

Disability (United Nations Convention on the Rights of Persons with Disabilities) Bill

2 July 2008

Attorney-General

LEGAL ADVICE

CONSISTENCY WITH THE NEW ZEALAND BILL OF RIGHTS ACT 1990: DISABILITY (UNITED NATIONS CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES) BILL

1. We have considered the Disability (United Nations Convention on the Rights of Persons with Disabilities) Bill (the 'Bill') (PCO 13153/2.9.2.0.1.0) for consistency with the New Zealand Bill of Rights Act 1990 (the 'Bill of Rights Act'). We understand that this Bill has already been considered by the Cabinet Business Committee and has been approved for introduction into Parliament.

2. The stated purposes of the Bill are to:

- amend legislative provisions that are inconsistent with the United Nations Convention on the Rights of Persons with Disabilities (the 'Disabilities Convention'); and
- amend the Human Rights Act 1993 (the 'HRA') to clarify the scope of its provisions enabling a person to refuse to accommodate a person's disability in certain areas of activity.

3. These amendments will enable New Zealand to ratify the Disabilities Convention.

4 The Bill proposes to amend numerous Acts and Regulations. Generally, the amendments may be divided into two groups:

- amendments to the HRA (which are set out in Part 1 of the Bill); and
- amendments to legislative provisions for disqualification from statute-based public or fiduciary offices based on a person's status under mental health legislation (which are set out in Parts 2 and 3 of the Bill).

5. We have considered the consistency of amendments to legislation not administered by the Ministry of Justice with the Bill of Rights Act. The Crown Law Office will provide separate advice on consistency of the HRA, the Juries Act 1981, the Sale of Liquor Act 1989, and the Trustees Act 1956, as these Acts are administered by the Ministry of Justice.

6. The Bill appears to be consistent with the rights and freedoms contained in the Bill of Rights Act.

Disqualification from public or fiduciary offices based on incompetence

7. The relevant amendments in Parts 2 and 3 of the Bill seek to amend legislation that allows a person to be disqualified from public or fiduciary offices based their status under mental health legislation. The amendments either do away with an automatic disqualification for a mental disorder or replace it with a test based on the exercise of certain powers by a Court under the Protection of Personal and Property Rights Act 1988 ('the PPPRA').

8. Recently, in respect of the Auckland Regional Amenities Funding Bill (the 'ARAF Bill'), we considered a provision under which a member of the funding board would be automatically disqualified where he or she became subject to a compulsory treatment order made under Part 2 of the Mental Health (Compulsory Assessment and Treatment) Act 1992. The use of compulsory treatment orders as a proxy for incapacity to carry out the duties of a board member was found to be discriminatory and unjustified under the Bill of Rights Act. This advice formed the basis of a section 7 report to Parliament.

9. The same clause of the ARAF Bill also included a provision providing an automatic disqualification where someone was subject to an order under the PPPRA. We advised you at that time that we considered PPPRA orders to be an appropriate proxy for incapacity.

10 Orders under the PPPRA are based on the objective of least restrictive intervention. The initial presumption is that a person is competent. Whether a person is wholly or partially lacking the competence to manage his or her own personal or financial affairs is a question of fact. The criteria to determine this include the ability to:

- a) communicate choices;
- b) understand relevant information;
- c) appreciate the situation and the consequences; and
- d) rationally manipulate information. ^[1]

11. The amendments, where they introduce a PPPRA order as a proxy for competence, are plainly aimed at addressing the issue of people that lack the capacity to perform the functions associated with the statutory office they hold. All of these statutory offices involve the management of large sums of money and property and the exercise of fiduciary duties.

12. The first question is whether section 19(1) of the Bill of Rights Act is engaged. This provision preserves the right to freedom of discrimination, on the grounds of discrimination in the Human Rights Act. One of those grounds of prohibited discrimination is disability (see section 21(h) of the Human Rights Act).

13. There is an argument that the use of PPPRA orders in the relevant amendments in Parts 2 and 3 of the Bill do not make a distinction based on a disability, as they require the Court to consider a person's competence.

