

THE ATTORNEY-GENERAL'S REPORTING FUNCTION UNDER SECTION 7 OF THE NEW ZEALAND BILL OF RIGHTS ACT 1990

Hon David Parker
Attorney-General

cc Minister of Justice

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Purpose of Report

1. This report briefs you on the section 7 reporting function of the Attorney-General under the New Zealand Bill of Rights Act 1990 ("BORA").

Executive Summary

2. The Bill of Rights Act requires the Attorney-General to advise the House if any provision in a Bill appears to be inconsistent with any of the rights and freedoms contained in that Act. The Ministry of Justice and the Crown Law Office support this role by providing you with advice on Bills before the relevant Cabinet Legislation Committee meeting approving introduction.
3. Every Government Bill (except appropriation Bills) is scrutinised, before the introduction of the Bill, for consistency with BORA by either the Ministry of Justice (for non-Justice Bills) or the Crown Law Office (for Justice Bills), following a procedure that was agreed to by the previous Attorney-General. Each week, your office will receive a list of Bills being vetted by the Ministry for BORA consistency. Officials' advice on BORA consistency is published on the Ministry's website as soon as practicable following a Bill's referral to Select Committee.
4. The Ministry has been examining ways to enhance post-introduction scrutiny of Bills for BORA consistency. We will provide you with a detailed report and options by 1 December 2005.
5. In February 2006, the Ministry plans to hold a symposium in which leading academics, government officials and practitioners working in the area of human rights can come together to discuss freedom of expression and other recent issues that have arisen in relation to the Bill of Rights Act.

Provision of Bill of Rights advice

Review and Reporting Procedure

6. Section 7 of the Bill of Rights Act requires the Attorney-General to bring to the attention of the House of Representatives any provision in a Bill that appears to be inconsistent with any of the rights and freedoms affirmed in BORA.
7. In the case of Government Bills, this must occur upon introduction of the Bill (section 7(a) BORA). Because a copy of a non-government Bill (such as a Private Member's Bill) is unlikely to be available for scrutiny prior to its introduction to Parliament, the Attorney-General is required to table a section 7 report, as soon as practicable, after the introduction of the Bill (section 7(b) BORA). Standing Orders clarify that advice must be provided before the first reading is moved.
8. The following process and timing requirements - which are set out in the Cabinet Office Circular - has been developed for Bills going to the Cabinet Legislation Committee (LEG) to ensure that officials, the Attorney-General and other Ministers, where appropriate, have sufficient time to consider BORA issues.
 - All final versions of Government Bills (except appropriation Bills) must be forwarded to the Crown Law Office (for all Bills in the names of Justice Ministers) or the Ministry of Justice (for all other Government Bills) at least two weeks in advance of LEG meeting on that Bill.
 - The Ministry of Justice (or the Crown Law Office) will then scrutinise the Bill for consistency with BORA and advise the Attorney-General accordingly. This advice shall be in writing and shall be provided at least one week in advance of the relevant LEG meeting.
 - The advice will be of three types, namely:

- no issues

- prima facie issues that are found, after close examination of the justification for the measures proposed, to be consistent with BORA

- prima facie issues that are found to be inconsistent with BORA

- If the final version of the Bill is not with the Ministry of Justice (or the Crown Law Office) at least two weeks in advance of the LEG meeting, the Minister sponsoring the Bill is required to defer submission of the Bill to LEG.
- In exceptional cases, a Minister who wishes to have a Bill considered by LEG despite the fact that the Bill is not with the Ministry of Justice (or the Crown Law Office) at least two weeks in advance of the LEG's meeting is required to seek the agreement of the Chair of LEG - who will consult with the Attorney-General - to such a "late bill" being included on the Committee's agenda.
- These requirements also apply if for some reason a Cabinet committee other than LEG is considering the Bill.
- If we identify that a provision of a Bill is inconsistent with BORA, we will attach a draft Section 7 report (which will be prepared in consultation with the Crown Law Office) to the advice with the recommendation that that report be tabled in the House of Representatives. In order to provide sufficient time for the printing of the report, the report needs to be

signed by the Attorney-General and returned to the Ministry of Justice or the Crown Law Office, as appropriate, at least two days before the Bill is to be introduced.

- Each week the Ministry will provide your office with a list of upcoming advice and Bills under consideration by the Ministry.
9. In practice, requests for the vetting of "late bills" are submitted directly to the Ministry of Justice (or the Crown Law Office) and we have worked with the agency concerned and the Attorney-General's office to ensure that appropriate arrangements can be made to allow prompt consideration of the Bill. We, nonetheless, consider that the process set out in the Cabinet Office Circular should be retained in order to highlight the importance of providing sufficient time to vet the Bill for consistency with BORA and the potential consequences of failing to comply with the time requirements.
 10. We seek your agreement that we should continue to follow the process and timing requirements that have been developed for the vetting of Bills going to LEG.

Guidance to departments

11. The Ministry of Justice also provides comment and guidance (not legal advice) to departments, when requested, on the consistency of policy proposals or regulations with BORA and the Human Rights Act 1993. In practice, this is a significant component of our work and is helpful in resolving many BORA issues before legislation is drafted.
12. At the start of 2005, the Ministry published *The Handbook of the New Zealand Bill of Rights Act 1990: An Introduction to the Rights and Freedoms in the Bill of Rights Act for the Public Sector* (a copy of which will be forwarded to your office) and produced the more comprehensive on-line publication *Guidelines on Compliance with the New Zealand Bill of Rights Act* (available at www.justice.govt.nz). These publications are designed to alert policy advisers and operational field staff to potential BORA issues and suggest ways of carrying out their activities consistently with BORA.
13. The Ministry has also conducted a number of seminars during the past year for interested departments on applying BORA principles in policy and legislative development.

