

Civil Union Bill

29 April 2004

Attorney-General

LEGAL ADVICE

CONSISTENCY WITH THE NEW ZEALAND BILL OF RIGHTS ACT 1990:

Civil Union Bill (PCO 5262/17)

Our Ref: ATT114/1197

1. We have considered the Civil Union Bill ("the Bill") for consistency with the New Zealand Bill of Rights Act 1990 ("BORA"). We advise that there appears to be no inconsistency between the Bill and BORA. The Bill raised issues of *prima facie* inconsistency with the freedom from discrimination on the basis of age and family status affirmed by s 19 BORA, but we consider such inconsistency to be justified in terms of s 5 BORA.

2. This advice is made in respect of version PCO5262/17. We have been advised that the final version of the Bill will include amendments to the commencement date and the name of the Minister. Those amendments do not affect this advice. We will however review the final version of the Bill before it is supplied to Cabinet Legislation Committee (which we have been informed will consider it on 6 May 2004) and will advise you immediately if there are any changes of substance that have occurred.

Background

3. The Bill provides for different-sex or same-sex couples to enter into a civil union to formally solemnise their relationship in a manner similar to marriage. Couples may enter a civil union if they are aged over 16 years (and if aged 16 or 17 have obtained the required consent), are not within the prohibited degrees of relationship set out in Schedule 2, and are not already married or in a civil union with a third party. The Bill provides the requirements and processes necessary to enter a civil union, for the appointment of celebrants, and for registration and dissolution of civil unions.

Prohibitions on civil union

4. Clause 9 prohibits two people who are related so as to be within the prohibited degrees of civil unions set out in Schedule 2 from entering into a civil union. Clause 10 provides that those who are within the prohibited degrees of affinity (related by marriage) but not within the prohibited degrees of consanguinity (related by blood) may apply to the Family Court for an order dispensing with the prohibition. These limitations on entering a civil union represent a *prima facie* infringement on the right not be discriminated against based on "family status" as defined by s 19 BORA and ss 21(1)(i)(iv) and 2(1) ("relative") of the Human Rights Act 1993.

5. These *prima facie* inconsistencies are, however, considered justified in terms of s 5 BORA. In our view, it is a justified limitation to completely prohibit a civil union between two

people who are within the prohibited degrees of consanguinity and to require the leave of the Family Court before two people within the prohibited degrees of affinity may enter a civil union. These measures are protections against the damage relationships between two people within the prohibited degrees of civil union may do to family structure, as is recognised in the general repugnance that society attaches to such relationships. The Bill does not limit two people within the prohibited degrees of affinity or consanguinity from entering into a relationship with each other in the nature of a civil union (although the Crimes Act 1961 incest provisions will, obviously, place restrictions on the extent to which sexual relations can occur between certain family members), it merely limits the legal recognition of such relationships (in much the same way that legal recognition of such relationships via marriage is prohibited). On balance, the prohibitions represent a reasonable limit on the right to be free from discrimination on the grounds of family status.

Consent requirement for 16 or 17 year olds

6. Clause 19 provides that persons aged 16 or 17 years must obtain their guardian's consent before they may enter a civil union. Clause 20 provides that, where consent has been refused, application may be made to a Family Court Judge to obtain consent.

7. This consent requirement based on age is *prima facie* inconsistent with the freedom from discrimination based on age as defined by s 19 BORA and s 21(1)(i) of the Human Rights Act 1993. That *prima facie* inconsistency is, however, justified in terms of s 5 BORA.

8. In our view it is a justified limitation to require 16 and 17 year olds to obtain consent before they may enter a civil union. First, it is considered reasonable to provide certain limits on persons under 18 years from entering into a relationship as significant as a civil union. The consent requirement protects those 16 or 17 year olds who may not have sufficient maturity and capacity to understand the significance of entering into a civil union and the effects of that arrangement. Further, the Bill provides a process whereby 16 or 17 year olds denied consent by their guardian can apply to a Family Court Judge to determine whether they have sufficient maturity to enter into a civil union. Accordingly, we consider the consent requirement for those aged 16 or 17 years to be a reasonable balance between the rights of those persons to be free from age discrimination and protecting them from the various effects of entering into a legal arrangement that is similar to marriage.

Yours faithfully

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