Report of the

ATTORNEY-GENERAL

under the New Zealand Bill of Rights Act 1990 on the Summit Road (Canterbury) Protection Bill

Presented to the House of Representatives pursuant to Section 7 of the New Zealand Bill of Rights Act 1990 and Standing Order 260 (2) of the Standing Orders of the House of Representatives

I have considered the Summit Road (Canterbury) Protection Bill (the "Bill") for consistency with the New Zealand Bill of Rights Act 1990 (the "Bill of Rights Act"). I have concluded that clause 30(3) of the Bill appears to be inconsistent with sections 24(d) and 25(a) and (e) of the Bill of Rights Act, and does not appear to be justified in terms of section 5 of the Bill of Rights Act. As required by section 7 of the Bill of Rights Act (and Standing Order 260) I draw this to the attention of the House of Representatives.

In bringing this clause to the attention of the House, I recognise that similar provisions exist in other legislation currently in force. These include the Resource Management Act 1991, and the Crown Minerals Act 1991. However, to the best of my knowledge the existing pieces of legislation that contain sections similar to this clause were either introduced prior to the enactment of the Bill of Rights Act, or did not contain such provisions at the time of their introduction.

The Bill

This Bill protects certain scenic areas. If a person carries out an unauthorised action on protected land, the Protection Authority can issue a notice requiring that person to restore the land to its previous condition. It is an offence to fail to comply with such a notice.

Clause 30 of this Bill states that in any prosecution for an offence against this Bill the prosecution need not prove the defendant intended to commit the offence. The clause then sets out two defences that the defendant may prove to escape liability. These two defences contain, in essence, the kind of "no fault" defence usually available in respect of strict liability in the environmental context.

However, clause 30(3) provides that, except with the leave of the Court, the defendant may not raise these defences unless, within 7 days after the service of the summons (or such further time as the Court may allow), the defendant delivers a written notice to the prosecutor stating that he or she intends to rely on one of the defences and specifying the facts that support his or her reliance on that defence.

***Prima Facie* Breach of Section 24(d) and Section 25(a) and (e)**

The initial question is whether clause 30(3) of the Bill constitutes a *prima facie* inconsistency with sections 24(d) and 25(a) and (e) of the Bill of Rights Act. Section 24(d) provides that:

"Everyone who is charged with an offence-

(d) *Shall have the right to adequate time and facilities to prepare a defence..."*

Section 25(a) and (e) provides that:

"Everyone who is charged with an offence has, in relation to the determination of the charge, the following minimum rights:

(a) The right to a fair and public hearing by an independent and impartial court:

...

(e) *The right to be present at the trial and to present a defence..."*

As noted above, unless the Court grants leave, failure to comply with the 7 day time limit set by clause 30(3) will result in the defendant being unable to raise a defence in respect of a prosecution for an offence under the Bill, except to challenge the *actus reus* itself. At trial stage, the defendant could be prevented from explaining certain circumstances of the offence that would otherwise have fallen within the explanations of one of the defences contained in clause 30(2). These limitations would hinder the defendant's ability to present a defence and, therefore, would adversely affect the defendant's rights to a fair trial and to present a defence.

The requirement that the defendant inform the prosecution that he or she intends to raise a defence within 7 days of receiving a summons in particular will also adversely impact upon the defendant's right to adequate time and facilities to prepare a defence. At that stage, the defendant may not yet even be represented by counsel, let alone have the opportunity to discuss the case and begin to prepare a defence. Yet failure to give notice during this 7 day period would result in the defendant being unable to raise any of the defences provided for in this clause, unless the Court otherwise permits.

It is commonly accepted that in order to receive a fair trial and have adequate facilities to prepare a defence, the defendant should have access to documents and other evidence required to prepare his or her case[1]. This principle is recognised by the requirement that prosecutors disclose their case to the defendant. However, full disclosure of the prosecution's case is unlikely to occur within 7 days of the defendant receiving a summons. Therefore, even if the defendant is already represented by counsel, the ability of counsel to advise the defendant may be impeded by a lack of information about the circumstances of the case. This fact exacerbates the deleterious effect of clause 30 on the defendant's rights to adequate time and facilities to prepare a defence and the rights to a fair trial and to present a defence.

