

Judicial Matters Bill

24 July 2003

Attorney-General

Judicial Matters Bill (PCO 4817/6) consistency with New Zealand Bill of Rights Act 1990 Our Ref: ATT114/1197(4)

1. I have considered the Judicial Matters Bill (PCO 4817/6) for consistency with the New Zealand Bill of Rights Act 1990 ("NZBORA") and am pleased to advise that the Bill does not contain any provisions that appear to be inconsistent with NZBORA. Nonetheless, three issues arose which required brief analysis in order to be able to establish NZBORA consistency, viz, (1) extending immunity from suit to all judges; (2) mandatory retirement ages for Acting Community Magistrates; (3) certain provisions affecting the right to freedom of expression.

Overview of the Bill

2. Although the Judicial Matters Bill deals with matters directly related to the appointment and monitoring of the judiciary, it is important to note that the Bill does not change the important principle of judicial tenure, the current constitutional process relating to the actual removal of members of the judiciary, or the conventional non-political role of the Attorney-General as the link between the executive and the judiciary. What the Bill does do is:
 - Establish a process for the receipt and processing of all complaints against Judges. This process is to be managed by a new office to be known as the Judicial Conduct Commissioner.
 - Establish a process to enquire into complaints that raise a question of removal in order to provide relevant information to Parliament or the Attorney-General when considering such questions. When necessary, this process is to be carried out by the Judicial Conduct Panel.
 - Provide for all Judges to be accorded the same protection of absolute personal immunity from suit as Court of Appeal and High Court Judges.
 - Provide for the Attorney-General, with the agreement of the relevant Chief or Principal Judge, to allow Judges to sit on a part-time basis.
 - Provide that the Attorney-General will be responsible for advising the Governor-General on the appointment of Environment Court Judges and Environment Commissioners. The Attorney-General will then be responsible for advising the Governor-General on the appointment of all Judges except the Chief Justice and Judges of the Maori Land Court.
 - Increase the maximum number of District Court Judges by 12 members, and the maximum number of High Court Judges by 8 members. The Bill also changes the statutory mechanism for determining the number of Judges in the future.
 - Rationalise the roles of the Principal Family Court and Principal Youth Court Judges and make the roles fixed-term positions of 8 years.
 - Provide Masters of the High Court with permanent tenure and change their title to "Associate Judge".
 - Allow retired Community Magistrates to be appointed as Temporary Community Magistrates.

Personal judicial immunity

3. Clauses 39, 40, 45, 59, 66 to 71, and 74 of the Bill are designed to accord all Judges the same absolute personal immunity from suit as High Court and Court of Appeal Judges. This is immunity from suit in their private capacity in respect of actions taken in their role as judges.
4. It might be suggested that an *absolute* immunity raises an issue of consistency with s 27(3) NZBORA. Section 27(3) states 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.

In my view exclusion of personal liability for Judges in relation to their actions as Judges does not engage s 27(3): Judges are not "The Crown" and the presence of a personal judicial immunity does not exclude the possibility of a suit against the Crown for the actions of the particular Judge should such a possibility be regarded as necessary to achieve BORA-consistency under s 6 BORA. Further, the Explanatory Note of the Bill explicitly recognises the possibility of compensation from the Crown in cases of miscarriage of justice.

Clause 44 - Mandatory retirement ages for Acting Community Magistrates

5. Clause 44 of the Bill allows for the appointment of retired Community Magistrates (who are required to retire at 68 years of age [\[1\]](#)) as Acting Community Magistrates. The clause provides that such an appointment cannot exceed a maximum period of 24 months, and for any particular Magistrate cannot extend beyond the date on which he or she turns 73 years of age. This mandatory retirement age is a *prima facie* interference with the right to freedom from discrimination in s 19 NZBORA on grounds of age. The issue that arises is whether the particular retirement age is, in terms of s 5 NZBORA, a reasonable limit on the right to be free from discrimination.
6. You will recall that this issue also arose with the provision of mandatory retirement ages in the Supreme Court Bill, and I would refer you to the extensive discussion in my letter of 30 October 2002 (our ref: ATT114/1124(13)). Essentially, in my view a mandatory retirement age for judicial officers pursues the legitimate aim of securing the integrity of the judicial system. The imposition of a mandatory retirement age for the judiciary is a rational response to the competing concepts of judicial independence through tenure and the need to introduce "new blood" into the court. Acceptance of this balancing exercise through use of mandatory retirement ages for Judges can be found in several international human rights documents.[\[2\]](#) For these reasons I would conclude that clause 44 does not appear to be inconsistent with NZBORA.

Restrictions on the right to freedom of expression

Clause 18 - Duty of confidentiality on the Judicial Conduct Commissioner and staff

7. Clause 18 of the Bill establishes a mandatory duty of confidentiality on the Judicial Conduct Commissioner and every person employed in the Office of the Commissioner. This statutory

duty on the Commissioner's office to keep confidential all matters that come to its knowledge in the performance of its functions may be regarded as a *prima facie* interference with the individual's right to freedom of expression under s 14 NZBORA and, in particular, the right to seek information guaranteed by that section. Assuming there to be a *prima facie* breach of s 14 BORA, the issue is whether this duty of confidentiality is, in terms of s 5 NZBORA, a justified limitation.

