Crimes Amendment Bill No.5

9 December 2003

Attorney-General

Legal Advice
Crimes Amendment Bill No.5 2003
Consistency With The New Zealand Bill Of Rights Act 1990

1. This is to confirm previous oral advice that we have considered the Crimes Amendment Bill No. 5 (PCO 5315/8), a copy of which was received yesterday morning, for consistency with the New Zealand Bill of Rights Act 1990 ("BORA"). We advise that there appears to be no inconsistency between the Bill and BORA.

Background

2. The Bill largely amends sexual offence provisions in the Crimes Act 1961. Specifically, the Bill provides definition of certain terms such as "for a material benefit", "sexual connection" and "doing an indecent act" (see cl 3), tidies up cross-references (see cll 4 and 5) and creates and/or restates numerous sexual offences (see cll 6 to 10). It also contains a range of consequential amendments, repeals and transitional matters (cll11 to 14).

Rape

3. New s 128 (see clause 7 of the Bill) defines "sexual violation" as being either the act of a male who "*rapes*" a female or the act of a person who has "unlawful sexual connection" with another person. As will be obvious, under this definition of sexual violation, it is not possible for a female to "*rape*" a male or for members of the same sex to "*rape*" one another. However, no substantive disadvantage flows from confining the concept of "*rape*" to its traditional understanding of male against female acts, since the punishments prescribed by the Bill are the same regardless of the type of "sexual violation" involved. Accordingly, there being no substantive disadvantage, no question of discrimination on grounds of sex or sexual orientation arises in terms of s 19 BORA.

Incest

4. Incest is consensual, or non-consensual[1], sexual activity between persons who are close blood relatives, viz -

4.1 Parent and child;

4.2 Grandparent and grandchild;

4.3 Siblings; and

4.4 Half-siblings.

5. The proposed new s 130 will expand the existing offence of incest from its present focus on acts of "sexual intercourse" to all acts of "sexual connection" (as defined in cl 3 of the Bill). The effect of the amendments will be to extend the type of sexual conduct that is the subject-matter of the offence, and make the offence applicable to same-sex activity.

6. Under new s 130, the offence will apply (as now) to everyone who is over the age of 16 years (note in this regard that the "victim" can be, but need not be, under 16 years of age), and will be punishable (as now) by a term not exceeding 10 years imprisonment.

7. The starting point is that consensual activity between adults, generally speaking, is permissible; what this section does is prohibit such conduct between certain defined people, and the basis of the definition is family relationships. Accordingly, the section represents a prima facie infringement of the prohibition on discrimination based on "family status" (as defined in s 21(1)(l)(iv) and s 2(1)("relative") of the Human Rights Act 1993). There is disadvantage involved, in that engaging in consensual sexual activity with person X leaves another person (person Y) open to criminal prosecution if they are a close relative of X, whereas another person (person Z) not in a similar relationship with X would have committed no crime. The question, which then arises, is whether the prima facie infringement can be justified in terms of s 5 BORA (justified limits).

8. Traditionally the explanation for the offence of incest lay in the area of the perceived risks that would attach to any children produced by such a relationship (the "eugenics" rationale). In more recent times, the rationale has moved to concerns over the damage to the participants in such a relationship, and to the family structure.

9. In our view, it is a justified limitation, in terms of s 5 BORA, to prohibit absolutely any sexual activity between parent and child and grandparents and grandchild. There is an inevitable risk, or even probability, of power imbalance in any such relationship. The concept of consent is very difficult to imagine in such situations, at least to the extent of fully informed consent. Further, the repugnance that society generally attaches to such relationships is well founded. There is plenty of research to say that incest of this type, even if "consensual", is totally destructive of the family environment, and anyone involved in the criminal justice process will be well familiar with the devastating effects it has on families. The research is also quite clear that it will have severe psychological consequences for the child in the relationship.

10. More difficult is the prohibition on adult sibling consensual sexual activity. There has been much written on the topic, and many, if not most, writers in the criminal law area oppose the prohibition. Ashworth, for example, in his *Principles of Criminal Law* describes the prohibition as "plainly wrong", and in an Australian text, Fisse is similarly opposed. (For a fuller list of relevant references see Footnote 2 to "Do We Need the Crime of Incest?", an article by Jennifer Temkin in [1991] Current Legal Problems 185. As she notes the "academic literature is replete with calls for its abolition".)

11. The main arguments against such an offence are:

11.1 Where the participants are consenting adults, the offence is victimless;

11.2 The "eugenics" argument is currently discredited since the risks on an individual relationship basis are not appreciably greater than any other relationship;

11.3 The other offences in the criminal law which deal with non-consensual sexual activity are adequate to protect people; and

11.4 As long as there is an adequate definition and understanding of "consent", then there is no basis on which to punish truly consensual activity.

12. There is much to be said in support of these arguments, but the issue from the vetting viewpoint is whether it is reasonable to prohibit such activity. The concerns with the section as drafted are that, contrary to this general line of argument that the offence should be abolished, the proposed section actually expands the scope of incest. It does this, as noted, by expanding the prohibition from sexual intercourse to sexual connection. In itself this is a logical development once one moves away from eugenics as the primary rationale of such an offence. If the concern is the nature of the relationship, then it should not matter whether the sexual activity takes the form of sexual intercourse or some other sexual conduct (whether penetrative or not). However, the move away from eugenics and the consequent broadening of the offence requires an even greater focus on the rationale for having the offence at all.

13. There is no doubt that there remains a general societal repugnance for such relationships. However, whilst relevant, this of itself cannot provide a rationale for family status discrimination. The answer must lie in the reasoned articulation of the basis for repugnance.

