

Children, Young Persons, and Their Families Amendment Bill (No 6) 2007

16 November 2007

Attorney-General

LEGAL ADVICE

CONSISTENCY WITH THE NEW ZEALAND BILL OF RIGHTS ACT 1990:
CHILDREN, YOUNG PERSONS, AND THEIR FAMILIES AMENDMENT BILL (NO
6) 2007

1. We have assessed whether the Children, Young Persons, and Their Families Amendment Bill (No 6) 2007 ('the Bill'), (PCO 8260/10) is consistent with the New Zealand Bill of Rights Act 1990 ('the Bill of Rights Act'). We understand that this Bill will be considered by the Cabinet Business Committee at its meeting on 19 November 2007.
2. We have concluded that the Bill appears to be consistent with the rights and freedoms contained in the Bill of Rights Act. In reaching this conclusion, we considered potential issues of inconsistency with sections 14, and 19(1) of the Bill of Rights Act. Our analysis of these issues is set out below.

PURPOSE OF THE BILL

3. The purpose of the Bill is to amend the Children, Young Persons, and Their Families Act 1989 (the CYPF Act) to:
 - give better effect to the CYPF Act's objectives and principles;
 - enable or direct best practice; and
 - strengthen the effectiveness of family group conferences.
4. The Bill makes a number of changes to the CYPF Act including:
 - increasing the upper age in the definition of "young person" in the CYPF Act to include 17 years olds;
 - clarifying when government and non-government organisations can appropriately share information under the CYPF Act.
5. The Bill also makes a number of changes to the care and protection provisions of the CYPF Act, the provisions for disabled children in out-of-home placement, and to the child offender and youth justice provisions.

POSSIBLE ISSUES OF INCONSISTENCY WITH THE BILL OF RIGHTS ACT

Section 19 – the right to be free from discrimination

6. Section 19(1) of the Bill of Rights Act affirms the right to freedom from discrimination on the grounds set out in section 21 of the Human Rights Act 1993. These grounds include age, which means any age commencing with the age of 16 years.
7. In our view, taking into account the various domestic and overseas judicial pronouncements as to the meaning of discrimination, the key questions in assessing whether discrimination under section 19(1) exists are:
 - Does the legislation draw a distinction based on one of the prohibited grounds of discrimination?
 - Does the distinction involve disadvantage to one or more classes of individuals?
8. If these questions are answered in the affirmative, we consider that the legislation gives rise to a *prima facie* issue under section 19(1) of the Bill of Rights Act.
9. Where a provision is found to be *prima facie* inconsistent with a particular right or freedom, it may nevertheless be consistent with the Bill of Rights Act if it can be considered a reasonable limit that is justifiable in terms of section 5 of that Act. The section 5 inquiry is essentially two-fold: whether the provision serves an important and significant objective; and whether there is a rational and proportionate connection between the provision and the objective.^[1]

Upper age limit of the CYPF Act

10. Clause 4(1) of the Bill amends the definition of "young person" in the CYPF Act to increase the upper age of the CYPF Act to 18 years. This increase would mean that the care and protection and youth justice provisions of the CYPF Act would apply to those aged 17 years and under.
11. The Bill also provides that court orders and family group conference plans already in place when the young person turned 17, which now expire on that date, will extend to 18 as a corollary of increasing the upper age of the CYPF Act.
12. Clause 4(1) therefore draws a distinction between those aged 16 or 17 and those aged 18 years and above for the purpose of applicability of the care and protection and youth justice provisions of the CYPF Act.
13. This clause disadvantages those aged 18 years and over, as these persons are not entitled to the benefits of the care and protection and youth justice provisions of the CYPF Act. The clause may also restrict choices for those who are younger than 18. Accordingly, we consider this clause to be *prima facie* inconsistent with section 19(1) of the Bill of Rights Act.

Is this a justified limitation under section 5?

14. We have concluded that the clause 4(1), increasing the upper age of the CYPF Act to 18 years, is justified in terms of section 5 of the Bill of Rights Act for the reasons set out below.
15. The Ministry of Social Development advises that an objective of the amendment is to provide consistency with other relevant instruments such as the Care of Children Act 2004 and the United Nations Convention on the Rights of the Child ('UNCROC'). The UNCROC and other international instruments require New Zealand to provide various protections to people under 18. Providing for the protection sought by the UNCROC is a significant and important objective.
16. Age limits necessarily involve a degree of generalisation, without regard for the particular abilities, maturity or other qualities of individuals within that age group. In this clause, age is being used as a proxy measure of the competence, maturity, autonomy, responsibility, and the need for special protection of the young person.
17. It is reasonable for Parliament to set an age limit reflecting its assessment of the age group to which the care and protection and youth justice provisions of the CYPF Act should apply. The CYPF Act also provides a statutory process by which 16 and 17 year olds are consulted with and participate in the decision made on their behalf.

Clause 49 - new sections 386A, 386B, and 386C

18. These provisions impose new duties on the chief executive and others in respect of certain persons. The categories of persons to whom the new duties apply to include persons aged between 15 and 25 years.
19. The purpose of these provisions is to provide support to vulnerable young people and, at 25; we consider that the age limit is set sufficiently high to ensure that it includes everyone who might need that support.
20. New section 386C ensures that care arrangements can continue to enable a young person to finish secondary education without that education being disrupted by the termination of care. The requirement in this provision to make payments applies until the end of the year in which a person turns 18 years of age.
21. In the event that a person is attending secondary school after the year in which they turn 18, the chief executive is able to use the power provided in new section 386B to provide any necessary assistance. New section 386B(3) provides that in exceptional circumstances financial assistance may be given. Persons attending secondary school after the year in which they turn 18 may also have entitlement to other benefits.
22. Accordingly, we consider that these provisions are justified in terms of section 5 of the Bill of Rights Act.

Section 14 – the right to freedom of expression

23. We note that clause 6 of the Bill inserts a new section 7C into the CYPF Act which would make it an offence for any person to publish information disclosed during a practice review, or any details that identify the subject of or participant in a practice review. New section 7C could limit the right to freedom of expression affirmed in section 14 of the Bill of Rights Act; however, we consider the limitation to be justifiable.

24. Practice reviews must be held from time to time in order to improve the professional performance of social workers or other employees of the department in regard to matters or if the review will otherwise promote the best interests of children and young persons. The purpose of the restriction on publication is to ensure that there is full disclosure in practice reviews without fear that the disclosure will have negative consequences for the participants of a practice review. The restriction on publication is a proportionate response because it specifically excludes any findings of fact of the person conducting the review that do not identify any other person.

CONCLUSION

25. 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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Footnote

1 *Moonen v Film and Literature Board of Review* [2000] 2 NZLR 9.

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