14. Balanced against this, there is also a counter argument that the use of PPPRA orders do discriminate on the basis of disability, as they effectively treat persons subject to an order differently from those who are not subject to such an order. In this context, it is relevant to note that the use of these provisions may disproportionately affect persons with a disability.

15. The next step is to consider whether the use of PPPRA orders in Parts 2 and 3 of the Bill as a proxy for capacity is justified in terms of section 5 of the Bill of Rights Act.

Justifications under section 5 of the Bill Of Rights Act

16. Where a Bill is found to be prima facie inconsistent with a particular right or freedom, it may nevertheless be found to be consistent with the Bill of Rights Act if the inconsistency is considered to be a reasonable limit that is justifiable under section 5 of that Act. The inquiry under section 5 is essentially two-fold:

- does the provision serve an important and significant objective; and
- is there a rational and proportionate connection between that objective and the provision?

Nature of amendment that use PPPRA orders as a proxy

17. The amendments are not uniform in their use of the PPPRA. There are different orders available under the PPPRA. The amendments in the Bill which rely on PPPRA orders for dealing with statutory offices may be put into six classes. With respect to property orders, section 30 of the PPPRA deals with temporary orders while section 31 deals with final orders.

18. The first class of amendment is where someone becomes subject to a property order under section 31 of the PPPRA. This class of amendments covers:

- the Soil Conservation and Rivers Control Act 1941 where a person shall not be capable of being elected or appointed as a member of any Catchment Board;
- the Taranaki Scholarships Trust Board Act where a person would have his office on the Board vacated; and
- the Waitangi National Trust Board Act 1932 where the office of a trustee or other member of the Board shall become vacant.

19. The second class of amendment is where someone becomes subject to a property order under section 30 or 31 of the PPPRA. This class of amendments covers:

- the Local Government Act 2002 where the office of a member of a local authority becomes vacant or the member is suspended in the case of a temporary order;
- the New Zealand Council for Educational Research Act 1972 where a person shall be disqualified from appointment as a member of the Council or deemed to have a leave of absence and incapable of acting where there is a temporary order;
- the Sale of Liquor Act 1989 where a person shall be incapable of being elected or appointed to be or of being a member of a licensing trust or deemed to have a leave of absence and incapable of acting where there is a temporary order;

20. The third class is where someone becomes subject to a property order under section 30 or 31 of the PPPRA or for whom a trustee corporation is acting as manager under section 32 or 33 of the PPPRA. This class of amendments only applies to:

- the Public Trust Act 2001, where the Public Trust acts as a co-trustee, it may exercise its discretion to separately invest estate money, or to investments in group investment funds, where it has the consent of every other co-trustee but for the people in this class; and

21. The fourth class is where a person is subject to either a property or personal order under the PPPRA. A temporary order deems a trustee to have taken a leave of absence and is not capable of acting as a trustee during that period or suspends a member of tertiary institutions council. A personal order is only a ground for removal if the order reflects adversely on his or her competence to manage his or her own affairs in relation to his or her property; or capacity to make or to communicate decisions relating to any particular aspect or aspects of his or her personal care and welfare. The only provision in this class is:

- the Education Act 1989 where a member of a tertiary institutions council would be dismissed (by resolution and not the chief executive) from, or barred from appointment, election or co-option as a member.

22. The fifth class is where someone is subject to a personal or property order under PPPRA. Again only one provision falls within this class, this being:

- the Maori Trust Boards Act 1955 where no person shall be appointed as a member of a Maori Trust Board.

23. The sixth class is where someone is subject to a personal or property order or for whom a trustee corporation is acting as manager under section 32 or 33 of the PPPRA. This class is to:

- the Te Ture Whenua Maori Act 1993 where no person shall be appointed or elected or shall continue to hold office of a committee of management or the member of the committee is suspended in the case of a temporary order.

24. The different classes reflect the increasingly broad number of orders available under the PPPRA that may cause disqualification. Class one is only property orders under section 31 of the PPPRA while class six is any personal or property order or for whom a trustee corporation is acting.

