

4 August 2022

Hon David Parker, Attorney-General

Consistency with the New Zealand Bill of Rights Act 1990: Self-Contained Motor Vehicles Legislation Bill

Purpose

1. We have considered whether the Self-contained Motor Vehicles Legislation 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 23555/13). 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(1) (freedom of movement), and s 25(c) (right to be presumed innocent until proven guilty). Our analysis is set out below.

The Bill

4. The Bill amends the Freedom Camping Act 2011 (the principal Act) and the Plumbers, Gasfitters and Drainlayers Act 2006 to introduce the following measures:
 - a. a national requirement for freedom campers staying in a vehicle on land managed by a local authority to use a certified self-contained vehicle,¹ unless staying at a site designated by the local authority as suitable for freedom camping in non-self-contained motor vehicles;
 - b. a regulatory system for the certification of self-containment of vehicles, with the Plumbers, Gasfitters and Drainlayers Board providing regulatory oversight (moving away from reliance on the current unmonitored voluntary standard);
 - c. requirement for self-contained vehicles to have a fixed toilet;

¹ The Bill defines "self-contained", in relation to a motor vehicle, as the vehicle having a valid certificate of self-containment issued in accordance with section 87U of the Plumbers, Gasfitters, and Drainlayers Act, a new section of that Act to be inserted by the Bill. That new section provides that a self-containment certification authority may issue a certificate of self-containment if the authority is satisfied that the vehicle meets the requirements for self-containment prescribed by regulations and the owner of the vehicle has paid any required levy prescribed by regulations. The power to make these regulations is set out in the Bill.

- d. strengthening the infringement regime and extending it to other Crown land.
- 5. The Bill also provides for a 2-year transition period, with various provisions coming into force over that period.
- 6. The principal Act's purpose is to regulate freedom camping on land controlled or managed by local authorities or by the Department of Conservation. Noting that the practice of freedom camping has increased over recent years, the Bill's explanatory note states that the purpose of the Bill is to improve the management of vehicle-based freedom camping by providing a regulatory system that central and local government can utilise to reduce the cumulative negative environmental impacts of freedom camping on communities.

Consistency of the Bill with the Bill of Rights Act

Section 14 – Freedom of expression

- 7. Section 14 of the Bill of Rights Act affirms the right to freedom of expression. This includes the freedom to seek, receive, and impart information and opinions of any kind and in any form. This right has been interpreted as including the right not to be compelled to say certain things or provide certain information.²
- 8. The Bill inserts new section 20C(c) which restates the existing requirement (in section 20(1)(l) of the principal Act) that a person, on request, provide information to an enforcement officer in accordance with section 35 of the principal Act.
- 9. That section provides that an enforcement officer who believes on reasonable grounds that a person has committed or is committing an offence may direct the person to give his or her full name, date of birth, full address, telephone number, and occupation (as well as the same information and the whereabouts of any other person connected with the alleged offence).
- 10. The Bill also amends section 35 of the principal Act to add to the list of information the enforcement officer can require a person to provide:
 - a. the person's email address; and
 - b. the certificate of self-containment that applies to the motor vehicle in which the person is freedom camping.
- 11. Refusal to do so, or providing false or misleading information, is an offence. Section 14 is engaged because the Crown is compelling people to provide information.
- 12. 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 a free and democratic society, under s 5 of that Act. Justification

² See, for example, *Slaight Communications v Davidson* 59 DLR (4th) 416; *Wooley v Maynard* 430 US 705 (1977).

under s 5 occurs where the limit seeks to achieve, and 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.³

13. The requirement to provide information is rationally connected to the objective of regulating the use of self-contained vehicles for freedom camping. This regulatory scheme could not operate effectively without accurate information about the use of such vehicles.
14. The regulatory scheme is necessary for improving the management of vehicle-based freedom camping, including effectively responding to concerns about such camper's cumulative impact on the environment.
15. We consider that the limit on the right is no more than is reasonably necessary and proportionate to achieve the Bill's objective. The information provision requirements are similar to those already in place and are consistent with the requirement to provide information in regulatory contexts.
16. We therefore consider the limit to be justified under s 5 of the Bill of Rights Act.

Section 18(1) – Freedom of movement

17. Section 18(1) of the Bill of Rights Act affirms that everyone lawfully in New Zealand has the right to freedom of movement and residence within New Zealand. Butler and Butler states that the right includes a right to not move.⁴
18. The Bill introduces clauses that prohibit freedom camping in non-self-contained vehicles in local authority areas and on conservation land or LINZ land.⁵ It will then be an infringement offence to freedom camp in contravention of these restrictions.⁶
19. In our 2011 advice to the then Attorney-General on the consistency of the principal Act with the Bill of Rights Act, we concluded that provisions that restricted where freedom camping could be undertaken appeared to limit the freedom of movement of people who would otherwise be able to enter and remain there to camp.
20. Similarly, the new restrictions and conditions in the Bill could be seen to engage s 18(1) of the Bill of Rights Act. However, this was questioned by Cooper J in *The New Zealand Motor Caravan Association Inc v Thames-Coromandel District Council*,⁷ in which the plaintiff challenged the validity of a Freedom Camping Bylaw in reliance on powers given

³ *Hansen v R* [2007] NZSC 7, [2007] 3 NZLR 1 at [123].

⁴ Andrew Butler and Petra Butler *The New Zealand Bill of Rights Act: A Commentary* (2nd ed, LexisNexis, Wellington, 2015), p 813.

⁵ New ss 11A and 19A.

⁶ New ss 20, 20A, and 20B.

