

Legal Services Amendment Bill—Consistency with the New Zealand Bill of Rights Act 1990

1. I have reviewed the Legal Services Amendment Bill (**LSA Bill**) for consistency with the New Zealand Bill of Rights Act 1990. I consider the LSA Bill does not appear to be inconsistent with the rights and freedoms contained in the Bill of Rights.
2. The LSA Bill would implement the Government's 100-Day Plan commitment to stop taxpayer funding for reports prepared under s 27 of the Sentencing Act 2002.
3. The sentencing process requires courts to strike a balance between holding an offender to account, promoting their individual responsibility, meeting victims' interests, repairing harm, denouncing criminal conduct, deterring offending, protecting the community, and rehabilitating and reintegrating the offender.¹ In crafting an appropriate sentence, the court must consider the overall criminality of the offending, and any relevant aggravating or mitigating circumstances relating to the offence and offender.²

Section 24(f) not engaged

4. Everyone who is charged with an offence has the right under s 24(f) of the Bill of Rights Act 'to receive legal assistance without cost if the interests of justice so require and the person does not have sufficient means to provide for that assistance'. The obligation in s 24(f) is largely given effect to via the legal aid system.
5. Section 27(1) of the Sentencing Act 2002 provides that an offender may request a sentencing court hear any person or persons they call to speak on specified matters relating to the offender's personal circumstances. It is procedural—it provides a mechanism by which an offender can place specified kinds of evidence before a sentencing court, usually to mitigate their sentence.
6. I consider that the scope of 'legal assistance' in s 24(f) does not extend to s 27 cultural reports. While the courts have considered that the right encompasses funds for forensic testing,³ cultural reports are not contestable technical expert evidence of that kind.
7. Further, s 27 is not the only mechanism available to an offender to ensure a court is aware of their personal, including cultural, circumstances. Such information can be given to a court by way of specialist report (eg from a health professional) and/or submissions from defence counsel. If the offender is legally-aided, such reports and representation will continue to be publicly funded in the usual way. In addition, the offender's personal circumstances will usually be brought to a court's attention by a pre-sentence report

¹ Sentencing Act 2002, s 7(1).

² Sections 8(a), 9(1) and 9(2).

³ *Brown v Attorney-General* [2003] 3 NZLR 335 (HC). See also UNHRC General comment 32 at 14.152.



prepared by a probation officer.⁴ Again, such reports are publicly-funded. All these mechanisms remain and will continue to meet the interests of justice.

8. Finally, the LSA Bill would not repeal s 27. All offenders would still be able to use the procedure. In particular, legally-aided persons who do not wish or are unable to pay for a report from a professional report-writer will still be able to use the procedure as originally intended—to call oral evidence from people personally known to them and who are not paid via legal aid.
9. If the LSA Bill is enacted, I consider legally-aided persons will still be able to adequately exercise their rights in the sentencing process. For these reasons, I do not consider the LSA Bill limits s 24(f) of the Bill of Rights.

Section 19(1) not engaged

10. I do not consider the LSA Bill limits the right to freedom from discrimination on the basis of race, ethnic or national origin.⁵ I am aware of statistics suggesting that historically, a higher proportion of Māori and Pacific offenders obtain a legally aided s 27 report (respectively 14% and 11% of offenders from these ethnic groups), compared with New Zealand Europeans/other offenders (7%)⁶ and also that Māori are disproportionately before the courts in criminal matters but I do not consider this to mean that the Bill will amount to indirect discrimination. While some racial or ethnic or national origin groups are overrepresented in the criminal justice system, it does not follow that any neutral measure touching upon that system will necessarily discriminate on a prohibited ground.⁷ If the LSA Bill is discriminatory under the Bill of Rights because of the disproportionate number of offenders from some racial, ethnic or national groups in the criminal justice system, then the same reasoning could apply to a range of racially neutral justice reforms that seek to deter further offending by increasing penalties. In reaching this conclusion I note that a similar analysis has previously been applied by the Courts in the context of prisoner voting rights.⁸
11. I do not consider that stopping taxpayer funding for reports prepared by specialist report-writers will cause material disadvantage to certain ethnic groups. This is because of my conclusion that all legally-aided persons, regardless of race or ethnic group, will still be able to adequately exercise their rights in the sentencing process as discussed in relation to s 24(f). To the extent that an offender's particular cultural or other personal circumstances are relevant to the sentencing process, the court will still be able to receive that information.

⁴ Section 26.

⁵ Contrary to Bill of rights Act, s 19(1) and Human Rights Act 1993, ss 20(1)(f) and (g).

⁶ Cabinet Paper on Removing taxpayer funding for section 27 reports at para 38.

⁷ *R v Sharma* 2022 SCC 39, at [3], [36], [39]-[50].

⁸ *Ngaronoa v Attorney-General of New Zealand* [2017] NZCA 351, [2017] 3 NZLR 643 at [138].



Conclusion

12. I have concluded that the LSA Bill is not inconsistent with the Bill of Rights Act.

A handwritten signature in blue ink, appearing to read 'Judith Collins', written in a cursive style.

Hon Judith Collins KC
Attorney-General

13 February 2024