

17 May 2016

Hon Christopher Finlayson QC, Attorney-General

## **Consistency with the New Zealand Bill of Rights Act 1990: Children, Young Persons, and Their Families Amendment Bill**

### **Purpose**

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1. We have considered whether the Children, Young Persons, and Their Families Amendment 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 with the latest version of the Bill (PCO 19719/2.0). We will provide further advice if the final version of the Bill 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 19(1) (right to be free from discrimination). Our analysis is set out below.

### **The Bill**

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4. The Bill amends the Children, Young Persons, and Their Families Act 1989 ('the principal Act') to:
  - a. extend the provisions of the statutory care and protection system to young people aged 17 years
  - b. embed children and young people's views at an individual and systemic level by strengthening obligations in the principal Act to support children and young people's participation
  - c. support the establishment of independent advocacy services, with a particular focus on children and young people in care, through a new duty on the chief executive, and
  - d. enable a broader range of professionals to perform a wider set of functions to help identify and meet the needs of vulnerable children and young people.
5. The Bill also makes minor consequential amendments to the Vulnerable Children Act 2014 and the Crown Proceedings Act 1950.

## Consistency of the Bill with the Bill of Rights Act

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### Section 19(1) - Right to be free from discrimination on the basis of national origin

6. Section 19 of the Bill of Rights Act affirms that everyone has the right to freedom from discrimination on the grounds set out in the Human Rights Act 1993. These grounds include age, which means any age commencing with the age of 16 years.
7. The key questions in assessing whether there is a limit on the right to freedom from discrimination are:<sup>1</sup>
  - a. does the legislation draw a distinction on one of the prohibited grounds of discrimination under s 21 of the Human Rights Act and, if so,
  - b. does the distinction involve disadvantage to one or more classes of individuals?
8. In determining if a distinction arises, consideration is given to whether the legislation proposes that two comparable groups of people be treated differently on one or more of the prohibited grounds of discrimination.<sup>2</sup> The distinction analysis takes a purposive and un-technical approach to avoid artificially ruling out discrimination.<sup>3</sup> Once a distinction is identified, the question of whether disadvantage arises is a factual determination.<sup>4</sup>

### *Raising the age limit in the principal Act for care and protection purposes and re-enacting the current age limit for the youth justice system*

9. Clause 4 of the Bill amends the definition of "young person" in Parts 2 to 3A (care and protection system) in the principal Act to include 17 year olds. In relation to Parts 4 to 5 (youth justice system) the Bill also re-enacts the current definition of "young person" to only include persons under the age of 17.
10. Clause 4 therefore draws a distinction between those aged 16 or 17 and those aged 18 years and above for the purpose of the applicability of the care and protection system, and for the youth justice provisions clause 4 distinguishes between those aged 16 and those aged 17 and above.
11. In respect of the benefits of the care and protection provisions, clause 4 arguably disadvantages those aged 18 years and over as these persons are not entitled to the benefits of this system. In respect of the youth justice system, clause 4 arguably creates a disadvantage to those aged 17 years and over as these persons will not have access to the additional support provided by the youth justice system.
12. For the purposes of this analysis, we therefore consider this clause to be a prima facie limitation on s 19(1) of the Bill of Rights Act.

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<sup>1</sup> See, for example, *Atkinson v Minister of Health and others* [2010] NZHRRT 1; *McAlister v Air New Zealand* [2009] NZSC 78; and *Child Poverty Action Group v Attorney-General* [2008] NZHRRT 31.

<sup>2</sup> *Quilter v Attorney-General* [1998] 1 NZLR 523 (CA) at [573] per Tipping J (dissenting) relied on in *Atkinson v Minister of Health and others* [2010] NZHRRT 1 at [199]; *McAlister v Air New Zealand* [2009] NZSC 78 at [34] per Elias CJ, Blanchard and Wilson JJ and at [51] per Tipping J; and *Child Poverty Action Group v Attorney-General* [2008] NZHRRT 31 at [137].

<sup>3</sup> *Atkinson v Minister of Health and others* [2010] NZHRRT 1 at [211]-[212]; *McAlister v Air New Zealand* [2009] NZSC 78 at [51] per Tipping J; and *Child Poverty Action Group v Attorney-General* [2008] NZHRRT 31 at [137].

<sup>4</sup> See, for example, *Child Poverty Action Group v Attorney-General* [2008] NZHRRT 31 at [179]; and *McAlister v Air New Zealand* [2009] NZSC 78 at [40] per Elias CJ, Blanchard and Wilson JJ.

*Is the limitation justified and proportionate under s 5 of the Bill of Rights Act?*

13. 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 justifiable in terms of s 5 of that Act.
14. The s 5 inquiry may be approached as follows:<sup>5</sup>
  - 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?
15. In respect of raising the age limit from 17 to 18 for the care and protection system, the amendment brings the principal Act into greater alignment with the United Nations Convention on the Rights of the Child ('the UNCROC'). The UNCROC and other international instruments require New Zealand to provide various protections to people under 18. Providing for the protection sought by the UNCROC is a sufficiently important objective and the amendments in the Bill are a rational way of achieving that objective.
16. The limitation is rationally and proportionately connected to the objective as the age of 18 is often used as a proxy for the responsibility and maturity sufficient to make significant financial and legal decisions. This is reflected, for example, in the voting age and our residential tenancies provisions.
17. We therefore consider this limit on s 19(1) is justified in terms of s 5 of the Bill of Rights Act.
18. In relation to re-enacting the current definition of young person for the youth justice system, we note that the purposes of Parts 2 to 3A and Parts 4 to 5 of the principal Act are distinct and guided by different principles.
19. The care and protection system aims to protect young people from harm, abuse or neglect and provide them with the care and protection required. The youth justice system responds to concerns about a young person's offending, ensuring that they are held to account, and giving due regard to the rights of victims and the safety of the community.
20. The Bill's general policy statement and the policy documentation accompanying the Bill indicates that the Bill is part one of a two stage reform. The second stage will include an investigation into the possibility of lifting the age limit for youths in the youth justice system from 17 to 18 years which would align with the current amendment to the care

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<sup>5</sup> *Hansen v R* [2007] NZSC 7 [123].

and protection system. This investigation will consider a number of factors which are particular to the youth justice system and distinct from the care and protection regime.

21. Parliament is entitled to appropriate latitude to achieve its objectives.<sup>6</sup> There can be 'many ways to approach a particular problem, and no certainty as to which will be the most effective.'<sup>7</sup>
22. Due to the different contexts and concerns of the two regimes and the fact that the investigation into the appropriateness of changing the age limits is still underway with no decision made, we consider that the re-enactment of the current age restriction of 17 years and under, for the purpose of the youth justice system is justifiable.
23. For these reasons, we consider the limit on s 19(1) is justified in terms of s 5 of the Bill of Rights Act.

## **Conclusion**

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24. 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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<sup>6</sup> *Hansen* at [126] per Tipping J.

<sup>7</sup> *Canada (A-G) v JTI-McDonald Corp* [2007] 2 SCR 610 at [43].