

# Child Support Amendment Bill (No 4) 2005

8 April 2005

Attorney-General

## LEGAL ADVICE

### CONSISTENCY WITH THE NEW ZEALAND BILL OF RIGHTS ACT 1990: CHILD SUPPORT AMENDMENT BILL (No 4) 2005

1. We have considered whether the Child Support Amendment Bill (No 4) ("the Bill") is consistent with the New Zealand Bill of Rights Act 1990 ("the Bill of Rights Act"). We understand that the Bill is to be considered by the Cabinet Legislation Committee at its meeting on Thursday, 14 April 2005.
2. The Bill amends the Child Support Act 1991 ("the CSA") in order to:
  - improve the level of compliance with the CSA to ensure that children receive the financial support that they are entitled to;
  - provide for greater flexibility in the way that penalties are imposed for outstanding financial support liabilities under the CSA;
  - provide a framework that will enable the Commissioner to determine whether individuals should be exempted from liability under the CSA;
  - ensure that liable parents' contributions more accurately reflect their ability to provide financial assistance; and
  - ensure that the rights of parties to proceedings in the Family Court pursuant to a determination under the CSA are given equal recognition.
3. The CSA currently allows for certain liable persons to be exempted from any requirement to provide financial support. These exemptions are provided to persons who are in hospitals or in prison for 13 weeks or more and do not have sufficient income to meet even the minimum liability. The Bill extends the exemptions regime to include a permanent exemption for victims of sex offences when the offender has been convicted or proved to have committed the offence before the Youth Court. The Bill also exempts young people who are under 16 years of age<sup>[1]</sup> and do not have sufficient income to meet the minimum liability.
4. We consider that the Bill appears to be consistent with the rights and freedoms contained in the Bill of Rights Act. However, the Bill does raise one issue relating to the observance of the principles of natural justice that we wish to draw to your attention.

## ISSUES OF CONSISTENCY WITH THE BILL OF RIGHTS ACT

### Section 27(1) Observance of the principles of natural justice

5. Clause 17 of the Bill inserts a new Part 5A into the CSA. Part 5A provides that certain persons who would otherwise be liable to provide financial support for their children, may be exempted in certain circumstances. Part 5A sets out what the criteria for being exempt under the CSA are and the process for obtaining an exemption.
6. The new section 89L of the CSA provides that a person who may qualify for an exemption must apply in writing to the Commissioner for a determination as to whether he or she is exempt. The applicant must specify the reasons for his or her exemption. The Commissioner must notify the custodial parent of the fact that an application for exemption has been made and the custodial parent may request a copy of the application and make submissions on whether the exemption should be granted (new section 89R). The Commissioner may reach a determination based on the information provided by the liable person and where the parties wish to be heard, the Commissioner must afford them that opportunity (89S(2)). The Commissioner can conduct the hearing as he or she thinks fit and is not bound by the rules of evidence (new section 89S(5)).
7. We note that parties to the hearing may be represented by another person if the Commissioner approves that person (new sections 89T(1) and 89T(2)). A party to the proceedings may be assisted in the presentation of his or her case by their representative if the Commissioner agrees (new section 89T(4) but the representative is not entitled to be heard (new section 89T(5)).
8. We have paid particular regard to new section 89T(6). This new section provides that the Commissioner must not approve as a representative under new sections 89T(1) or (2), or approve as an assistant under new section 89T(4) any person who is, or has been, enrolled as a barrister and solicitor, or who, in the opinion of the Commissioner, is or has been regularly involved in advocacy work before other tribunals.
9. We have considered whether new section 89T(6) raises issues of consistency with the right under section 27(1) of the Bill of Rights Act for every person whose rights and interests are affected by the determination of a public authority. The Court of Appeal in *Drew v Attorney General* [2002] 1 NZLR 58 has held that in certain contexts, the right to legal representation forms part of the principles of natural justice.<sup>[2]</sup> The right to legal representation forms part of the principles of natural justice in circumstances where such representation is considered necessary to ensure that the party has a fair hearing.<sup>[3]</sup> A number of factors are relevant in determining whether a person requires legal representation in order to ensure they receive a fair hearing. These include:<sup>[4]</sup>
  - The severity of the penalties or consequences faced by the party;
  - The nature of the hearing (i.e. is the decision-maker exercising judicial or administrative functions?);
  - The complexity of the issues raised in the hearing;
  - The ability of the person to present his or her own case;
  - Whether the hearing is likely to raise any points of law;
  - The need for fairness between the parties; and

- Whether there are likely to be procedural difficulties in conducting the hearing without legal representatives.
10. The Court of Appeal noted that the principles of natural justice would not require legal representation in every case. The Court also observed that it is more accepted for legal representation to be restricted at the lower level as any defects or injustices could be dealt with by process of appeal.<sup>[5]</sup>
  11. We note that in the context of this Bill that the proceedings are not intended to be complex – they are intended simply to enable the parties to put their case. The hearing is also of an administrative nature and to this extent is quite different from the circumstances of *Drew* (which concerned disciplinary proceedings in the penal system). Further, the Commissioner has a broad array of powers to ensure that any hearing is fair to all parties. For example, new section 89T(7) provides that if the Commissioner does approve a representative for one party, then he or she can attach any conditions to the approval to ensure that the other party is not adversely affected. The Commissioner is also unable to approve a proposed representative unless he or she considers that the representative has the required knowledge of the case (new section 89T(3)). Finally, we note that decisions of the Commissioner are able to be appealed to the Family Court (new section 103A) and that parties are able to be legally represented at these proceedings.
  12. We have therefore come to the conclusion that new section 89T(6) is consistent with the principles of natural justice. We consider that even if the prohibition on legal representation in these proceedings was *prima facie inconsistent* with section 27(1), such a limitation is reasonable and justifiable in terms of section 5 of the Bill of Rights Act.
  13. The administrative review process for child support was introduced in 1994 as a means of overcoming the perceived barriers of access to the Family Court for parents seeking departure orders. Among those barriers were the complexity of the process, the high costs involved and the intimidatory nature of the court process. IRD considers that the re-introduction of legal representation or "professional advocacy" into the process would move the scheme away from that original concept and the barriers would re-emerge. The process can therefore be seen as serving a significant and important objective.
  14. We also consider that the measure is both rational and proportionate for many of the reasons set out in paragraphs 11 and 13 above. We note that the scope of the prohibition in section 89T extends beyond barristers and solicitors to include professional advocates. However, we have taken into account the concerns of IRD and accept that any arbitrary distinction between professional advocates and barristers and solicitors may undermine the effectiveness of the policy.

## Conclusion

15. We have considered whether the Child Support Amendment Bill (No 4) is consistent with the Bill of Rights Act, and particularly whether the restriction on the ability of parties to obtain legal representation or the services of a professional advocate are consistent with the principles of natural justice.
16. We have come to the conclusion that the Bill does appear to be consistent with the Bill of Rights Act.

17. In accordance with previous practice, we attach a copy of this opinion for referral to the Minister of Justice. A copy is also attached for referral to the Minister of Revenue if you agree.

Jeff Orr                      Boris van Beusekom  
Chief Legal Counsel      Senior Legal Adviser  
Office of Legal Counsel   Bill of Rights Team

CC Minister of Justice  
Minister of Revenue

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## Footnotes

1 It should be noted that age only becomes a prohibited ground of discrimination from the age of 16 years.

2 *Drew v Attorney-General*, at para 69

3 *Ibid* at para 73

4 *Ibid* at paras 64 and 66

5 *Ibid*, at para 72

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