

27 July 2023

Hon David Parker, Attorney-General

Consistency with the New Zealand Bill of Rights Act 1990: Residential Property Managers Bill

Purpose

1. We have considered whether the Residential Property Managers 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 23500/6.8). We will provide you with further advice if the final version includes amendments that affect the conclusions in this advice.

Summary

3. The Bill establishes a new regulatory regime designed to improve the provision of residential property management services in New Zealand. The Bill raises a number of limitations on rights and freedoms affirmed in the Bill of Rights Act, specifically:
 - 3.1. s 14 (freedom of expression);
 - 3.2. s 19 (freedom from discrimination);
 - 3.3. s 21 (freedom from unreasonable search and seizure);
 - 3.4. s 25(c) (right to be presumed innocent until proven guilty).
4. We have concluded that the Bill appears to be consistent with the rights and freedoms affirmed in the Bill of Rights Act. Our analysis is set out below.

The Bill

5. The purpose of the Bill is to protect the interests of residential property owners and tenants (including prospective tenants) by creating a comprehensive regulatory regime for residential property managers. The Bill will give effect to this objective by -
 - 5.1. establishing minimum entry requirements for residential property managers;
 - 5.2. ensuring residential property managers meet professional standards of practice;
 - 5.3. providing accountability by establishing an independent, transparent, and effective complaints and disciplinary process that applies to residential property managers and the delivery of residential property management services.

Consistency of the Bill with the Bill of Rights Act

Section 14 – Freedom of expression

6. 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
7. Where a provision is found to limit a 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 justified in terms of section 5 of that Act. The s 5 inquiry asks whether the objective of the provision is sufficiently important to justify some limitation on the right or freedom; and if so, whether the limitation is rationally connected and proportionate to that objective and limits the right or freedom no more than reasonably necessary to achieve that objective.²
8. Various clauses in the Bill prima facie limit the freedom of expression by compelling people to provide information, for example:
 - 8.1. Clause 20 requires an applicant for a residential property management licence to publicly notify the application in the manner (if any) prescribed by the regulations;
 - 8.2. Clause 46 requires applicants and licensees of a residential property management licence to notify the Registrar of their change of circumstances, for example any change in the information recorded in the register and any material change in the residential property management organisation; and
 - 8.3. Clause 65 states that a Complaints Assessment Committee may require a residential property manager licensee to appear before it to make an explanation in relation to an inquiry.
9. We consider that these provisions are rationally connected to the objectives that are sufficiently important to justify some limit on freedom of expression. The clauses ensure that the public is aware of applications for residential property management licences, help hold property manager licensees to account for their conduct and ensure that trust accounts are administered appropriately.
10. For these reasons we conclude that any limits to the freedom of expression imposed by the Bill are justified under s 5 of the Bill of Rights Act.

Section 19 – freedom from discrimination

11. Section 19 of the Bill of Rights Act concerns the right to be free from discrimination, on the grounds contained in the Human Rights Act 1993, which includes the ground of ‘age’. Under s 21 of the Human Rights Act, ‘age’ means any age commencing with the age of 16 years.
12. The key questions in assessing whether there is a limit on the right to freedom from discrimination are:³

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.

³ *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.

- 12.1. does the legislation draw a distinction on one of the prohibited grounds of discrimination under s 21 of the Human Rights Act? and, if so,
- 12.2. does the distinction involve a disadvantage to one or more classes of individuals?
13. A distinction will arise if the legislation treats two comparable groups of people differently based on one or more of the prohibited grounds of discrimination. Whether a disadvantage arises is a factual determination.⁴
14. Clause 17 requires that for an individual to be licensed as a residential property manager, they must be at least 18 years old (amongst other criteria). The Bill treats 16 and 17-year-olds differently from those 18 and over, and accordingly prima facie gives rise to a limit on the right to be free from discrimination based on age. It is arguable that this difference in treatment may give rise to a disadvantage.
15. Any limit on the non-discrimination right may be justified in terms of section 5 of the Bill of Rights Act, as outlined above. The broad policy of the Bill is to promote public confidence in the delivery of residential property management services and protect the interests of property owners and tenants (including prospective tenants).
16. We consider that the age limit is intended to act as a proxy for maturity. Such bright-line age restrictions are necessarily arbitrary to a degree but can provide a level of certainty and consistency where (as here) an individual assessment of maturity is not practical. The age limit set by the Bill is one that has been generally adopted by society in a number of areas (such as voting age and alcohol consumption, for example) as an appropriate proxy for maturity.
17. To the extent that clause 17 raises an issue of discrimination under section 19 of the Bill of Rights Act, we consider that this is justified under section 5.

