

## ***Births, Deaths, Marriages, and Relationships Registration Amendment Bill***

9 May 2007

Attorney-General

### LEGAL ADVICE

#### CONSISTENCY WITH THE NEW ZEALAND BILL OF RIGHTS ACT 1990:

#### BIRTHS, DEATHS, MARRIAGES, AND RELATIONSHIPS REGISTRATION AMENDMENT BILL

1. We previously provided you with advice on 17 November 2006 as to whether the Births, Deaths, Marriages, and Relationships Registration Amendment Bill ('the Bill') (PCO 5516/29) was consistent with the New Zealand Bill of Rights Act 1990 ('the Bill of Rights Act'). That advice concluded that although the Bill gives rise to *prima facie* issues in relation to sections 19 and 21 of the Bill of Rights Act, the Bill appears to achieve overall consistency with that Act.
2. Our original advice did not discuss the proposed framework limiting access to registered information as we considered that section 14 of the Bill of Rights Act (freedom of expression) was not engaged by the restrictions imposed by the Bill. However, given the recent concerns that have been raised about the proposal, we consider it appropriate to provide you with supplementary advice on this aspect of the Bill.
3. We have discussed this advice with the Crown Law Office and they agree with our approach.

#### **Section 14 – the right to freedom of expression**

4. Section 14 of the Bill of Rights Act provides:

"Everyone has the right to freedom of expression, including the freedom to seek, receive, and impart information and opinions of any kind in any form."

5. The Bill introduces a new framework that limits access to registered information (for example birth information, death information, marriage information, civil union information and name change information), with the purpose of incorporating appropriate privacy safeguards. We have considered whether these provisions infringe the right to freedom of expression, which is expressed to include the right to seek and receive information.
6. Given these express references, it might be suggested that the right of freedom of expression extends to a right to obtain information. However, the courts in New Zealand and Canada and the European Court of Human Rights have each held that the right relates to restriction on the receipt of information, not a positive entitlement to be given information held by the state or others.
7. First, in *R v Mahanga*, the Court of Appeal rejected a claim under section 14 for access to a recording of a Police interview:[\[1\]](#)

"Under s 14 of the Bill of Rights, freedom of expression includes 'the freedom to seek, receive, and impart information and opinions of any kind in any form', but that does not confer any right to acquire information ..."

8. The Court in that instance acknowledged a more specific requirement of open access to court proceedings, but held that that had been satisfied by the playing of the recording in open court. The leading commentary on the Bill of Rights Act by Andrew Butler and Petra Butler similarly rejects any entitlement to information by reason of s 14. The authors comment:[\[2\]](#)

"The right to receive information prevents the state from restricting a person from receiving information that others may wish or may be willing to impart.

On the other hand, the right to receive information and opinions does not entail the right to insist on being given access to information and opinions."

9. This means, for instance, that the right prohibits a State from standing between a speaker and his or her audience, but does not confer on an individual the right to access a register containing confidential information about other persons and, in certain circumstances, themselves.[\[3\]](#)
10. Second, in *Guerra v Italy* (1994) 20 EHRR 277, the European Court of Human Rights held in respect of the Article 10 ECHR right of freedom of expression:[\[4\]](#)

"The Court reiterates that freedom to receive information, referred to in paragraph 2 of Article 10 of the Convention, 'basically prohibits a government from restricting a person from receiving information that others wish or may be willing to impart to him' (see the *Leander v. Sweden* judgment of 26 March 1987, Series A no. 116, p. 29, § 74). That freedom cannot be construed as imposing on a State, in circumstances such as those of the present case, positive obligations to collect and disseminate information of its own motion."

11. The issue does not appear to have been determined by the Supreme Court of Canada or under the International Covenant on Civil and Political Rights ("ICCPR"). Canadian courts have, however, rejected or at least expressed doubt that the freedom of expression right under the Canadian *Charter* extends to a right to information.[\[5\]](#)

12. In respect of the ICCPR, the leading commentary by Professor Manfred Nowak states:

"[i]t is ... more difficult to answer whether the right to seek information obligates the States parties in certain cases to guarantee with positive measures access to State or private information ... such a *right to be informed* is still largely unrecognised in case law ...".[\[6\]](#)

13. It is noted that as in *Mahanga*, above, a specific right of access to court and parliamentary proceedings has been upheld in both jurisdictions.[\[7\]](#)
14. On this basis, it follows that section 14 is not engaged by the restrictions imposed by the Bill and no issue therefore arises.

## Conclusion

15. We have concluded that the Bill appears to be consistent with the rights and freedoms contained in the Bill of Rights Act.

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## Footnotes

1 [2001] 1 NZLR 641 (CA).

2 *The New Zealand Bill of Rights Act: A Commentary* (2005) 319-321.

3 *Ibid*, at 321.

4 (1994) 20 EHRR 277. See, similarly, *Leander v Sweden* (1987) 13 EHRR 212.

5 See, particularly, *Travers v Anderson* (1994) 171 NR 158 (FCA) at [2]:

"... there is nothing ... which would turn s. 2(b) of the Charter into a key to open every closed door in every government building and require a s. 1 justification to keep it closed"

See also *Edmonton Journal v A-G (Alberta)* (1984), 5 DLR (4th) 240 (Alta QB), affirmed (1984) 13 DLR (4th) 479 (Alta CA) (rejecting); *Ontario (Attorney-General) v Fineberg* (1994) 19 OR (3d) 197 (Ont Div Ct) (rejecting); *Travers v Anderson* [1993] 3 FC 528 (rejecting); *National Bank v Melnitzer* (1991) 5 OR (3d) 234 (Ont Gen Div) (rejecting); *Blackman v British Columbia (Review Board)* (1995) 95 CCC (3d) 412 (BCCA) (doubting).

6 M Nowak *CCPR Commentary* (2ed: 2005) 447.

7 See *Canadian Broadcasting Corp v New Brunswick (A-G)* [1996] 3 SCR 480 and *Gauthier v Canada* CCPR 633/1995.

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