MINISTRY OF JUSTICE
Tāhū o te Ture

LEGAL ADVICE

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5 June 2018

Hon David Parker, Attorney-General

Consistency with the New Zealand Bill of Rights Act 1990: Protection of First Responders and Prison Officers Bill

Purpose

1. We have considered whether the Protection of First Responders and Prison Officers Bill ('the Bill'), a member's Bill in the name of Darroch Ball 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 s 9 (the right not to be subjected to torture or to cruel, degrading, or disproportionately severe treatment or punishment). Our analysis is set out below.

The Bill

3. The purpose of the Bill is to introduce new protections for first responders and prison officers. It amends the Crimes Act 1961, the Sentencing Act 2002, and the Summary Offences Act 1981. The Bill:

   a. creates a new offence of intentionally or recklessly injuring a first responder or prison officer acting in the execution of their duty, punishable by up to 10 years' imprisonment;

   b. requires that persons found guilty of the new offence be sentenced to at least 6 months' imprisonment unless, given the circumstances of the offence and the offender, a sentence of imprisonment would be manifestly unjust; and

   c. extends the existing offence of assault on a Police, prison, or traffic officer[1] to cover emergency health and fire service staff.

4. In considering the effect of the Bill, we note that the conduct covered by the new and extended offences is already criminal by virtue of the generally applicable offence of assault. Further, it is already an aggravating factor to be considered at sentencing that the victim of any offending was a constable or prison officer acting in the course of their duty, or an emergency health or fire services provider acting in the course of their duty at the scene of an emergency.[2] As such, the primary effect of the Bill as drafted is, effectively, to provide for more severe penalties for this conduct.

[1] Summary Offences Act 1981, s 10. The maximum penalty for this offence is 6 months' imprisonment or a fine not exceeding $4,000.
[2] Sentencing Act 2002, s 9(1)(fa) and (fb).

Consistency of the Bill with the Bill of Rights Act

Section 9 – Right not to be subjected to torture or cruel treatment

5. Section 9 of the Bill of Rights Act provides the right not to be subjected to torture or to cruel, degrading, or disproportionately severe treatment or punishment.

6. The Supreme Court has held that for s 9 to be engaged, the treatment or punishment complained of must reach the very high threshold of outrageousness. The Court has noted that the standard of disproportionate severity will be engaged only in extreme circumstances:[3]

> "… 'disproportionately severe', appearing in s 9 alongside torture, cruelty and conduct with degrading effect, is intended to capture treatment or punishment which is grossly disproportionate to the circumstances."

7. The Court has taken a similar approach to the Supreme Court of Canada, which has held that the length of sentences is a matter of broad legislative judgment,[4] and that a mandatory minimum sentence only offends the right not to be subjected to cruel or unusual treatment or punishment where the resulting sentence is grossly disproportionate.[5] As the Supreme Court of Canada held in *R v Lloyd*:[6]

> "To be 'grossly disproportionate', a sentence must be more than merely excessive. It must be 'so excessive as to outrage standards of decency' and 'abhorrent or intolerable' to society [citations omitted]. The wider the range of conduct and circumstances caught by the mandatory minimum, the more likely it is that the mandatory minimum will apply to offenders for whom the sentence would be grossly disproportionate."

8. In *The New Zealand Bill of Rights Act: A Commentary,* Butler and Butler consider that minimum mandatory sentences "must be regarded as usually amounting to a prima facie breach of section 9 of the Bill of Rights Act".[7] Mandatory minimum sentences do not allow a Judge to take into account the specific circumstances of the offender and the offending in the particular case. This may mean there are cases where the sentence is disproportionate to the relevant offending. However, Butler and Butler also consider that there may be cases where the minimum sentence is set so low as to never raise the possibility of "gross disproportionality" and not implicate s 9 of the Bill of Rights Act.

9. Where s 9 is engaged, there is no scope for justification in terms of s 5 of the Bill of Rights Act.[8]

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[3] *Taunoa v Attorney-General* [2008] NZLR 429 (SC) at [176].
[4] *R v Smith* [1987] 1 SCR 1045, 1070 and *R v Latimer* [2001] 1 SCR 3 at [77].
[5] Affirmed by s 12 of the Canadian Charter of Rights and Freedoms, the Canadian equivalent to s 9 of the Bill of Rights Act.
[6] [2016] 1 SCR 130 at [24].
[7] A Butler and P Butler *The New Zealand Bill of Rights Act: A Commentary* (2nd ed, LexisNexis, Wellington, 2015) at 373.
[8] *R v Hansen* [2007] 3 NZLR 1 (SC) at [264].

Does the mandatory minimum sentence implicate s 9?

10. The 6-month term of the mandatory minimum sentence is equivalent to the maximum term of imprisonment that can currently be imposed for the offence of assaulting a Police, prison or traffic officer under s 10 of the Summary Offences Act. The 6-month term is relatively low compared with some of the mandatory minimum terms of imprisonment that have been struck down by Canadian courts as grossly disproportionate.[9] However, the term is not, in our view, so low that it could confidently be said that it would never raise the possibility of "gross disproportionality" and thereby engage s 9.

11. Further, we consider that the inclusion of reckless conduct is likely to significantly extend the range of conduct and circumstances covered by the new offence. For example, it is conceivable that a person could recklessly fall into a first responder and cause them injury. The inclusion of reckless conduct makes it more likely that the offence will capture offenders for whom a sentence of 6 months' imprisonment would be grossly disproportionate.

12. Despite these concerns, we consider that the ability for courts to depart from the mandatory minimum sentence goes some way to ameliorating the potentially harsh effects of the scheme. Enabling departure from the mandatory minimum sentence where to impose it would be "manifestly unjust" in the circumstances of the offender or offending in question represents a safeguard against gross disproportionality.

13. In light of this feature of the proposed scheme and the high threshold that must be met in order to offend s 9, we consider that the mandatory minimum sentence imposed by the Bill is not so grossly disproportionate as to limit the right not to be subjected to torture or to cruel, degrading, or disproportionately severe treatment or punishment.

Conclusion

14. 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, for example, *R v Smith* [1987] 3 SCR 519 (7 years' imprisonment for importing any quantity and any type of illegal narcotic), *R v Nur* [2015] 1 SCR 773 (3 years' imprisonment for a first offence, 5 years' imprisonment for a second or subsequent offence for possessing loaded prohibited firearms) and *R v Lloyd* [2016] 1 SCR 130 (1 year's imprisonment for possessing controlled substances for the purposes of trafficking).