Publication of BORA Advice

14. Following the previous Attorney-General's direction, officials' advice on BORA consistency prepared since 1 January 2003 is published on the Ministry of Justice website (www.justice.govt.nz) as soon as practicable following a Bill's referral to Select Committee. This practice was adopted as publication promotes public debate and understanding of BORA issues, provides greater transparency about the vetting process and assists Select Committees and submitters to assess BORA issues when considering bills.
15. Specific approval for publication will be sought on each piece of advice and as Attorney-General, you have the right to maintain legal professional privilege in respect of any BORA advice. To date, there have only been a limited number of exceptions to the publication of officials' advice and on these occasions previous Attorneys-General published their own statements on BORA consistency.

16. BORA advice provided prior to 1 January 2003 has been published on the website, but only on a case-by-case basis after we have received the Attorney-General's agreement.
17. We seek your agreement that BORA advice should continue to be published on the Ministry's website.

Section 7 Reports: The experience to date

Chronological Summary

18. Since 1990 there have been 36 section 7 reports tabled (18 of which were Government Bills).
19. During that time ten different sections have been reported on:
20. As this graph indicates, a significant number of the section 7 reports that have been issued relate to provisions that were found to be unjustifiably discriminatory (section 19 BORA). This is not surprising given that macro-economic policies are by their very nature discriminatory (i.e. they concern the allocation of scarce resources). However, we do not expect this trend to continue for the following reasons:
 - A number of provisions used relationship terminology that was defined in another piece of legislation in an unjustified discriminatory way. Many of these definitions were amended as part of the Relationships (Statutory References) Act to include references to civil union and de facto couples and are therefore no longer discriminatory.
 - A number of discriminatory provisions were included in reviews (e.g. tax legislation) aimed simply at reordering and renumbering the legislation in question, as well as rewriting the provisions using a plain English style. It was not the intent of these reviews to examine the underlying policy rationales for the unjustified discriminatory provisions. We are not aware of any agency currently intending to conduct a review of this nature.
 - Although section 19 BORA has received little judicial attention in New Zealand, the equivalent provision in the Human Rights Act (UK) has been closely examined by the UK courts. For instance, the House of Lords has recently issued a series of judgments clarifying the types of arguments that can be used to justify discriminatory policies, and types of policies to which the Courts should apply a degree of deference to Parliament. These judgements have guided our thinking on where the boundaries of justification lie in relation to discriminatory policies.

Post-Introduction BORA issues

21. The present process focuses on BORA issues raised by the introduction version of a Bill. Subsequent changes to Bills may be BORA inconsistent but there is no formal post-introduction vetting process. On request, the Ministry provides comment on BORA issues in Government Supplementary Order Papers to the sponsoring department. When the Ministry has been consulted and an amendment appears BORA inconsistent, the Ministry will advise

the Attorney-General (a recent example was the SOP to the Misuse of Drugs Amendment Act). However, most amendments by SOP are not referred to the Ministry. Similarly, the Ministry is generally not consulted on amendments made in Select Committee. The Crown Law Office does not provide post-introduction advice unless specifically directed by the Attorney-General.

22. The previous Attorney-General was interested in enhancing post-introduction scrutiny of Bills for BORA consistency. In October 2004, the Ministry provided a preliminary briefing to the previous Attorney-General in which we outlined some of the preliminary options for improving post-introduction scrutiny and recommended that those options be developed further. We were directed to continue this work and develop a more detailed report and options during 2005. We will provide you with the report by 1 December 2005.

BORA Symposium

23. To contribute to the better understanding of the rights and freedoms protected in BORA, the Ministry has been making arrangements to hold a one-day symposium on 10 February 2006 in which leading academics, government officials and practitioners working in the area of human rights can come together to discuss some of the main issues that have arisen recently in relation to BORA. The theme for the symposium will be the right to freedom of expression, but there will be opportunities for speakers to present papers on other topics. The symposium will enable the Ministry to analyse a number of issues of concern that we have identified in relation to the vetting process, which in turn will improve the quality of BORA advice. It will also help strengthen the links between the Ministry and the human rights community in New Zealand.
24. The symposium has attracted a reasonable amount of interest from academics, government officials and practitioners. Sir Geoffrey Palmer has agreed to be the keynote speaker, and we have received a number of proposals for papers from other individuals. To facilitate audience participation, the symposium will not be open to the general public and the number of participants will be restricted. "Chatham House" rules will apply and the Ministry will not be promoting any specific policy positions, although there may be analysis and explanation of current policies.
25. We would welcome your participation at the symposium and would like to invite you to open the day's proceedings. Once the list of papers has been finalised, we will send the details of the symposium to your office.

Recommendations

26. It is recommended that you:
 1. **agree** that we should continue to follow the process and timing requirements that have been developed for the vetting of Bills going to LEG;

Yes/No

2. **note** that each week your office will receive a list of Bills being vetted by the Ministry for Bill of Rights Act consistency;

3. **agree** that BORA advice should continue to be published on the Ministry's website;

Yes/No

4. **note** that, by 1 December 2005, the Ministry will report to you on options for enhancing post-introduction scrutiny of Bills for BORA consistency;

5. **agree**, subject to your other commitments to attend the symposium that the Ministry will hold on 10 February 2006 on the main issues that have arisen in relation to the Bill of Rights Act; and

Yes/No

6. **agree** to open the day's proceedings.

Yes/No

Paul James
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APPROVED / SEEN / NOT AGREED

David Parker
Attorney-General
/ /2005