For these reasons, clause 30 is a *prima facie* breach of the right to adequate time and facilities to prepare a defence affirmed by section 24(d) of the Bill of Rights Act, and the rights to a fair trial and to present a defence affirmed by section 25(a) and (e) of the Bill of Rights Act. While the Court can extend the 7 day limit and allow the defendant to raise a defence notwithstanding his or her failure to inform the prosecution of his or her intention to raise a defence, I do not consider this cures the fundamental flaw in this provision.

The question is, therefore, whether this breach can be said to be a "reasonable and justified" limit on these rights in terms of section 5 of the Bill of Rights Act (as applied by the Court of Appeal in *Moonen v Film and Literature Board of Review* [2000] 2 NZLR 9).

Is the Bill a justified limitation in terms of section 5?

This Bill's explanatory note states that it is intended to replace the Summit Road (Canterbury) Protection Act 1963. The Long Title of the 1963 Act states that it is an Act to provide for the preservation and protection of the scenic amenities associated with the Summit Road and other roads in the Port Hills of Canterbury. I have concluded that this broad aim is "important and significant". I also consider that strict compliance with the notices requiring unauthorised actions to be remedied is warranted.

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[1] See *R v Stinchcombe* [1991] 3 SCR 326, *R v Egger* [1993] 2 SCR 451, 466 and *R v Royal* (1993) CRNZ 4, 7.

However, in terms of section 5 of the Bill of Rights Act, I must also consider whether there is a rational and proportionate connection between the Bill's objective and the measures proposed to effect that objective. In the case of this Bill, the inquiry is whether clause 30(3) implements the objective of preserving and protecting the amenities of the Summit Road area in a rational and proportionate manner that impairs the rights to adequate time and facilities to prepare a defence, to a fair trial, and to present a defence as little as possible.

I consider that given the desirability of protecting the amenities of the Summit Road area it is reasonable to limit the defences available to a defendant for failure to comply with the notices issued under this Bill to the kind of "no fault" defence usually available under strict liability offences in the environmental context.

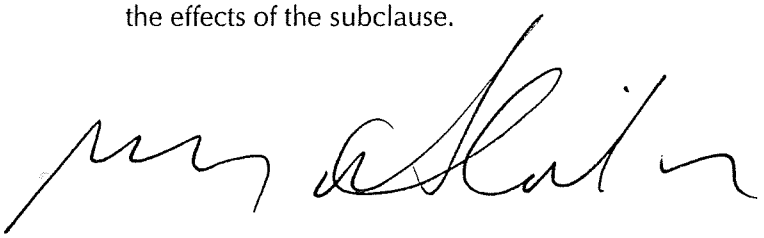
However, clause 30(3) goes further in my opinion than is required to recognise the public interest in protecting these amenities. Subclause (3) substantially restricts the defendant's ability to raise the defences provided in subclause (2) if the defendant does not inform the prosecution of their intention to do so within 7 days of receiving the summons. I am not aware of any persuasive reason for such a provision in this Bill. Therefore, I consider that subclause (3) goes beyond what is reasonably required to regulate behaviour under the Bill.

Accordingly, I do not consider that clause 30(3) is proportionate to the objective of the Bill. Clause 30(3) cannot be considered a justified limitation on the rights to adequate time and facilities to prepare a defence, to a fair trial, and to present a defence in terms of section 5 of the Bill of Rights Act.

Conclusion

I conclude that clause 30(3) of the Summit Road (Canterbury) Protection Bill appears to be inconsistent with section 24(d) and section 25(a) and (e) of the New Zealand Bill of Rights Act 1990, and does not appear to be justified in terms of section 5 of the Bill of Rights Act.

This inconsistency could be remedied, in my view, by either removing subclause (3) in its entirety from clause 30, or perhaps, if it is considered necessary to achieve the objective of the Bill, changing the reference from "7 days after receiving the summons" to "7 days before the hearing" and continuing to allow the court discretion to allow an extension of time or to waive the effects of the subclause.



Hon Margaret Wilson

Attorney-General

WELLINGTON, NEW ZEALAND
Published by Order of the House of Representatives — 2000