

Courts and Criminal Matters Bill

21 March 2003

Attorney-General

Courts and Criminal Matters Bill
PCO5143/9
Our Ref: ATT114/1124(18)

1. The Courts and Criminal Matters Bill is likely to be on the agenda of the Cabinet Legislation Committee on 3 April 2003.
2. I have considered the Bill for consistency with the New Zealand Bill of Rights Act 1990 ("BORA") and advise that in my opinion no provision appears to be inconsistent.

The Bill's purpose

3. The Bill makes amendments to the following Acts:
 - Crimes Act 1961
 - Customs and Excise Act 1996
 - District Courts Act 1947
 - Immigration Act 1987
 - Misuse of Drugs Amendment Act 1978
 - Privacy Act 1993
 - Sentencing Act 2002
 - Summary Proceedings Act 1957
 - Tax Administration Act 1994
4. The amendments are largely directed at improving the system for collection of fines, the administration of reparation and civil enforcement activities.

Crown liability and s 27 BORA

5. The only issue of substance arising on the face of the bill were proposed new s 280E of the Customs and Excise Act 1996 and s 141AE of the Immigration Act 1987, both of which provide that the Crown is not liable for loss or damage suffered as a result of, or in connection with, the execution of a warrant to arrest a person who is in serious default on fines, where that action, is taken immediately after the person's arrival in New Zealand or immediately prior to the person's departure from New Zealand. These proposed new sections raise issues of consistency with s 27(3) BORA which provides:

"(3) Every person has the right to bring civil proceedings against, and to defend civil proceedings brought by, the Crown, and to have those proceedings heard, according to law, in the same way as civil proceedings between individuals."

6. On one view of it, s 27(3) BORA only guarantees that the procedure that is to be adopted in any proceedings that can be brought against the Crown will be the same as that applicable in litigation between private parties, and does not affect Parliament's ability to determine that in certain instances the Crown (or for that matter any other person) shall not be liable for certain acts that could, without a "no liability" clause, be the subject of legal proceedings.
7. Assuming, however, for the sake of argument, that s 27(3) does touch on Parliament's ability to legislate "no liability" clauses, the question that arises is whether proposed ss 280E and 141AE amount to justified limits on s 27(3) BORA.
8. In my view, the proposed exclusion of liability in those clauses is a justified limit on s 27(3) in terms of s 5 BORA:

8.1 The "no liability" clauses would only be interpreted as protecting the Crown, where the impugned conduct was not done in bad faith: *Simpson v Attorney-General* [Baigent's case] [1994] 3 NZLR 667 (CA);

8.2 The "no liability" clauses will only operate where the person is in serious default (as defined); hence, where illegal action occurs in respect of someone who was not in fact in serious default the clauses have no application;

8.3 The "no liability" clauses only relate to execution of an arrest warrant (ie they do not protect action taken where no warrant is in place); moreover, they only operate when the action is taken within a tightly defined temporal period (ie around the person's time of arrival/departure);

8.4 In the framing of coercive enforcement powers for state officials, it is justified - to ensure that appropriate enforcement action can be taken without the fear of potential liability obstructing that activity - to exclude liability for good faith conduct that could otherwise give rise to liability.

8.5 The proposed clauses mirror longstanding "no liability" clauses found elsewhere in the statute book in respect of the execution of warrants: see eg Crimes Act 1961, ss 26, 27.

Yours sincerely
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