

Crimes of Torture Amendment Bill

13 March 2006

Attorney-General

LEGAL ADVICE

CONSISTENCY WITH THE NEW ZEALAND BILL OF RIGHTS ACT 1990:

Crimes of Torture Amendment Bill (PCO 6409/8)

Our Ref: ATT114/1371(7)

1. We have undertaken an examination of the Crimes of Torture Amendment Bill (PCO6409/8) ("the Bill") for consistency with the New Zealand Bill of Rights Act 1990 ("NZBORA"). In our view, the Bill appears to be consistent with NZBORA and no report in terms of s 7 NZBORA is required. However, one feature of the Bill raises a potential issue with respect to s 21 NZBORA (unreasonable search and seizure) and therefore we set out our reasons for finding consistency below.

Summary of the Bill

2. This Bill implements the optional protocol to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ("the Optional Protocol"). The objective of the Bill is to establish a system of regular visits by international and national bodies to places where people are deprived of their liberty, in order to prevent torture, and other cruel, inhuman or degrading treatment or punishment. Accordingly, the Bill establishes the following three bodies:

2.1 The Bill enables the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ("the Subcommittee") to exercise in New Zealand its functions and powers set out in the Optional Protocol. The Subcommittee is permitted to visit any place under the Crown's jurisdiction or control where persons are deprived of their liberty (cl 19), to have unrestricted access to such information as is necessary for the proper performance of its functions (cl 18), and to conduct private interviews with detained persons (cl 20).

2.2 The Bill authorises the Minister of Justice to designate one or more National Preventive Mechanisms ("NPM"), which are functionally independent (cl 26). These NPMs are to examine at regular intervals the conditions of detention applying to detainees and the treatment of those detainees in those places of detention for which it is designated, and to make any recommendations for improving the conditions of detention and the treatment of detainees (cl 27). An NPM is also required to provide at least one written report to the Minister of Justice each year on the exercise of its functions under the Bill.

2.3 Finally, the Bill authorises the Minister of Justice to designate a national body ("the Central National Preventive Mechanism") to co-ordinate the activities of the NPMs and to maintain effective liaison with the Subcommittee (cls 32 & 33).

Potential Unreasonable Search Issue

3. Clause 19 of the Bill states that:

"Subcommittee's access to places of detention and persons detained

Every person must permit the Subcommittee to have unrestricted access to -

(a) Any place of detention in New Zealand and to every part of that place:

(b) Any person in a place of detention."

Clause 29 of the Bill essentially repeats this statutory obligation in terms of granting unrestricted access to an NPM.

4. An issue of consistency with s 21 of the NZBORA arises because at first glance the provisions would appear to permit unrestricted access to all parts of a place of detention, including those areas set aside for the exclusive use of the staff of an institution.
5. The bill applies to a broad range of places of detention including for example prisons, hospitals, police cells and refugee detention centres.
6. The inspection of areas set aside for personal use of institution staff (such as staff lockers) without either consent or reasonable grounds for belief that there is evidence in that place of torture or other proscribed ill-treatment could amount to an 'unreasonable search' in terms of s 21 of the NZBORA.
7. In the case of prison officers, this interpretation would also be inconsistent with s 100 of the Corrections Act which permits searches of areas set aside for exclusive use of persons other than prisoners only where there are reasonable grounds to suspect there is an unauthorised item in that area.

The Subcommittee and NPM must exercise their functions consistently with NZBORA

8. However, the Subcommittee and NPM only have the functions and powers provided to them under domestic legislation. These statutory functions and powers are required, whenever possible, to be interpreted consistently with the fundamental rights and freedoms contained in the NZBORA. There is nothing in the bill that indicates an intention to exclude the application of the NZBORA to the exercise by the Subcommittee and the NPM of their statutory functions or powers.
9. Accordingly, whenever the Subcommittee or NPM seeks to exercise its investigation functions under the proposed legislation, it would have to do so in a manner consistent with the rights and freedoms contained in the NZBORA. This would mean that neither the Subcommittee nor the NPM could seek to use its ability to obtain unrestricted access to any place of detention in a manner that would result in an unreasonable search or seizure. This

also means that it is inherent in clauses 19 and 29 that the statutory obligation to provide these bodies with "unrestricted access" will not allow access that would result in a breach of the NZBORA.

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