8. The duty of confidentiality in respect of the Commissioner's preliminary investigation has three essential justifications:

- 8.1. There is a risk to judicial independence if one is able, merely by complaining, to raise sufficient public concerns to cause a Judge to consider resignation;

- 8.2. The benefits of transparency of the Commissioner's process are outweighed by the potential damage to public confidence in the judiciary caused by publication of complaints at an early stage of the process; and

- 8.3. Confidentiality of the process assists the Commissioner to complete preliminary examination of complaints, as the Commissioner does not have any powers to compel information and will rely on the co-operation of judges and others.

It should also be noted that Article 17 of the *Basic Principles on the Independence of the Judiciary* states that the examination of a complaint "...at its initial stage shall be kept confidential, unless otherwise requested by the judge". [\[3\]](#)

9. When considering issues of "proportionality" under s 5 NZBORA, it is to be noted that the degree to which the duty of confidentiality in clause 18 interferes with s 14 NZBORA is reduced by clause 19 of the Bill. Clause 19 requires the Commissioner to provide the relevant files to the Attorney-General, the independent prosecution counsel and the counsel representing the Judge, if a complaint progresses to the Judicial Conduct Panel. I also note that there is no prohibition on either a complainant or a judge releasing information about a complaint at the Commissioner stage. Accordingly, I do not consider that clause 18 is inconsistent with the NZBORA.

Clauses 28 to 30 - Judicial Conduct Panel's power to conduct private hearings and order restrictions on publication.

10. Once a complaint progresses to the Judicial Conduct Panel, clause 28 allows the Panel to determine that a hearing should be conducted in private. Clause 29 also provides the Judicial Conduct Panel with the ability to make various orders restricting publication of the matters discussed at a particular hearing or the particulars of the individuals involved in the hearing. Clause 30 provides that these decisions of the Judicial Conduct Panel can be the subject of appeal to the Court of Appeal.
11. To the extent that these clauses limit the ability of the press and members of the public to attend at, and report on, the proceedings of the Panel, s 14 NZBORA is engaged. In my view, however, the interference with free expression permitted by those clauses is reasonable for s 5 NZBORA purposes. First, clause 28(1) establishes as the guiding principle that "Every [Panel hearing] must be held in public", and implies that clause 28(2) (which allows hearings to be held in private) is to be the exception rather than the rule. Second, clauses 28 and 29

clearly indicate the balancing that must take place between the privacy of individuals and the public interest in the conduct and conclusions of the hearings. Third, the obligation under s 6 NZBORA to prefer a rights-consistent interpretation of the statutory discretions provided in clauses 28 and 29, in addition to the appeal right to the Court of Appeal, ensures that sufficient weight will always be given to the freedom of expression under s 14 NZBORA and ensures that only those limitations on free expression that would be reasonable for s 5 NZBORA purposes will occur.

Conclusion

12. While the Judicial Matters Bill (PCO 4817/6) raises some *prima face* human rights issues, I consider that the provisions of the Bill are not inconsistent with the New Zealand Bill of Rights Act 1990.

Yours faithfully

Andrew Butler

Crown Counsel

In addition to the general disclaimer for all documents on this website, please note the following: This advice was prepared to assist the Attorney-General to determine whether a report should be made to Parliament under s 7 of the New Zealand Bill of Rights Act 1990 in relation to the Judicial Matters Bill. It should not be used or acted upon for any other purpose. The advice does no more than assess whether the Bill complies with the minimum guarantees contained in the New Zealand Bill of Rights Act. The release of this advice should not be taken to indicate that the Attorney-General agrees with all aspects of it, nor does its release constitute a general waiver of legal professional privilege in respect of this or any other matter. Whilst care has been taken to ensure that this document is an accurate reproduction of the advice provided to the Attorney-General, neither the Ministry of Justice nor the Crown Law Office accepts any liability for any errors or omissions

Footnotes

1. See s 11F District Courts Act 1947.
2. International acceptance of mandatory judicial retirement ages is reflected in clauses 11 and 12 of the UN Basic Principles on the Independence of the Judiciary (endorsed by the UN general assembly 1985); clause 6(b) and clause 8(c) of the Draft Universal Declaration on the Independence of Justice; clause 22 of the IBA Minimum Standards of Judicial Independence (1982); and clause 1 of the Declaration of Principles of Judicial Independence issued by the Chief Justices of the Australian states and territories (1997). In particular, we note that article 23(6) of the European Convention for the Protection of Human Rights and Fundamental Freedoms provides that the terms of office of the judges of the European Court of Human Rights shall expire when they reach the age of 70. This clearly demonstrates the acceptability of mandatory judicial retirement ages within a human rights framework.
3. Adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders held at Milan from 26 August to 6 September 1985 and endorsed by

UN General Assembly Resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985.