Report of the

ATTORNEY-GENERAL

under the New Zealand Bill of Rights Act 1990 on the Auckland Regional Amenities Funding Bill

Presented to the House of Representatives pursuant to Section 7 of the New Zealand Bill of Rights Act 1990 and Standing Order 266 of the Standing Orders of the House of Representatives

I have considered the Auckland Regional Amenities Funding Bill (the 'Bill') for consistency with the New Zealand Bill of Rights Act 1990 (the 'Bill of Rights Act'). I have concluded that clause 6(1)(k) of schedule 4 of the Bill authorises measures that limit the right affirmed in section 19(1) of the Bill of Rights Act. These limitations cannot be justified in terms of section 5 of that Act. As required by section 7 of the Bill of Rights Act and Standing Order 266, I draw this to the attention of the House of Representatives.

PURPOSE OF THE BILL

The Bill creates a statutory framework for the secure and sustainable funding of particular organisations that provide arts, educational, rescue and other community facilities or services used or relied on by people throughout the Auckland region.

As part of the framework, the Bill establishes the Auckland Regional Amenities Funding Board (the 'Board'). The purpose of the Board is to assess applications for funding and monitor specified amenities for ongoing compliance with the assessment criteria.

INCONSISTENCY WITH SECTION 19(1) OF THE BILL OF RIGHTS ACT

I have considered whether schedule 4, clause 6(1)(k) of the Bill ('clause 6(1)(k)') could give rise to an issue of discrimination under section 19 of the Bill of Rights Act. Section 19(1) of the Bill of Rights Act provides that everyone has the right to freedom from discrimination on the grounds set out in the Human Rights Act 1993. These grounds include 'disability' which is defined to include, amongst other conditions, psychiatric illness; intellectual or psychological disability or impairment; or, any other loss or abnormality of psychological, physiological, or anatomical structure or function.

The determination as to whether a provision is discriminatory depends on whether: the legislation draws a distinction based on one of the prohibited grounds of discrimination; and the distinction involves a disadvantage to one or more classes of individuals.

Under clause 6(1)(k), a Board member will have his or her term in office end immediately where the member becomes subject to a compulsory treatment order made under Part 2 of the Mental Health (Compulsory Assessment and Treatment) Act 1992 (the 'Mental Health (CAT) Act'). I note that the term ends and an extraordinary vacancy arises once the member becomes subject to such an order. No provision is made for changes to that status, such as the expiry of that order or a successful review.

Compulsory treatment orders may be considered by a Court only where someone is suffering from an abnormal state of mind (whether of a continuous or an intermittent nature) of such a degree that it: poses a serious danger to the health or safety of that person or of others; or seriously diminishes the capacity of that person to take care of himself or herself. In such a case, the individual may be considered mentally disordered for the purposes of the Mental Health (CAT) Act.

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The Mental Health (CAT) Act is not a general mental health Act. It applies only to those whom it is necessary to assess or treat compulsorily and then only if their condition reaches a sufficient state of seriousness. It can therefore be said that the Act is not an incapacity based piece of legislation and, in this regard, it represents a movement away from the use of categories or "proxies" to determine legal incapacity.

Any differential treatment of persons with a disability that results in a disadvantage is *prima facie* inconsistent with the freedom from discrimination. The provision under clause 6(1)(k) that would force the removal of a Board member under a compulsory treatment order creates a disadvantage to people with a disability seeking to remain on the Board and therefore must be justified under section 5 of the Bill of Rights Act.

JUSTIFICATIONS UNDER SECTION 5 OF THE BILL OF RIGHTS ACT

Where a Bill is found to be *prima facie* inconsistent with a particular right or freedom, it may nevertheless be found to be consistent with the Bill of Rights Act if the inconsistency is considered to be a reasonable limit that is justifiable under section 5 of that Act. The inquiry under section 5 is essentially two-fold:

- does the provision serve an important and significant objective; and
- is there a rational and proportionate connection between that objective and the provision?

Important and Significant Objective

It appears that the specific objective of clause 6(1)(k) is to remove a Board member where he or she no longer has the capacity to serve on the Board. In my view, this is an important and significant objective for the purposes of section 5 of the Bill of Rights Act.

Rational and Proportionate Connection

For the provision to be justified, however, there must be a rational and proportionate connection between removing an individual from the Board due to his or her incapacity, and that individual being subject to a compulsory treatment order.

The definition of mental disorder contained in the Mental Health (CAT) Act is both expansive and constrained. It is expansive in that an abnormal state of mind may broadly apply and it is constrained by the second element of serious danger to safety of self or others, or a seriously diminished capacity of self-care.[1]

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[1] Brookers *Mental Health (Compulsory Assessment and Treatment) Act 1992 – section 2 Commentary* MH2.13.04(4).

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The definition of mental disorder represents a move away from 'identity-based' criteria where individuals are defined by their identity as mentally ill persons. The definition focuses instead on an individual's ability to perform tasks in specific areas of social life. The goal is to prevent the negative labelling and decisions based on irrelevant grounds that are inherent in identity-based criteria.[2]

The question of capacity is issue-specific. That is, whether the Board member is unable to make reasonable decisions relating to the funding of the organisations referred to in the Bill. Linking the test of incapacity to an individual's status under particular legislation does not amount to an accurate assessment of incapacity for this purpose.

Advice I have received from the Ministry of Health indicates that it is also not appropriate to adopt the test under the Mental Health (CAT) Act as the test for incapacity, as this test comprises statutory criteria promulgated for other purposes, including criterion (such as dangerousness) irrelevant to the question of whether an individual has capacity to make funding decisions. Danger to oneself and capacity of self-care of an individual are generally independent of the individual's general level of functioning and achievement in the community.[3]

Compulsory treatment orders do not signify nor are they an appropriate proxy for incapacity. Such a presumption would be at odds with the rights-based framework and the policies of legal protection underpinning the Mental Health (CAT) Act. The legislation has been designed to achieve a balance between compulsion and protection of the rights of those subject to an order under the legislation. The legislation assumes the capacity of individuals subject to the Act to make decisions in a number of areas. This is particularly relevant given that approximately 80% of individuals subject to a compulsory treatment order live in the community under community based treatment orders.

Furthermore clause 6(1)(k) is not sufficiently precise to ensure that it addresses only those matters that it is intended to address. Given the extent that individuals subject to a compulsory treatment order may contribute to society and the goal of treating those with mental illness with dignity, prematurely ending the term of a Board member based on what may be an irrelevant label and potentially in cases involving a transitory condition is disproportionate. The Bill will disadvantage those with mental illness and who are subject to a compulsory treatment order at some point after their appointment to the Board and who have the capacity to contribute to making Auckland a vibrant and attractive place to live and visit.

Given the significant limitations identified by the Ministry of Health of a compulsory treatment order as a proxy for legal capacity, I have concluded

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[2] Brookers *Mental Health (Compulsory Assessment and Treatment) Act 1992 – section 2 Commentary* MH2.13.05(5); see also J Dawson, "The changing legal status of mentally disabled people" (1994) 2 Journal of Law and Medicine 38.

[3] *Re K L G* 31/3/99, NRT 682 (Northern Review Tribunal).

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that there is an insufficient rational and proportionate connection between such an order and the capacity to carry out the duties and responsibilities of the Board, for the purposes of s 5 of the Bill of Rights Act.

CONCLUSION

Based on the analysis set out above, I have concluded that the Bill appears to be inconsistent with section 19(1) of the Bill of Rights Act and that the inconsistency cannot be justified under section 5 of that Act.

Hon Michael Cullen
Attorney-General

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