

26 June 2006

ATTORNEY-GENERAL

LEGAL ADVICE

CONSISTENCY WITH THE NEW ZEALAND BILL OF RIGHTS ACT 1990: CORRECTIONS (MOTHERS WITH BABIES) AMENDMENT BILL

1. We have considered the Corrections (Mothers with Babies) Amendment Bill ('the Bill'), a Member's Bill in the name of Sue Bradford MP, for consistency with the New Zealand Bill of Rights Act 1990. The Bill was introduced to the House of Representatives on 15 June 2006 and is currently awaiting its first reading. The next Members' Day is scheduled for 28 June 2006.
2. We have concluded that the Bill appears to be consistent with the Bill of Rights Act.
3. The purpose of the Bill is to amend the Corrections Act 2004 in order to enable a baby, whose mother is imprisoned, to be cared for, breastfed by, and to bond with, his or her mother, as far as this is in the best interests of the child and if certain other conditions are met.
4. The Bill proposes to amend the Corrections Act 2004 to:
 - increase the age limit until which a child is entitled to be accommodated in the prison with his or her mother from 6 months to 24 months. This 24 months age limit is based on the World Health Organisation's resolution regarding the appropriate period for continuation of breastfeeding.
 - introduce an obligation for prisons to provide for appropriate facilities for the accommodation of children under 24 months and to give these children sufficient opportunities to be breastfed.
 - ensure that imprisoned mothers of children accommodated in prison enter into parenting agreements, including an obligation for the mother to care for her child and a reciprocal obligation to be provided with and participate in parenting education.
5. Arguably the point could be raised that the Bill favours imprisoned women with children up to 24 months old over imprisoned women with older children or imprisoned men with children. This could be viewed as giving rise to a prima facie issue of inconsistency with section 19(1) of the Bill of Rights Act which provides the right for everyone to freedom from discrimination on the grounds of discrimination in the Human Rights Act 1993. The prohibited grounds of discrimination that could be considered relevant are sex, which includes pregnancy and childbirth, and family status.

6. We are, however, of the view that this Bill should not be analysed in terms of the rights of the parents, but instead should be considered from the perspective of the best interests of the child.
7. Support for this approach can be found in the United Nations Convention on the Rights of the Child (CRC) which has been ratified by New Zealand. Article 7(1) CRC provides that the child shall, as far as possible, have the right from birth to be cared for by his or her parents. Article 3 CRC further stipulates that in respect of all actions by a State concerning children the best interests of the child shall be the primary consideration.
8. A similar approach, focussing on the best interests of the child, can be noted in limiting the scope of the Bill to children up to the age of 24 months which is considered by the World Health Organisation to be the appropriate period for continuation of breastfeeding. The Bill thus enables the child to be breastfed up to this age. Necessarily, in this respect, the Bill focuses on accommodating children with their imprisoned mothers and not with their imprisoned fathers, and does not include children over the age of 24 months.
9. In the timeframe available, we have not been able to fully consider all the literature on imprisoned mothers, bonding, and the effect of imprisonment on babies. We note, however, that new section 81A(2)(a)(i) imports these considerations by requiring placement of a baby with his or her imprisoned mother if inter alia, it is in the best interests of the baby. The placement of the baby with the imprisoned mother can be ended if that is in the best interests of the baby.
10. Our conclusion is that it is doubtful whether the Bill raises an issue of discrimination under section 19 of the Bill of Rights Act. If section 19 is engaged, our view is that it is justifiable that priority is given to accommodating children with their imprisoned mothers to enable on-going breastfeeding up to 24 months where this is in the best interests of the child. We can for that reason conclude that the Bill appears to be consistent with the Bill of Rights Act.
11. In accordance with your instructions we attach a copy of this opinion for referral to the Minister of Justice. Copies are also attached for referral to the Minister of Health, and Sue Bradford MP, if you agree.

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Office of Legal Counsel

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Bill of Rights/Human Rights Team

Cc: Minister of Justice
Minister of Health

Sue Bradford MP

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