

18 November 2021

Hon David Parker, Attorney-General

Consistency with the New Zealand Bill of Rights Act 1990: Accident Compensation (Maternal Birth Injury and Other Matters) Amendment Bill

1. We have considered whether the Accident Compensation (Maternal Birth Injury and Other Matters) 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 in relation to the latest version of the Bill (PCO 22578/2.1). We will provide you with further advice if the final version 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 (freedom from discrimination) of the Bill of Rights Act. Our analysis is set out below.

The Bill

4. The Bill amends the Accident Compensation Act 2001 (the Act), and makes consequential amendments to the Accident Compensation (Definitions) Regulations 2019 and the Injury Prevention, Rehabilitation, and Compensation (Interest Rate for Late Payment of Levies) Regulations 2002.
5. The Bill's objectives, as set out in the explanatory note, are to "increase the equity of injuries covered by the Accident Compensation Scheme", to provide greater clarity to claimants, and better give effect to the policy intent of the Act.
6. The Bill;
 - a. Expands the types of injuries covered by the Act;
 - b. Clarifies test requirements;
 - c. Updates the Act in light of the End of Life Choice Act 2019; and,
 - d. Provides for a number of other minor technical amendments relating to definitions and other matters.

Consistency of the Bill with the Bill of Rights Act

Section 19 Freedom of expression

7. Section 19(1) 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 (the Human Rights Act).

8. The key questions in assessing whether there is a limit on the right to freedom from discrimination are whether the legislation draws a distinction on one of the prohibited grounds of discrimination under s 21 of the Human Rights Act and, if so, whether the distinction involve disadvantage to one or more classes of individuals.¹
9. A distinction will arise if the legislation treats two comparable groups of people differently on one or more of the prohibited grounds of discrimination.² Whether disadvantage arises is a factual determination.
10. Clause 5 inserts a new definition of “child” into s 17 of the Act. Section 17 sets out the requirements for a person to be considered ordinarily resident in New Zealand (some entitlements under the principal Act are only available to those ordinarily resident in New Zealand) and provides that, in certain circumstances, children and other dependants of someone who is ordinarily resident in New Zealand are also considered to be ordinarily resident in New Zealand. The new definitions align with the approach taken to children and other dependants of deceased claimants in clause 70 of Schedule 1.
11. The new definition will result in children of New Zealand citizens by descent being ineligible for coverage under the Act for injuries that occur overseas if they are over the age of 18, or, are over the age of 21 and not in full-time study. We consider this is a disadvantage, and accordingly the clause amounts to a discrimination on the basis of age.

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

12. 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. The limitation will be considered justified where the objective of the provision is sufficiently important to justify differential treatment on the basis of age, the limitation is rationally connected and proportionate to achieving that objective, and the limitation is no more than reasonably necessary to achieve the objective.³
13. We consider the differential treatment outlined in clause 5 to be rationally connected to the primary purpose of the Act, which is to use funds levied from New Zealanders to minimise both the overall incidence of injury in the New Zealand community, and the impact of injury on the community (including economic, social, and personal costs).
14. We also consider that is it reasonable to limit the coverage for overseas injuries to those with an appropriate degree of connection to the New Zealand community. Children under

¹ See, for example, *McAlister v Air New Zealand*[2009] NZSC 78, [2010] 1 NZLR 153; *Ministry of Health v Atkinson*[2012] NZCA 184, [2012] 3 NZLR 456; and *Child Poverty Action Group Inc v Attorney-General*[2013] NZCA 402, [2013] 3 NZLR 729.

² See, for example *McAlister v Air New Zealand* above n 6 at [40] per Elias CJ, Blanchard and Wilson JJ.

³ *Hansen v R* [2007] NZSC 7 at [123].

the age of 18, and those under the age of 21 who are in full-time study, have a reasonable connection to New Zealand through the combination of their dependency on their parents and their parents' ties with New Zealand. We consider that treating independent adult children of "ordinarily resident" New Zealanders differently from dependent children is a reasonable and proportionate limit on the right to be free from discrimination on the basis of age.

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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