⁷ *The New Zealand Motor Caravan Association Inc v Thames-Coromandel District Council* [2014] NZAR 1217 at [130].

to local authorities under the principal Act. The plaintiff argued that the bylaw was inconsistent with s 18(1) of the Bill of Rights Act. The defendant argued that the right to freedom of movement does not involve the freedom to remain overnight.

21. Cooper J expressed doubt that the right asserted by the Motor Caravan Association was “in fact a right that falls within s 18”, noting that “the right asserted is a right to remain in place for the purpose of staying in a location overnight simpliciter”.⁸ It was not necessary to decide the point because even if the right was breached, the limitations arising from the Bylaw were considered to be a justified limitation under s 5 of the Bill of Rights Act.
22. Accordingly, and contrary to the view expressed in our 2011 advice, s 18 may not be engaged by the restrictions imposed by the Bill as people are not restricted from entering and moving around in the areas set out in the Bill, they are just prohibited from freedom camping in certain areas or may only do so if they can satisfy certain conditions. The alternative view is that the provisions in the Bill appear to limit the movement of those who wish to enter an area and remain there to camp as their right to not move is engaged.
23. To the extent that these provisions limit the freedom of movement, we have considered whether the limit can be justified under s 5 of the Act.
24. As described above, under s 5 of the Bill of Rights Act, a limit on a right or freedom may be justified where the limit seeks to achieve, and 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 its importance.⁹
25. We consider that these provisions are rationally connected to the important objective of protecting the specified areas from the potential environmental degradation and public health risk associated with freedom camping which may be caused by freedom camping in non-self-contained vehicles.
26. We also consider that the provisions are proportionate and limit the right to freedom of movement no more than is reasonably necessary. As such, we consider that the limits imposed by the Bill on the freedom of movement are justified under s 5 of the Bill of Rights Act.

Section 25(c) - Right to be presumed innocent

27. Section 25(c) of the Bill of Rights Act affirms the right of everyone charged with an offence to be presumed innocent until proven guilty according to law. The right to be presumed innocent requires the Crown to prove an accused person’s guilt beyond reasonable doubt.
28. 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 proof, and the onus for disproving any potentially available defence, must remain on the prosecution.

⁸ At [131].

⁹ *Hansen v R* [2007] NZSC 7, [2007] 3 NZLR 1 at [123].

29. The Bill contains a number of strict liability offences. These give rise to a prima facie issue of inconsistency with section 25(c) because a strict liability offence may be proved by a finding that certain facts occurred without proof of mens rea. The accused is then required to prove (on the balance of probabilities) a defence to avoid liability; whereas, in other criminal proceedings an accused must merely raise a defence in an effort to create reasonable doubt.
30. The strict liability offences in the Bill relate to prohibited or restricted freedom camping activities undertaken in local authority areas or on conservation or LINZ land (new sections 20, 20A, and 20B),¹⁰ as well as offences relating to fraudulent certification of a freedom camping vehicle (new section 20C) and interfering with an enforcement officer (new section 20G).
31. Although infringement offences do not result in a criminal conviction,¹¹ the Court of Appeal in *Henderson v Director, Land Transport New Zealand* held that the rights in s 25 of the Bill of Rights Act apply to minor offences dealt with under the infringement notice regime.¹²
32. Strict liability offences may nevertheless be justifiable limits on rights under section 5 of the Bill of Rights Act. They have been considered more 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.
33. The strict liability offences in the Bill operate as part of a scheme to regulate the practice of freedom camping by providing higher and more consistent standards for the vehicles that freedom campers use. The scheme therefore is of a public welfare nature, in that these measures will fulfil the purpose of the Bill, which is to establish a regulatory system for the certification of self-contained vehicles. This system aims to establish a baseline expectation that freedom campers who are staying on land managed by taxpayers will stay in self-contained vehicles that enable them to be self-supporting and minimise their impacts on the environment.
34. The principal Act contains defences to the offences contained within that Act (section 22) which will apply to the strict liability offences introduced by the Bill. These defences include, for example, that the action or event could not have been reasonably foreseen or prevented (section 22(1)(a) of the principal Act), and that the act or omission giving

¹⁰ These offences largely replicate the current offence scheme, including, for example, the offence of depositing waste generated while freedom camping other than in an appropriate waste receptacle (new section 20(h), 20A(d), and 20B(f), previously contained in section 20(1)(d) of the principal Act).

¹¹ Criminal Procedure Act 2011, s 375(1)(a).

¹² *Henderson v Director, Land Transport New Zealand* [2006] NZAR 629 (CA).

rise to the offence was necessary to save or protect life or health, prevent injury, prevent serious damage to property, or to avoid actual or likely damage to the environment (section 22(2) of the principal Act).

35. It is a general principle that strict liability offences are associated with penalties at the lower end of the scale. Generally, the strict liability offences in the Bill contain low level penalties (a fine not exceeding \$3,000) and none of them involve imprisonment. The offences are public welfare regulatory offences and are largely infringement offences. Further, the alleged offender is in the best position to justify their apparent failure to comply with the law, rather than requiring the Crown to prove the opposite.
36. The Bill will result in the practice of freedom camping becoming more tightly and consistently regulated. The new offences and penalties in the Bill therefore need to reflect the nature of the standards relating to freedom camping post amendment.
37. We consider that the strict liability offences created by the Bill can be justified under s 5 of the Bill of Rights Act. This is because:
 - a. the offences are public welfare regulatory offences;
 - b. the maximum applicable penalty will be \$3,000;
 - c. the principal Act allows for a number of statutory defences; and
 - d. the alleged offender is in the best position to justify their apparent failure to comply with the law, rather than requiring the Crown to prove the opposite.
38. As such, we are satisfied that the strict liability offences set out above place a justifiable limit on the right to be presumed innocent until proven guilty.

Conclusion

39. 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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