Important and significant objective

25. In respect of all the different classes of amendments, the objective of introducing the PPPRA test is to immediately remove people from statutory offices overseeing significant public finances, or in positions of trust, where they cannot communicate choices, understand relevant information, appreciate a situation and the consequences, and rationally manipulate information. The importance of these offices is that a person must be fully able to carry out their duties under the particular office.

26. We consider that disqualification from certain public or fiduciary offices based on a Court finding that a person not competent to manage their affairs, whether fully or in part, is an important and significant objective.

Rational and proportionate connection between the objective and the provision

27. We consider there to be a rational and proportionate connection between the need to remove people from public or fiduciary office for reasons of incompetence and the use of the PPPRA test to do so. The Ministry of Health and the Office for Disability Issues have confirmed that, as a matter of fact, even a limited PPPRA order will not be an overly wide proxy for incompetence.

28. Accordingly, we consider the use of PPPRA orders to determine competence to serve in public or fiduciary offices represents an appropriate balance between the right to be free from discrimination based on disability and the requirement to be fully able to carry out the duties under those offices.

Temporary orders

29. The Bill provides that in the case of temporary property orders granted under section 30 of the PPPRA, a person will not be disqualified from office automatically but there will be a suspension from office which is treated as a leave of absence. When a temporary order is converted into a final property order, the effect will be automatic exclusion from public or fiduciary office as provided in the Bill.

30. There are also consequential amendments to the Acts being amended in this Bill to maintain some consistency in the use of temporary orders.

31. This is necessary because temporary orders can be obtained on an urgent basis, and the person concerned may be unaware of the application or the hearing, with no right to be heard or call or cross-examine witnesses. It also addresses the lower test that must be applied by the Court in granting an order, which is whether there are reasonable grounds that a person may be incompetent. The Bill thus ensures sufficient protection that will help prevent an overly wide application of temporary orders as proxies for incapacity to hold office.

Specific classes of amendment

32. Some of the classes of amendment are not confined to the use of property orders as the proxy for incapacity. We consider, however, that such provisions are also justified in terms of section 5 of the Bill of Rights Act.

33. The use of personal orders as a trigger under the Education Act is nuanced to reflect that the order must adversely reflect on the person's ability to manage property or communicate decisions. These abilities are integral to being a member of a tertiary institution council. If a personal order did not reflect adversely on the ability to manage property or communicate decisions then there would be no bar on appointment, election or co-option as a member of a council.

34. With respect to the Maori Trust Boards Act and personal orders, the Minister has the discretion to take action in the name of the Board or Committee subject to certain requirements.

35. Similarly, in relation to the Te Ture Whenua Maori Act, the Maori Land Court may investigate an incorporation's affairs and appoint some person or persons to hold office as an additional member or additional members of the committee of management.

36. In both the Maori Trust Boards Act and the Te Ture Whenua Act, there is an avenue for appeal and reinstatement for any person removed due to a personal order that does not affect their ability to deal with property. In addition, the PPPRA provides for a reference to the Maori Land Court where it appears that an application for the exercise of the Family Court's jurisdiction in relation to property rights may result in an order appointing one or more persons to act as the manager of beneficial interests in Maori freehold land or shares in a Maori incorporation.

Concluding comments

37. We have concluded that the Bill is consistent with the rights and freedoms contained in the Bill of Rights Act.

38. In reaching this view, we have sought to address, in detail, any concerns with the use of PPPRA orders as a proxy of incompetence in relation to people serving in public or fiduciary offices, particularly as the Bill arises out of efforts to deal with any inconsistencies with the Disabilities Convention. The Convention notes that disability is an evolving concept. More importantly, the Convention promotes a focus on a person's capacity and not the disabilities that others may see in a person. The PPPRA reflects this focus by ensuring that the inquiry is directly focussed on capacity.

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Footnotes

1. Re G [2000] NZFLR 139, Judge Grace adopted criteria suggested by Judge Boshier in Re T F 11/1/95, Judge Boshier, FC Auckland FP68/94.

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