14. Two difficulties complicate the matter:

14.1 First, the bulk of the research is focussed on parent/child incest. There has been very little done on sibling incest;

14.2 Second, the extent of the intrusion could be minimalised from that as contained in the Bill. For example, by increasing the age of consent for sibling incest to 20 from 16, one increases the likelihood of true consent, and thereby casts further doubt on the need for a prohibition above that age.

15. Against this background it is necessary to look carefully to see whether there is a justified reason for maintaining and indeed expanding the prohibition. On balance, we have concluded that it lies in a rationale advanced by Jennifer Temkin in the article cited above. If one accepts that the vast majority of sibling incest relationships commence when a girl (as is the norm) is less than the age of consent, it is appropriate to focus on the aspect of protection that underlies these offences. The reality of these situations is that the young girl is the subject both of confusing messages and pressure. Their already limited ability to assimilate this, and to resist, will be significantly impaired by the recognition in the criminal law that at some stage such a relationship is permissible. In other words, as Temkin argues, the absolute

maintenance of the social taboo on these relationships brings with it a level of, if not support, then at least a clarity that may assist the young victims in this area. This rationale is something that underlies much of the offences in this area namely, the need to avoid sexual exploitation of young people. Whilst prohibiting consensual adult activity would not normally be seen to be rationally connected to this purpose, in the case of sibling incest and the dynamics within which such relationships normally develop, the connection can be fairly made.

16. Once one accepts this as a rationale for total prohibition, other factors which are insufficient in themselves, can be added to the mix:

16.1 The very limited scope of this offence is a relevant factor. Consensual sibling intercourse, on the limited research available is rare.

16.2 In itself, the prohibition is one that applies to everyone. It creates no further category of discrimination and isolates no other group. No one is permitted such a relationship. Further, the offence does not particularly restrict sexual expression. In this sense it can be distinguished from the old homosexuality offences. In those situations the argument was available that to ban homosexuality was in fact to deny those persons an opportunity to express themselves sexually. This is not so with an incest offence. There is no suggestion that incest is the only way a particular group can express themselves.

16.3 It is relevant that, notwithstanding the width of challenges to this offence, almost every jurisdiction still has it.

16.4 In the rare case of sibling incest which commences after the age of consent, there are sentencing and prosecution discretions that can be used to ameliorate hardship.

17. Weighing all these matters in the balance, the conclusion is that the offence as drafted represents a reasonable limit on the right to be free from discrimination on grounds of family status.

Sexual conduct with child under 12

18. The new s 132 makes it an offence to have sexual connection with a child under 12 years of age. The offence is essentially one of absolute liability since:

18.1 Consent is no defence (new s 130(5)); and

18.2 It is not necessary for the Crown to prove that the accused knew the victim to be underage (see s 132(4) which states that it is no defence that the accused believed the victim to be 12 years or older).

19. In our view, offences of absolute liability do not engage any provision of BORA. Even if they did this offence would readily pass muster under s 5 BORA: see mutatis mutandis *R v M(RS)* (1991) 8 CRR (2d) 322 (PEICA).

Sexual connection with young person under 16

20. The new s 134 makes it an offence to have (or attempt to have) sexual connection with, or to do an indecent act on, a young person under 16 years. New s 134A provides a number of defences to such charges, including:

20.1 That the young person consented and either:

20.1.1 The accused was of or under the age of the young person; or

20.1.2 The accused was older than the young person by no more than two years; (s 134A(1)) and

20.2 That the young person consented and the accused both:

20.2.1 Believed on reasonable grounds that the young person was of or over 16 years; and

20.2.2 Took reasonable steps to find out if the young person was of or over 16 years (s 134A(2)).

21. In both cases, the accused must "prove" each element of the relevant defence relied on. "Prove" has traditionally been understood as meaning, in New Zealand, "prove on the balance of probabilities": see e.g. *R v Perry & Pledger* [1920] NZLR 21 (CA), and *Adams on Criminal Law* 3rd ed para CA134.08.

22. In effect, ss 134A(1) and 134A(2) create reverse onuses on an accused. Accordingly, s 25(c) BORA (presumption of innocence) is *prima facie* infringed, since the effect is to deem an accused to be guilty of an offence unless he or she disproves core elements of it. The question is whether ss 134A(1) and 134A(2) are a justified limit on s 25(c) BORA in terms of s 5 BORA.

23. In our view, both provisions pass muster.

24. While it is true that offences against s 134 carry high penalties (from seven to ten years depending on the offence), they are nonetheless aimed at protecting particularly vulnerable members of society, children and young persons. In this field, society can rightly undertake special measures of this type in order to ensure compliance with prohibitions on sexual exploitation of young people: see e.g. *M(RS)* above, *R v Cobb* [1993] RJQ 1967 (CQ).

25. Further, the nature of the matters in issue are, largely speaking, ones falling peculiarly within the knowledge of an accused – he or she would know for example what (reasonable) steps had been taken to ascertain the complainant’s age, and ought to be able to articulate and demonstrate why he or she believed that consent existed prior to sexual conduct occurring.

26. Finally, the nature of the acts in issue and the harm that they can cause is such that it is reasonable for Parliament to only allow those persons who can convincingly demonstrate their lack of moral blameworthiness to escape legal liability: the reverse onus achieves this objective.

Yours faithfully

Andrew Butler Simon France
Crown Counsel Crown Counsel

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Footnotes

1. Non-consensual incest would usually be charged as sexual violation (which is a far more serious charge with higher penalties) rather than incest.