

# Family Courts Matters Bill

4 December 2006

Attorney-General

LEGAL ADVICE

CONSISTENCY WITH THE NEW ZEALAND BILL OF RIGHTS ACT 1990:

Family Courts Matters Bill

Our Ref: ATT395/23

1. We have considered the Family Courts Matters Bill (PCO 6771/4) and have concluded that it is not inconsistent with the New Zealand Bill of Rights Act 1990 (BORA). We understand that the Bill is to be considered by the Cabinet Legislation Committee at its meeting on 14 December 2006.

## Overview of Bill

2. The Bill amends a range of legislation affecting Family Court proceedings. The stated purpose of these amendments is to improve the efficiency and effectiveness of Family Courts by:

2.1 Introducing "openness" in the Family Courts (albeit subject to restrictions);

2.2 Extending the range of administrative powers currently exercised by Judges that may also be exercised by Family Court registrars;

2.3 Replacing the provision enabling rules to be made prescribing Family Court fees with a regulation-making power, which also provides for the waiver, reduction, postponement and refund of fees; and

2.4 Miscellaneous procedural amendments (for example, removing the restriction on Family Court judges wearing gowns in Court).

## The "openness" provisions

3. The Bill contains amendments to the following Acts which are intended to "open" the Family Courts to public view and scrutiny:

3.1 Adoption Act 1955 (attendance at hearings and publication of reports of proceedings);

3.2 Care of Children Act 2004 (clarifying the power of a Court to punish any contempt of Court);

3.3 Child Support Act 1991 (amending current restrictions on publication of proceedings);

3.4 Children, Young Persons, and Their Families Act 1989 (attendance at hearings and amendments to restrictions on publication of proceedings);

3.5 Domestic Violence Act 1995 (amendment to attendance at hearing and restriction on publication of reports of proceedings);

3.6 Family Courts Act 1980 (attendance at hearings and publication of reports of proceedings);

3.7 Family Proceedings Act 1980 (attendance at hearings and publication of reports of proceedings);

3.8 Intellectual Disability (Compulsory Care and Rehabilitation) Act 2003 (amendment of restriction on publication of reports of proceedings);

3.9 Mental Health (Compulsory Assessment and Treatment) Act 1992(amendment of restriction on publication of reports of proceedings);

3.10 Property (Relationships) Act 1976 (attendance at hearings and publication of reports of proceedings);

3.11 Protection of Personal and Property Rights Act 1988 (attendance at hearings and publication of reports of proceedings);

4. Generally, where the Bill amends provisions regulating who may attend Family Court hearings it provides that officers of the Court, parties to a proceeding, lawyers representing parties, witnesses, persons permitted by the Judge to be present as support persons for a party, and accredited news media reporters may be present. Discretion is granted to Family Court Judges to permit other persons to be present.
5. The provisions regarding publication of reports of proceedings generally permit publication of a report of the proceeding but prohibit the publication of identifying information where a child or vulnerable person is involved in the proceeding.
6. The "openness" provisions are intended raise public awareness and understanding of the workings of the Courts by increasing attendance at, and the reporting of, Family Court proceedings. However, as these provisions do include restrictions on who may attend hearings and on the publication of details of proceedings, they do constitute a limitation on the right to freedom of expression contained in s 14 of BORA (which includes the freedom to *seek and receive* information as well as the freedom to impart information and opinions).

#### **Justified limitation?**

7. A full bench of the High Court in *Newspapers Publishers Association of New Zealand (Inc) v Family Court* [1999] 2 NZLR 344 considered the relationship between s 14 of the BORA and the suppression of information by the Family Court for the purpose of protecting a child. In that case, a child suffering cancer had been made a ward of the Court as his parents opposed the medical treatment doctors thought necessary to save his life. His parents took him into hiding. The Court approved a news release being made on the basis that it might

help to locate the child. However, following widespread public debate and media interest, counsel for the child applied to the Family Court for a suppression order on the basis that the publication was counter-productive. The Court granted the order and held that s 23 of the Guardianship Act 1968 (paramountcy of the welfare of the child) prevailed over s 14 of the BORA. The Newspapers Publishers Association sought a judicial review of the Family Court's decision.

8. The High Court held that freedom of expression should only be restricted to the extent that publicity would be inimical to the child's welfare. It set out five principles to be considered:

- 8.1 Great importance should be attached to safeguarding freedom of the press as the eyes and ears of the public;

- 8.2 Freedom of the press is not absolute – it must bend to the extent necessary to protect a child;

- 8.3 In imposing restrictions upon publication in order to protect a child, the Court must engage in a balancing act;

- 8.4 The nature and extent of the public interest in the subject matter is an important factor; and

- 8.5 The purpose behind the restraint on publication must govern the extent of the restriction.

9. In our view the restrictions on attendance at hearings in the Family Court and on publication of proceedings of the Court are consistent with these principles. The restrictions are aimed at protecting children and other vulnerable persons involved in proceedings. In addition, they recognise the highly personal and stressful nature of such proceedings in that parties might not willingly participate in the process if their identity together with sensitive information was likely to be made public. Finally, they are restrictions on the publication of identifying information and not on publication of the substance of the proceedings.

10. As commentators have noted, the question needs to be asked what the public interest in the Court proceeding actually is and whether the reporting of all identifying details is necessary. The balance struck by the Bill fulfils the objectives of ensuring the integrity of the Family Court system through transparency and disseminating information about its workings while still protecting vulnerable individuals.

11. For these reasons we have concluded that the provisions limiting attendance at Family Court hearings and restricting publication of Family Court proceedings constitute a justified limitation on the right to freedom of expression in s 14 of BORA.

Yours faithfully

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