Section 21 – Freedom from unreasonable search and seizure

18. 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 an amalgam of values including property, personal freedom, privacy and dignity. The touchstone of this section is the protection of reasonable expectations of privacy, although it does not provide a general protection of personal privacy.⁵
19. There are two limbs to the s 21 right. First, the section is applicable only in respect of activities that constitute a search or seizure. Secondly, it protects only against those searches or seizures that are “unreasonable” in the circumstances.
20. A number of clauses require the provision of information or documents to the Complaints Assessment Committee and the Real Estate Agents Authority.⁶ The compelling of this information or documents may constitute search powers for the purposes of section 21 of the Bill of Rights Act. As the Bill allows for the use of these powers in an investigatory

⁴ See, for example *McAlister v Air New Zealand* [2009] NZSC 78, [2010] 1 NZLR 153 at [40] per Elias CJ, Blanchard and Wilson JJ.

⁵ See, for example, *Hamed v R* [2011] NZSC 101, [2012] 2 NZLR 305 at [161] per Blanchard J.

⁶ See cls 67, 68, 113, 116 and 120.

context, we consider that they constitute search powers that engage s 21 as well as s 14 of the Bill of Rights Act.

21. Ordinarily a provision found to limit a particular right or freedom may nevertheless 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 logically, an unreasonable search cannot be demonstrably justified and therefore the inquiry does not need to be undertaken.⁷ Rather, for a statutory power to be consistent with s 21, engagement of the right must not be unreasonable.
22. We consider the search powers in the Bill are reasonable and therefore consistent with s 21 of the Bill of Rights Act. The availability of such powers will substantially assist the Complaints Assessment Committee and the Real Estate Agents Authority to monitor and enforce compliance with the Bill and thereby ensure that its objectives are met. We also note that clause 68 is appropriately limited in scope and does not require provision of information or documents that would be privileged in a court of law or where it would be a breach of an obligation of secrecy or non-disclosure imposed by an enactment (other than the Bill, the Official Information Act 1982, or the Privacy Act 2020).

Section 25 – Minimum standards of criminal procedure

23. 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.⁸ This means the state must affirmatively prove the physical and mental elements of the offence and must also negate any matter of defence raised by the evidence.
24. 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 (which could be the physical elements of the offence and/or the existence of particular circumstances) without proof of any mental element. The accused is required to prove a defence (on the balance of probabilities) such as the absence of fault, or disprove a presumption, to avoid liability.
25. Strict liability offences have been found more likely to be justifiable where:
 - 25.1. the offences are regulatory in nature and apply to persons participating in a highly regulated industry;
 - 25.2. the offence is directed at conduct having a tendency to endanger the public or a section of the public;
 - 25.3. 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
 - 25.4. the penalty for the offence is proportionate to the importance of the Bill's objective.

⁷ *Hamed v R* [2012] 2 NZLR 305 at [162] per Blanchard J.

⁸ *Hansen v R* [2007] NZSC 7, [2007] 3 NZLR 1 at [26] and [27] per Elias J.

26. The Bill contains numerous strict liability offences for contravention of provisions under the Bill⁹ which give rise to a prima facie issue of inconsistency with s 25(c).
27. We have concluded that the strict liability offences are justified for the following reasons:
 - 27.1. the offences serve the important objective of promoting compliance with the Bill, such as ensuring:
 - 27.1.1. residential property managers meet professional standards of practice;
 - 27.1.2. compliance with requirements to provide information;
 - 27.1.3. people comply with the Disciplinary Tribunal requirements; and
 - 27.1.4. people comply with people exercising powers or performing functions under the Bill;
 - 27.2. they are regulatory in nature and apply to people participating in a highly regulated industry; and
 - 27.3. the defendant will be best placed to justify their apparent failure to comply with the strict liability offences and statutory defences are included.
28. It is a general principle that penalties in strict liability offences should typically be at the lower end of the scale. The maximum fines for the strict liability offences in the Bill are \$40,000 for an individual and \$100,000 in any other case. We consider these fines are reasonable in the context of a highly regulated industry. The fines are likely to be commensurate to affected entities' and individuals' ability to pay, and are necessary to contribute to the purposes of the offence regime (including deterrence and punishment).
29. We consider that as the pecuniary offences in the Bill relate to regulatory matters and result only in a monetary penalty and not a criminal conviction, the limit on the right can be justified under s 5 of the Bill of Rights Act.
30. For these reasons we consider that the offences in the Bill appear to be justified.

Conclusion

31. 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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⁹ See cls 12 – 16, 47, 68(4), 86(4), 98(1), 99(1)(f), and 123-125