

# Disabled Persons Employment Promotion (Repeal and Related Matters) Bill

14 November 2003

Attorney-General

LEGAL ADVICE

CONSISTENCY WITH THE NEW ZEALAND BILL OF RIGHTS ACT 1990:

Disabled Persons Employment Promotion (Repeal and Related Matters) Bill

1. We have considered whether the Disabled Persons Employment Promotion (Repeal and Related Matters) Bill 2003 (PCO 4343/6) is consistent with the New Zealand Bill of Rights Act 1990 (the "Bill of Rights Act"). We understand that this Bill is to be considered by the Cabinet Legislation Committee on Thursday, 20 November 2003.

2. We have concluded that this Bill appears to achieve overall consistency with the Bill of Rights Act. However, two of potential issues of inconsistency with section 19 of the Bill of Rights Act arose on the face of the Bill. These issues were justified in each case to ensure overall consistency.

## Purpose of the Bill

3. The Disabled Persons Employment Promotion (Repeal and Related Matters) Bill repeals the Disabled Persons Employment Promotion Act 1960 ("the Principal Act") and includes a number of transitional and savings provisions arising from the repeal of that Act.

## Section 19 of the Bill of Rights Act: The right to freedom from discrimination

4. Section 19(1) provides the right to freedom from discrimination on the grounds set out in section 21 of the Human Rights Act 1993. These grounds include, for example, sex, age, marital status, disability, political opinion, sexual orientation, race, and ethnic or national origins.

5. Taking into account the various New Zealand and Canadian judicial pronouncements as to the meaning of discrimination, in our view the key questions in assessing whether discrimination<sup>[1]</sup> under section 19 exists are:

i Does the legislation, policy or practice 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?

6. If these questions are answered in the affirmative, we consider that the legislation or policy/practice gives rise to a *prima facie* issue of "discrimination" under section

19 of the Bill of Rights. Where this is the case, the legislation/policy/practice falls to be justified under section 5 of the Bill of Rights Act. We now turn to the specific clauses of the Bill that raise potential discrimination issues.

#### Clause 6 - Exempt organisation

7. This is a transitional provision that provides for the continuation of specific exemptions, in respect of the employment of disabled persons, granted to operating sheltered workshops in respect of all or any of the provisions of any awards, agreements or employment legislation designed to protect employees. Such exemptions may continue until they become void or of no effect under section 3(3) or until 30 June 2007. The continuation of such exemptions gives rise to a *prima facie* issue of discrimination on the grounds of disability. Accordingly, any provision designed to enable the continuation of such exemptions requires justification in terms of section 5 of the Bill of Rights Act.

*Is there a significant and important objective behind the policy or service in question?*

8. Department of Labour officials have informed us that the transition period has been established to manage potential risk arising from the repeal of the Principal Act and to ensure that current service users (i.e. people with disabilities employed in sheltered workshops) continue to receive an appropriate service. It will provide the sector sufficient time to progressively shift to the new settings with the least disruption to service users. During that time government officials can work with the sector to assist them to make the necessary changes required as a result of the repeal of the Principal Act and to continue operating under the new environment. The Bill requires that by 2007, there will be 100% compliance within the sector

9. In effect, the transition policy is designed to achieve a balance between two objectives. The first is to ensure that people with disabilities have the same employment conditions, rights and entitlements as other people, including minimum wage provisions for work of comparable productivity. The second is to maintain employment opportunities for people with disabilities who are currently participating in sheltered workshops. We consider that all of these aims constitute significant and important objectives.

*A rational and proportionate connection between that objective and the policy or service in question?*

10. The repeal of the Principal Act will achieve the first objective. However, we have been advised by Labour officials that immediate implementation without a period of adjustment would almost certainly jeopardise the second objective. The risk with this approach is that providers might be unable to make the necessary financial and business changes and may cease operating and providing services and employment opportunities to people with disabilities. Potentially, this raises a risk that up to 3714<sup>[2]</sup> people could be left without services and employment opportunities. This would not be in line with the policy objective.

11. In practice, many providers have been unaware of their full rights and obligations as employers, and officials have had to go through an educative process with

providers to assist them to identify where employment relationships exist and to evaluate their commercial viability.

### *Conclusion Clause 6*

12. On the basis of this material, we consider that this provision is justifiable in terms of section 5 of the Bill of Rights Act.

### Clause 11 – Section 8 of the Minimum Wage Act 1983 Substituted

13. Clause 11 of the Bill repeals the existing section 8 of the Minimum Wage Act 1983. In its place, it substitutes a new section 8 which provides that a Labour Inspector may issue a minimum wage exemption permit to a worker in those instances where the Inspector is satisfied that;

- a worker is significantly and demonstrably impaired by disability from carrying out the requirements of his/her work; and
- any reasonable accommodations that could have been made by the employer have been considered; and
- it is reasonable and appropriate to grant the permit.

14. A provision that enables the Labour Inspector to issue a minimum wage exemption in respect of disabled persons is disadvantageous to that group of persons as they may receive a lower wage than other persons whose wage is set by a minimum statutory standard. Accordingly, this provision gives rise to a *prima facie* issue of discrimination on the grounds of disability and requires justification in terms of section 5 of the Bill of Rights Act.

*Is there a significant and important objective behind the policy or service in question?*

In terms of justification, Department of Labour officials have advised us that this provision is designed to maintain employment opportunities for this group who face persistent disadvantage in the labour market. We consider that this is a significant and important objective.

*A rational and proportionate connection between that objective and the policy or service in question?*

We note also that a provision that enables a Labour Inspector to issue a minimum wage exemption for disabled persons can be considered a rational measure as it may provide an incentive for employers to employ disabled persons in situations where it might not otherwise be practicable to do so.

Finally, we note that the authority to grant such an exemption is discretionary in nature and must satisfy a number of criteria. These criteria require the Inspector to be satisfied that the worker is significantly and demonstrably impaired from carrying out the requirements of his work, that reasonable accommodations have been considered by the employer; and that it is reasonable and appropriate to grant the permit. These detailed criteria will ensure that any decisions to grant such a permit are made on a case-by-case basis after careful consideration of a number of factors.

This will allow decisions that are reasonable and proportionate to the individual's capabilities and circumstances to be made.

*Conclusion on Clause 11 and the Bill*

18. We consider that Clause 11 of the Bill is justifiable in terms of section 5 of the Bill of Rights.

**CONCLUSION ON THE DISABLED PERSONS EMPLOYMENT PROTECTION (REPEAL AND RELATED MATTERS) BILL**

19. On balance we consider that the Bill achieves overall consistency with the Bill of Rights Act. In accordance with your instructions, we attach copies of this opinion for referral to the Minister of Justice and Associate Minister for Social Development and Employment and Peter Lorimer, Senior Adviser to Minister of Social Development and Employment, if you agree.

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Footnotes

1. *Quilter v Attorney-General* [1998] 1 NZLR 523; *Egan v Canada* (1995) 124 DLR (4<sup>th</sup>) 609; *Law Society of British Columbia et al v Andrews* [1989] 1 SCR 143; *Law v Canada (Minister of Employment and Immigration)* [1999] 1 SCR 497; *M v H* [1999] 2 SCR 577; *Lovelace v Ontario* [2000] SCC 37.

2. This is an estimated figure of people attending organisations covered by the DPEP Act. This figure is based on actual attendance numbers provided to the Ministry of Social Development and the Ministry of Health. It is difficult to quantify the proportion of people within this group who are in an employment relationship with

these organisations, as these organisations provide a mix of services to this group of people, including therapeutic activities.