

Diplomatic Privileges And Immunities Amendment Bill 2003

12 June 2003

Attorney-General

Legal Advice

**Consistency With The New Zealand Bill Of Rights Act 1990:
Diplomatic Privileges And Immunities Amendment Bill 2003**

1. We have considered whether the Diplomatic Privileges and Immunities Amendment Bill 2003 (PCO 4922/6) is consistent with the New Zealand Bill of Rights Act 1990. We understand that this Bill is to be considered by the Cabinet Legislation Committee on Thursday, 19 June 2003.
2. The stated purpose of the Bill is to make certain amendments to the Diplomatic Privileges and Immunities Act 1968 (the principal Act) that are needed to implement the Agreement on the Privileges and Immunities of the International Criminal Court (the Agreement). The Agreement, which New Zealand signed in October 2002, sets out the privileges and immunities that the International Criminal Court (the ICC), its Judges, staff, and other persons associated with the Court enjoy while in the territory of a State on ICC business.

Discrimination on the ground of nationality

Section 19 of the Bill of Rights Act

3. Section 19(1) of the Bill of Rights Act provides the right to freedom from discrimination on the grounds set out in section 21 of the Human Rights Act 1993. These grounds include, inter alia, ethnic or national origin.
4. 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 exists are:
 - (i) Does the legislation draw a distinction based on one of the prohibited grounds of discrimination?
 - (ii) Does the distinction involve disadvantage to one or more classes of individuals?
5. If these questions are answered in the affirmative, we consider that the legislation gives rise to a prima facie issue of "discrimination" under section 19(1) of the Bill of Rights Act. Where this is the case, the legislation falls to be justified under section 5 of the Bill of Rights Act.

Possible Discrimination on the Ground of Nationality

6. In order to give full effect to the Agreement, clause 3 of the Bill repeals section 10D of the principal Act and substitutes new sections 10D and 10E.
7. The proposed new section 10D(3)(a) of the principal Act provides that a declaration can be made under Article 23 of the Agreement that confers a more limited range of privileges and immunities on New Zealand citizens and permanent residents working for the ICC in this country than those available to foreign nationals performing the same functions. For instance, New Zealand nationals and permanent residents may be excluded from a variety of "customs privileges" associated with the inspection and seizure of their personal baggage and duty free importation and exportation of their furniture and effects. This provision, therefore, gives rise to a distinction on the ground of ethnic or national origin (defined in section 21 of the Human Rights Act 1993 as including nationality or citizenship).
8. We consider, however, that the distinction does not appear to disadvantage New Zealand nationals and permanent residents working for the ICC. This is because customs privileges are primarily granted to help ICC officials set up home in a new country to which they have been posted and to assist them relocate back to their country of residence at the end of their posting. In our opinion, New Zealand nationals and permanent residents working for ICC are unlikely to face such hardships, especially as they are likely to stay in New Zealand at the end of their employment with the ICC.
9. In the remote possibility that disadvantage may occur - for instance, if New Zealand nationals and permanent residents remained with the ICC after the end of their posting in this country - we consider that the resulting nationality discrimination would be justifiable under section 5 of the Bill of Rights Act. In reaching this conclusion, we note that the Agreement sets out the privileges and immunities to which each class of persons associated with the ICC are entitled. These vary according to the particular role and function involved. Article 23 of the Agreement specifies the minimum privileges and immunities that are necessary for the nationals and permanent residents of a country who have an ICC role or function within that country's own territory (namely, immunity from personal arrest and detention; immunity from legal process; inviolability of papers and documents; communication privileges; and exemption from taxation on the salaries, emoluments and allowances paid to them by the Court). It ensures that each group retains the core protections necessary to ensure that they can perform their functions independently.
10. The corollary is that some privileges (especially, customs privileges) can be regarded as less fundamental and their absence for New Zealand nationals and permanent residents would not affect the independent performance of their functions. Granting them these privileges would accord them a benefit that is not essential to the independent performance of their functions as ICC officials.

Conclusion

11. We have concluded that the provisions of the Bill do not appear to be inconsistent with the rights and freedoms contained in the Bill of Rights Act.

12. In accordance with your instructions we attach a copy of this opinion for referral to the Minister of Justice.

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