

20 March 2008

ATTORNEY-GENERAL

LEGAL ADVICE
CONSISTENCY WITH THE NEW ZEALAND BILL OF RIGHTS ACT 1990:
EMPLOYMENT RELATIONS (BREASTFEEDING AND BREAKS) AMENDMENT BILL

1. We have considered whether the Employment Relations (Breastfeeding and Breaks) Amendment Bill (PCO 12995/7) ('the Bill') is consistent with the New Zealand Bill of Rights Act 1990 ('Bill of Rights Act'). We understand that this Bill is likely to be considered by the Cabinet Business Committee at its meeting on Monday, 31 March 2008.
2. The purpose of the Bill is to create minimum standards for a modern workforce in respect of the protection and promotion of infant feeding through breastfeeding and the provision of rest and meal breaks. The proposals in this Bill also support government policy concerning the choices of employees, particularly regarding their work-life balance and caring responsibilities.
3. The Bill seeks to achieve these aims by requiring:
 - employers to provide appropriate facilities for employees who wish to breastfeed in the workplace and appropriate breaks for employees who wish to breastfeed during work periods;
 - the Minister of Labour to approve a code of employment practice relating to an employer's obligation to provide breastfeeding breaks and facilities as soon as practicable; and
 - employers to provide their employees with rest and meal breaks.
4. We have concluded that the Bill appears to be consistent with the rights and freedoms contained in the Bill of Rights Act. In reaching this conclusion, we considered a potential issue of inconsistency with section 19(1) (freedom from discrimination) of the Bill of Rights Act. Our analysis of this issue is set out below.

THE RIGHT TO BE FREE FROM DISCRIMINATION

5. Section 19(1) of the Bill of Rights Act affirms the right to freedom from discrimination on the grounds set out in section 21 of the Human Rights Act 1993. These grounds include sex.
6. 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(1) exists are:
 - Does the legislation draw a distinction based on one of the prohibited grounds of discrimination?
 - Does the distinction involve disadvantage to one or more classes of individuals?
7. If these questions are answered in the affirmative, we consider that the legislation gives rise to a *prima facie* issue under section 19(1) of the Bill of Rights Act.

8. Where a provision is found to be *prima facie* inconsistent with a particular right or freedom, it may nevertheless be consistent with the Bill of Rights Act if it can be considered a reasonable limit that is justifiable in terms of section 5 of that Act. The section 5 inquiry is essentially two-fold: whether the provision serves an important and significant objective; and whether there is a rational and proportionate connection between the provision and the objective.¹

Breastfeeding facilities and breaks

9. Clause 5 of the Bill proposes to insert a new Part 6C into the Employment Relations Act 2000. This Part contains an obligation for employers to ensure that, so far as is reasonable and practicable in the circumstances, appropriate facilities and breaks are provided in the workplace for an employee who is breastfeeding, and who wishes to do so in the workplace or during a work period.
10. By requiring the provision for facilities and breaks solely for employees who are breastfeeding, the Bill implicitly makes a distinction based on sex as only women can breastfeed and therefore only women qualify for using these facilities and enjoying these breaks.
11. Clause 5 therefore draws a distinction between women and men. However, because only women can breastfeed, we are of the view that this distinction does not involve any disadvantage to men. We, therefore, consider that this clause does not raise an issue of *prima facie* inconsistency with section 19(1) of the Bill of Rights Act.
12. In any case, we consider that the objective of promoting and protecting infant feeding through breastfeeding is an important and significant objective. Breastfeeding is critical to providing the best start for infants and important to both infant and maternal health. While there is willingness among some employers to facilitate breastfeeding, evidence nevertheless suggests workplace policies and/or provisions for the support of breastfeeding or breast-milk collection and storage are ad hoc in nature, vary widely, and are in their infancy in New Zealand. Clause 5 addresses that issue. We therefore consider that if the implicit distinction between women and men were found to amount to discrimination on the ground of sex under section 19(1) of the Bill of Rights Act it appears to be justifiable under section 5 of that Act.

CONCLUSION

13. We have concluded that the Bill appears to be consistent with the rights and freedoms affirmed by the New Zealand Bill of Rights Act 1990.

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¹ *Moonen v Film and Literature Board of Review* [2000] 2 NZLR 9.

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