

13 July 2023

Hon David Parker, Attorney-General

Consistency with the New Zealand Bill of Rights Act 1990: McLean Institute (Trust Variation) Bill

Purpose

1. We have considered whether the McLean Institute (Trust Variation) Bill (the Bill), a private Bill in the name of Hon Dr Duncan Webb MP, 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 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 section 19 (freedom from discrimination). Our analysis is set out below.

The Bill

3. The McLean Institute (the Institute) is a registered charitable trust. It was incorporated as a charitable trust board by the McLean Institute Act 1909, pursuant to the will of Allan McLean, who passed away in 1907. The terms of the Institute were amended by the McLean Institute Act 1930 and the McLean Institute Act 1934. The assets of the Institute are applied so as to give effect to Allan McLean's wish to benefit destitute women and, in particular, women of refinement or education in straitened circumstances, along with their children.
4. Over time, the specific purposes of the Institute have become hard to satisfy. The Board of the Institute is seeking to update the terms of the trust so that it can still be used to assist disadvantaged women and their children. This private Bill updates the trust deed and repeals the McLean Institute Acts of 1909, 1930 and 1934.

Consistency of the Bill with the Bill of Rights Act

Section 19 – Freedom from discrimination

5. Section 19(1) of the Bill of Rights Act affirms the right to freedom from discrimination on the grounds set out in the Human Rights Act 1993 (Human Rights Act). It is generally unlawful to treat people in comparable circumstances differently on the basis of a prohibited ground, unless the difference is justified.
6. Discrimination under section 19 of the Bill of Rights Act arises where:¹
 - a. there is differential treatment or effects as between persons or groups in analogous or comparable situations based on a prohibited ground of discrimination; and

¹ *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.

- b. that treatment has a discriminatory impact (it imposes a material disadvantage on the person or group differentiated against).
7. The purpose of the Institute, as outlined in clause 5.1 of the schedule, is to “provide assistance to and promote the welfare and well-being of disadvantaged women residing or located in the Region (and the children in the care of such women), who the Board considers are in need of care, support and assistance due to poverty, ill health or other circumstances, whether temporary or long-term.” Clause 5.2 provides examples of how the trust can support women to achieve this purpose. Clause 5.4 states that “In this Deed the reference to “women” is to be interpreted in its broadest possible sense, having regard to both biological sex and gender identity.” Sex is a prohibited ground of discrimination under section 21 of the Human Rights Act.
8. We consider that clause 5.1 of the Bill’s schedule constitutes prima facie discrimination on the basis of sex, as men in a comparable situation may be disadvantaged by not being able to seek support or assistance from the trust.
9. Section 150 of the Human Rights Act is a savings provision relating to charitable instruments. The effect of this section is that provisions in a will, deed or other charitable instrument which confer charitable benefits on a discretionary basis are exempt from the forms of conduct potentially unlawful under Part 2 of the Human Rights Act.² Section 150 could conceivably apply here given the Bill amends a trust deed deriving from a will. If it does, section 19 of the Bill of Rights Act would not be engaged.
10. In the event that section 150 of the Human Rights Act does not apply, we have considered whether discrimination on the basis of sex is justified.
11. A provision which limits a protected right or freedom may be consistent with the Bill of Rights Act if the limitation is reasonable and justifiable in a free and democratic society under section 5 of that Act. The section 5 inquiry may be approached as follows:
 - a. Does the provision serve an objective sufficiently important to justify some limitation of the right or freedom?
 - b. If so, then:
 - i. Is the limit rationally connected with the objective?
 - ii. Does the limit impair the right or freedom no more than is reasonably necessary for sufficient achievement of the objective?
 - iii. Is the limit in due proportion to the importance of the objective?³
12. The objective of these provisions appears to be to enable the trust to continue giving effect to the charitable purposes of the bequest. We consider that this objective is sufficiently important to justify some limit on the right to freedom from discrimination, especially in the context of the protection for charitable purposes provided in section 150 of the Human Rights Act. We note also that the bequest’s intended purpose was likely intended to be equity-enhancing for women to some degree and can itself be seen as an important objective.

² *Te Mata Park Trust Board* [2020] NZHC 239 at [16].

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

13. In our view, restricting the provision of assistance to women is rationally connected to this objective. We think the limit appears reasonable and proportionate in the context that the Bill is regulating a private trust and that it intends to update the trust deed in a way that aligns with the original charitable purposes of the bequest.
14. For these reasons, we consider that the limitation on section 19 of the Bill of Rights Act in clause 5.1 of the Bill is justified.

Conclusion

15. 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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