

Justices of the Peace Amendment Bill

10 May 2006

Attorney-General

LEGAL ADVICE

CONSISTENCY WITH THE NEW ZEALAND BILL OF RIGHTS ACT 1990:

Justices of the Peace Amendment Bill(PCO 5145/7)

Our Ref: ATT395/8

1. We have considered the Justices of the Peace Amendment Bill (PCO 5145/7) for consistency with the New Zealand Bill of Rights Act 1990 ("NZBORA") and advise that the Bill does not contain any provisions that are inconsistent with NZBORA. Nonetheless, three issues arose which required brief analysis in order to be able to establish NZBORA consistency, viz, (1) restricting the use of the designation "JP (retired)"; (2) processes for the removal, suspension or discipline of Justices who perform judicial functions; (3) providing an age at which Justices may choose not to perform District Court duties.

Overview of the Bill

2. The Justices of the Peace Amendment Bill is designed to update and clarify the training and disciplinary processes for "Justices". Accordingly, the Bill:
 - Requires new Justices to undertake training before taking up their duties.
 - Allows certain retired Justices to use the designation "JP (retired)".
 - States the grounds on which the Governor-General may remove a Justice from office.
 - Provides a new power for the Governor-General to suspend a Justice from office for a period of time.
 - Provides new disciplinary actions, short of removal or suspension, which can be taken in respect of actions of Justices.
 - Lowers from 72 to 68 the age at which a Justice may be exempted from District Court duties.

Restrictions on the designation "JP (retired)" – Freedom of Expression issue

3. Clause 4 of the Bill creates a new section 3C that prevents any person from using the designation "JP (retired)" unless the Secretary for Justice has published in the *Gazette* a notice authorising that person to do so. The Secretary must publish the *Gazette* notice in respect of a former Justice, unless satisfied that the former Justice:

3.1 had served as a Justice for less than 10 years; or

3.2 had demonstrated any of the listed undesirable behaviour.

4. Although minor in character, this provision can be viewed as a restriction on the individual's right to freedom of expression under s 14 NZBORA. However, we consider that the provision is a justified limitation under s 5 NZBORA for the following reasons:

4.1 There is a social currency in the "JP" title that recognises the individual's valuable role in the legal system and standing in the community.

4.2 Former JPs who have contributed to their community in this way should be able to be recognised for their years of voluntary service to the community.

4.3 It is a legitimate government objective to seek to preserve the value of the "JP" title and preventing its devaluation by allowing any individual, or former JPs who have not met the expected standard, to use the title.

4.4 The provision of a *Gazette* notice provides the public with an acceptable method of confirming an individual's claim to be either a "JP" or "JP (retired)".

4.5 The proposed restrictions will only affect a small group of people in very limited circumstances.

Removal and Suspension of Justices performing "Judicial Functions" – Judicial Independence issue

5. Section 25(a) NZBORA provides that everyone who is charged with an offence has, in relation to the determination of the charge (emphasis added):

"The right to a fair and public hearing by an *independent and impartial* court."

The concept of "judicial independence" is an important aspect of ensuring that an "independent and impartial" court adjudicates criminal charges. Accordingly, to the extent that Justices are involved in the criminal judicial process s 25(a) NZBORA requires an appropriate level of independence from the executive. Accordingly, the new removal, suspension and disciplinary powers set out in proposed sections 5 and 5D of the Bill raise *prima facie* issues of compliance with s 25(a) NZBORA.

6. However, it has been repeatedly emphasised that the guarantee of judicial independence must be applied with sensitivity to the place of the particular Court or Judicial Officer within the judicial hierarchy. For example, the South African Constitutional Court observed in *Van Rooyen v State*:[\[1\]](#)

"In deciding whether a particular Court lacks the institutional protection that it requires to function independently and impartially, it is relevant to have regard to the core protection

given to all Courts by our constitution, to the particular functions that such a Court performs and to its place in the court hierarchy."

7. With this principle in mind, on balance we consider the provisions in the Bill to be consistent with the requirements of s 25(a) NZBORA on the following grounds:

7.1 Justices in performing "judicial functions" have a very limited jurisdiction, and most decisions are subject to appeal or review by Judges operating in a judicial process with its own systemic guarantees of "independence and impartiality".

7.2 New sections 5(2) and 5D(1) exclude any person who is a Justice by virtue of being a District Court Judge or a Judge of the Maori Land Court. These members of the judiciary are already covered by their own particular legislation.

7.3 When dealing with other Justices who perform judicial functions new section 5A requires a recommendation by the Chief District Court Judge before removal or suspension of the particular Justice.

7.4 In making the above recommendation the Chief District Court Judge must comply with a statutory process designed to ensure natural justice obligations are met (s 5A(2)).

7.5 New section 5D(2) ensures that the new disciplinary measures (less than removal or suspension) are not available to the Minister in relation to alleged misconduct in the exercise or performance of judicial powers or functions.

Age limitation on ability to opt out of District Court duties – Age Discrimination issue

8. Clause 7 amends s 7(1)(a) of the Act to reduce from 72 to 68 the age at which Justices can opt out of performing District Court duties (see s 9A Summary Proceedings Act 1957). This clause must be viewed in conjunction with new section 8, which provides that the Minister can remove a Justice if that Justice has (without a reasonable excuse) failed to attend a District Court on 2 successive occasions. Some may view this as a *prima facie* interference with the right to freedom from discrimination in s 19 NZBORA on grounds of age. In other words, a Justice who is 64 years of age may argue that he or she should also be entitled to decline District Court duties.
9. However, we do not consider that s 7(1)(a) of the Act represents any *prima facie* age discrimination, as there is no substantive disadvantage for Justices under the age of 68 years. As mentioned above, it is possible for a Justice to provide the Minister with a "reasonable excuse" and be excused from District Court work. As the mandatory retirement age for District Court Judges is also 68 years, then even without s 7(1)(a) of the Act, being over 68 years will be a "reasonable excuse" within the new section 8. Accordingly, the appropriate interpretation of s 7(1)(a) of the Act is to view the section as simply codifying a particular "reasonable excuse" under new s 8 of the Act and therefore there is no disadvantage to Justices below 68 years who retain the ability to put forward any "reasonable excuse" for opting out of District Court duties.

Conclusion

10. While the Justices of the Peace Amendment Bill (PCO 5145/7) raises some *prima face* human rights issues, we consider that the provisions of the Bill are not inconsistent with the New Zealand Bill of Rights Act 1990.

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Footnote

1. 2002 (5) SA 246, 2002 (8) BCLR 810 (SACC), para 23.

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