

2 April 2019

Hon David Parker, Attorney-General

Consistency with the New Zealand Bill of Rights Act 1990: Support Workers (Pay Equity) Settlements Amendment Bill

Purpose

1. We have considered whether the Support Workers (Pay Equity) Settlements 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 21182/12.2). 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 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 amends the Care and Support Workers (Pay Equity) Settlement Act 2017 ("the principal Act") to include vocational and disability support workers and mental health and addiction support workers. The Bill gives effect to elements of two settlement agreements between the Crown, the relevant employers and unions. The agreements are intended to address historical inequities and achieve pay equity across the support services sector.
5. The Bill provides vocational and disability support workers and mental health and addiction support workers with the same rights as care and support workers under the principal Act. In particular, they will receive access to training and agreed pay rates back-dated to 1 July 2017. Employers will receive additional funding to offset the additional costs imposed by the Bill.
6. The Bill extinguishes any current pay equity claims and bars future claims by these workers until June 2022. The Bill also changes the name of the principal Act (resulting in consequential amendments to the Employment Relations Act 2000) and makes other amendments in order to bring vocational and disability support workers and mental health and addiction support workers under the scheme of the principal Act.

Consistency of the Bill with the Bill of Rights Act

Section 14 – Freedom of expression

7. 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.¹

8. Clause 19 amends section 19 of the principal Act to compel employers of vocational and disability support workers and mental health and addiction support workers to provide certain information to the funder upon request. 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 2000.
9. 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.
10. The same limit was discussed in the Bill of Rights Act advice for the principal Act which concluded that any limits to the freedom of expression imposed by the Bill are justified under s 5 of the Bill of Rights Act.²

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 by, the Crown, and to have those proceedings heard, according to law, in the same way as civil proceedings between individuals.
12. Clause 10 of the Bill extinguishes existing claims and bars future claims by vocational and disability support workers and mental health and addiction support workers under the Equal Pay Act 1972, until 30 June 2022.
13. The principal Act also extinguished claims and barred future claims by care and support workers under the Equal Pay Act. The Bill of Rights Act advice for the principal Act concluded that s 27(3) did not appear to be engaged because the Bill did not extinguish claims against the Crown *per se*.
14. To the extent that claims referred to in the principal Act could be considered to be claims against the Crown (because the Crown funds the employers), the advice noted 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. Section 27(3) cannot restrict the power of the legislature to determine what substantive rights the Crown is to have.³ The advice concluded that even if s 27(3) were engaged, the limit was reasonable and demonstrably justified under s 5 of the Bill of Rights Act.⁴
15. As clause 10 is similar to s 8 of the principal Act, we find that the same arguments in the previous Bill of Rights Act advice apply in this case. Like the principal Act, the Bill gives effect to two negotiated settlements, the purpose of which are to provide statutory certainty of employer obligations and employee rights. The Bill extinguishes current

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

² Ministry of Justice *Legal Advice – Consistency with the New Zealand Bill of Rights Act 1990: Care and Support Worker (Pay Equity) Settlement Bill* (17 May 2017).

³ *Westco Lagan Ltd v Attorney-General* [2001] 1 NZLR (HC) at 55.

⁴ Ministry of Justice, above n 2

proceedings and bars future pay equity claims by providing for a forward-looking agreed structure of pay rates for employees over a 5-year period and additional funding for employers to offset additional costs.

16. 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. Section 27(3) does not appear to be engaged, however if it is, it is a reasonable and justifiable limit in terms of s 5 of the Bill of Rights Act.
17. 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.

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