

17 May 2017

Hon Christopher Finlayson QC, Attorney-General

## **Consistency with the New Zealand Bill of Rights Act 1990: Care and Support Worker (Pay Equity) Settlement Bill**

### **Purpose**

---

1. We have considered whether the Care and Support Worker (Pay Equity) Settlement 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 20367/3.0). We will provide you with further advice if the final version of the Bill includes changes that affect the conclusions of 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 14 (freedom of expression) and s 27(3) (right to bring civil proceedings against the Crown). Our analysis is set out below.

### **The Bill**

---

4. The Bill implements a settlement agreement relating to pay equity issues for care and support workers. The agreement was signed by, and on behalf of, the Crown by the Ministry of Health, the Accident Compensation Corporation ('ACC'), District Health Boards ('DHBs') and various unions representing care and support workers. It also applies the terms of that agreement to employers and care and support workers who were not party to the agreement. The Bill:
  - a. extinguishes existing claims and bars future claims by care and support workers under the Equal Pay Act 1972
  - b. provides minimum wage rates payable by employers to care and support workers, and
  - c. provides for funding to be paid by the Ministry of Health, DHBs and ACC to employers towards the cost of employers' obligations under the Bill.

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

---

#### **Section 14 – Freedom of expression**

5. Section 14 of the Bill of Rights Act affirms the right to freedom of expression, including the freedom to seek, receive, and impart information and opinions of any kind in any

form. The right has also been interpreted as including the right not to be compelled to say certain things or to provide certain information.<sup>1</sup>

6. Clause 19 of the Bill compels the provision of certain information. Employers must keep records for each employee of the qualifications the employee holds and the length of time they have been employed by the employer. The employer must provide these to a funder upon request, along with the employee's wages and time records kept by the employer under the Employment Relations Act 2000. If an employer fails to comply with these requirements they are liable to a penalty imposed by the Employment Relations Authority under the Employment Relations Act.
7. The penalties associated with failure to disclose the information introduce an element of compulsion that *prima facie* limits the right to freedom of expression affirmed in s 14 of the Bill of Rights Act.
8. 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.
9. We consider that the limitation is justified under s 5 of the Bill of Rights Act because:
  - a. the objective of giving effect to the pay equity settlement agreement for care and support workers is sufficiently important
  - b. requiring employers to provide the specified information is rationally connected to that objective
  - c. the information required is factual and impairs the right no more than is reasonably necessary to achieve the objective, and
  - d. the limits are in due proportion to the importance of the objective.
10. For these reasons, we conclude that any limits to the freedom of expression imposed by the Bill are justified under s 5 of the Bill of Rights Act.

### **Section 27(3) – Right to bring civil proceedings against the Crown**

11. Section 27(3) provides that every person has the right to bring civil proceedings against, and to defend civil proceedings brought by, the Crown, and to have those proceedings heard, according to law, in the same way as civil proceedings between individuals.
12. Clause 7 of the Bill extinguishes existing claims and bars future claims by care and support workers under the Equal Pay Act. The question then arises as to whether s 27(3) is engaged, as the Bill aims to give effect to a settlement reached with the Crown, DHBs and ACC that, effectively, deems existing proceedings to have been withdrawn.
13. Section 27(3) does not appear to be engaged because the Bill does not extinguish claims against the Crown *per se*, as the claims referred to cover claims brought against "employers" as defined in the Bill (being essentially those funded by the Ministry of

---

<sup>1</sup> *RJR MacDonald v Attorney-General of Canada* (1995) 127 DLR (4th) 1.

Health, DHBs or ACC). DHBs and ACC are Crown entities, which are not part of the Crown under s 15 of the Crown Entities Act 2004.

14. To the extent that claims referred to in the Bill could be considered to be claims against the Crown (because the Crown funds the employers), then it is worth noting that s 27(3) of the Bill of Rights Act is directed at procedural matters in litigation, not the substantive content of rights and duties. This was made clear by McGechan J in *Westco Lagan Ltd v Attorney-General*.<sup>2</sup>

“Section 27(3) is a clearly procedural provision... aimed at procedures which govern the assertion or denial of rights in the course of Court or equivalent proceedings; and is not aimed at the creation of other rights in themselves... it cannot restrict the power of the legislature to determine what substantive rights the Crown is to have.”

15. In *Westco*, the plaintiffs sought to restrain the Clerk of the House of Representatives from presenting a Bill to the Governor-General for assent. The Bill would have cancelled the West Coast Forest Accord and annulled any outstanding Crown obligations arising under that Accord, without the payment of compensation to anyone affected by the Accord’s cancellation. The decision appears to be the most recent<sup>3</sup> and on point, and supports the view that s 27(3) is not engaged on this occasion.
16. We have not found it necessary to form a concluded view on this interpretational issue as, even if s 27(3) is engaged, we consider the limit is a reasonable and demonstrably justified limit in terms of s 5 of the Bill of Rights Act. The Bill gives effect to a negotiated settlement, the express purposes of which include:
- a. to extinguish the proceedings (and any associated awards of compensation) and the right of employees to make future pay equity claims, by providing for a forward-looking agreed structure of pay rates for employees over a period of 5 years, and
  - b. to provide for statutory certainty of employer obligations and employee rights, the lawful payment of funding, and related matters through legislation.<sup>4</sup>
17. As the Bill provides a framework for future claims to be made, the right is impaired no more than reasonably necessary and any limitation is in due proportion to the objective. We therefore consider that the Bill appears to be consistent with the right affirmed in s 27(3) of the Bill of Rights Act.

## **Conclusion**

---

18. We have concluded that the Bill appears to be consistent with the rights and freedoms affirmed in the Bill of Rights Act.

Jeff Orr  
**Chief Legal Counsel**  
**Office of Legal Counsel**

---

<sup>2</sup> *Westco Lagan Ltd v Attorney-General* [2001] 1 NZLR 40 (HC) at 55.

<sup>3</sup> Although it has since been cited with approval by Kos J in *New Health New Zealand Inc v Attorney-General* [2015] NZAR 1513.

<sup>4</sup> Clauses 1(c) and (d) of the Care and Support (Pay Equity) Settlement Agreement.