a requirement issued under s 178 therefore appears to be the coercion of information. Giving enforcement officers the power to arrest an individual in these circumstances appears to be a disproportionate power, and one which should be carefully controlled through clear parameters as to when it would be appropriate to exercise it, and immediate relief where it is exercised in a manner that cannot be justified. In the absence of judicial supervision, for example through issuing a warrant for arrest, I cannot conclude that appropriate safeguards exist to mitigate against disproportionality.
13. However the inconsistency could be remedied through removing cl 6 and limiting the arrest power in cl 7 so it does not apply to the parts of s 229 that relate to the provision of information under s 178.
14. As currently drafted, however, I conclude the Bill is inconsistent with s 22 of the Bill of Rights Act.

Consideration of consistency with other sections of the Bill of Rights Act

15. I also considered a further *prima facie* limitation in the Bill on the right to freedom of expression affirmed in s 14 of the Bill of Rights Act.
16. Section 14 of the Bill of Rights Act states 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."
17. Clause 5 of the Bill amends s 164 of the principal Act to provide that an enforcement officer may seize and impound property that has been erected, placed or fixed on non-private land if the property has been in place for more than five days in any 12 month period, and it is in place without the necessary consent. Before seizing and impounding the property, the enforcement officer must:
 - 17.1 direct the owner of the property to remove it
 - 17.2 advise the person that if he or she does not remove the property, the officer has the power to seize and impound it, and
 - 17.3 provide the person with the necessary time to remove the property without delay.
18. Clause 5 also provides an alternative to notifying the owner, where the owner of the property cannot be identified. In such cases, the enforcement officer may attach a

notice to the property that provides the same information about removal. Further, cl 5 states that, to avoid doubt, the seizure of property powers apply to property that is being used for the purposes of a protest or demonstration. The Bill therefore *prima facie* limits freedom of expression.

19. In order for a limitation to be justified and proportionate under s 5 of the Bill of Rights Act, the objective must serve a purpose sufficiently important to justify the limitation.³ If so, then the limit must be rationally connected with the objective, it must not impair the right or freedom any more than is reasonably necessary to achieve the objective, and the limit must be in due proportion to the objective.
20. The objective of the Bill is to prevent health hazards, damage to property and restriction of the use of public land during protests and demonstrations. I consider that this purpose is sufficiently important to justify a limitation on s 14.
21. The limitation to s 14 is connected to the impeding access aspect of the Bill's objective through the requirement that property must be in place for five days in any 12 month period before it can be removed. While it is unlikely that property that is fixed or erected for longer than five days would effectively impede access in every case, I consider there is at least a minimum necessary level of rational connection to the objective.
22. I also consider the limit is no more than reasonably necessary to achieve, and is in due proportion to, the objective. The Bill includes a limit on the exercise of the power to remove property in the form of a requirement to notify the owner. Moreover, the removal of property does not significantly inhibit the expression of protestors. They remain free to assemble on council land and express their opinions.
23. Further, although there is no direction in the Bill to assist an enforcement officer to exercise their decision making power in a manner consistent with s 14, I consider by conferring the power of decision on a person who is covered by s 3 of the Bill of Rights Act and therefore bound to act consistently with guaranteed rights, Parliament would be legislating consistently with s 14 of the Bill of Rights Act.

Conclusion

24. For the reasons set out in paragraphs 5-14, I conclude the Bill appears to be inconsistent with s 22 of the Bill of Rights Act and that the inconsistency cannot be justified under s 5 of that Act.

Hon Christopher Finlayson

Attorney-General

July 2017

³ *Hansen v R* [2007] NZSC 7.