

Domestic Violence Reform Bill

11 November 2008

Attorney-General

Domestic Violence Reform Bill (304-1): Consistency with the New Zealand Bill of Rights Act 1990

Our Ref: ATT395/81

1. Further to advice provided through the Cabinet paper process prior to the introduction of this Bill, I conclude that this Bill appears consistent with the New Zealand Bill of Rights Act 1990 ("Bill of Rights Act"). Certain provisions of the Bill raise or may appear to raise issues under that Act but do not give rise to any inconsistency. Differential treatment of young people

2. Clauses 5(1)-(3), 8, 31 and 38 (new s 124D) give rise to different treatment of people aged 16 or 17 from older people: in particular, 16 and 17-year olds cannot be the subject of prohibitive orders. As such, these provisions may appear to raise an issue under the right of non-discrimination on the grounds of age in ss 19(1) of the Bill of Rights Act. Age is defined as "any age commencing with the age of 16 years" by s 21(1)(i) of the Human Rights Act 1993.

3. However, the different treatment reflects the availability of similar, but specifically designed, protective measures for 16 and 17-year olds, such as the power of removal of young persons at risk of harming themselves or others or of causing serious damage to property under s 40 of the Children, Young Persons and Their Families Act 1989.

4. Given the availability of these measures, no issue of inconsistency arises.

Court-directed attendance at addiction assessment and treatment

5. Clause 23 (new ss 44B and 44D-44F), 24 (new s 47(1A)(b)) and 26 (new s 49A) permit the Family Court to direct a person who is a respondent to a protection order to undertake an addiction assessment and, consequent on that assessment, an addiction treatment programme and, further, sanction non-compliance both as an offence and as an adverse factor in subsequent court decisions. The proposed provisions supplement existing provisions for directed attendance at other programmes.

6. Assuming that such programmes do or can constitute such treatment, these provisions raise an issue of consistency with the right to refuse medical treatment affirmed by s 10 of the Bill of Rights Act.

7. That right is, however, subject to limitation in the interests of the safety or wellbeing of others ^[1]. Given that the Bill provides for treatment only after initial assessment and

following further consideration by the Court of the necessity of such treatment and, further, provides substantial procedural safeguards for the person concerned (see cl 18 (new s 36(2)), no issue of inconsistency arises.

Making of safety orders by qualified Police officer

8. Clause 38 (new Part 6A) introduces a power for a police officer of or over the rank of sergeant to make a temporary "safety order" where necessary to ensure the immediate safety of a person.

9. The effect of such an order is, for a period of not more than 72 hours, to require the person who is the subject of the order to vacate any place occupied by the person at risk, to surrender any firearms and to refrain from threats against or any other contact with that person. An order also has the effect of suspending parenting orders.

10. Under proposed s 124C, an order may be made without the consent of the person at risk. Further, proposed s 124K provides that no proceedings may be brought against the officer or the Crown in respect of actions taken provided that the actions are taken with reasonable care and in good faith.

11. As such, the effect of an order engages numerous rights under the Bill of Rights Act, including the right of expression under s 14 and the right to freedom of movement under s 18. Further, and noting that the safety order is in substance a short-term version of protection orders made by the Family Court under the existing legislation, the new provisions necessarily lack the procedural and institutional safeguards of that Court. It is therefore necessary to consider whether these various limitations are justifiable in terms of s 5 of the Bill of Rights Act ^[2].

12. The explanatory note to the Bill indicates (at 4) that the safety order provisions are intended to provide Police with an alternative where a person is believed to be at risk but where there is not a sufficient basis to arrest and to provide persons at risk with an opportunity to consider their options. There are also indications of practical difficulties faced by people at risk in making use of the existing Family Court regime ^[3].

13. Given those considerations, the threshold of necessity under proposed s 124B(1)(b), the relatively short duration of safety orders and the requirement of seniority of authorised officers, I consider that this provision is, on balance, a justifiable limitation on the rights concerned.

14. This advice has been reviewed, in accordance with Crown Law protocol, by Fergus Sinclair, Crown Counsel.

Yours sincerely

Ben Keith
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Footnotes

See A Butler & P Butler *The New Zealand Bill of Rights Act: A Commentary* (2005) 274; M Nowak *CCPR Commentary* (2ed: 2005) 190.

The application of s 5 entails an assessment of whether the restriction is rationally connected to an important objective and is proportionate to that objective: see, most recently, *R v Hansen* [2007] 3 NZLR 1 (SC) at [70], [123], [203]-[204] and [271].

N Robertson et al *Living at the Cutting Edge: Women's Experiences of Protection Orders* (2007).

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