

8 April 2003

ATTORNEY-GENERAL

**LEGAL ADVICE
FAMILIES COMMISSION BILL:
CONSISTENCY WITH THE NEW ZEALAND BILL OF RIGHTS ACT 1990**

INTRODUCTION

1. We have considered whether the Families Commission Bill (the Bill) (PCO 5144/6) is consistent with the New Zealand Bill of Rights Act 1990 ("Bill of Rights Act"). We understand that this Bill will be considered by the Cabinet Legislation Committee at its meeting on Monday 14 April 2003.

SUMMARY

Conclusion on consistency of the Bill with the Bill of Rights Act

2. We have concluded that the Bill does not appear to be inconsistent with the Bill of Rights Act.

Overview of the Bill

3. The Bill establishes the Families Commission (the Commission) as a new Crown entity. The Commission's main function will be to act as an advocate for the interests of families generally. Additional functions which support this main function include:
 - Encouraging and facilitating informed debate on matters relating to the interests of families across sectors and involving the general public;
 - Increasing public awareness and promoting better understanding of matters relating to the interests of families including the importance of stable family relationships and the rights and responsibilities of parents; and
 - Undertaking and promoting research into matters affecting the interests of families.

Particular Clauses of the Bill considered for consistency with the Bill of Rights Act

4. We have considered the consistency of the Bill with the following sections of the Bill of Rights Act:

Section 14: The right to freedom of expression

5. Clauses 8 and 14 of Schedule 1 (Duty not to disclose information, and obligation to disclose interests respectively), and clause 3 of Schedule 2 (Requirements before appointment) contain rules relating to the disclosure of certain information. We have concluded that any limitations on section 14 contained in these clauses are justifiable as they serve to promote the integrity and independence of the Commission.

Section 19: The right to freedom from discrimination

6. Clauses 11 (Needs, values, and beliefs of particular groups), 12 (Mechanisms for obtaining views of specified groups) and 32 (Personal policy: Commission to be good employer) specifically mention Māori. We do not consider an issue of *prima facie* discrimination arises in this instance as the clauses are worded in such a way as to be inclusive of other cultural groups.

Section 27(3): The right to being, and to defend, civil proceedings brought by the Crown

7. Clause 9 of Schedule 2 provides that a member is not entitled to compensation if he or she is removed from office. We consider that this clause falls outside of the range of section 27(3) of the Bill of Rights Act.

FULLER ANALYSIS: THE BILL OF RIGHTS ACT ISSUES RAISED BY THE FAMILIES COMMISSION BILL

Section 14 of the Bill Rights Act: The right to freedom of expression

8. The right to freedom of expression extends to all forms of communication that attempt to express an idea or meaning. The right extends to conduct as well as silence and may apply irrespective of the content or form of the expression. Clauses 8 and 14 of Schedule 1 (duty not to disclose information, and obligation to disclose interests respectively), and clause 3 of Schedule 2 (requirements before appointment) contain rules relating to the disclosure of certain information, thereby raising *prima facie* issues in terms of section 14 of the Bill of Rights Act. We have accordingly considered whether the clauses can be considered a reasonable limit on the right to freedom of expression in terms of section 5 of the Bill of Rights Act.
9. We consider that these clauses are justifiable under section 5 of the Bill of Rights Act. The clauses are necessary to enable the Commission to undertake its statutory duties without fear of compromise by its members. This is a significant and

important objective as it promotes the integrity and independence of the Commission. Further, the limitations are rationally and proportionately connected to this objective as they are tailored to certain circumstances and information that are proportionate and clearly relevant to the objective.

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

10. Clauses 11 (Needs, values, and beliefs of particular groups), 12 (Mechanisms for obtaining views of specified groups) and 32 (Personal policy: Commission to be good employer) specifically mention Māori. In some cases, specific measures for identified racial groups can raise *prima facie* issues of discrimination under section 19 of the Bill of Rights Act.

11. However, given that clauses 11, 12 and 32 are worded in such a way as to be inclusive of other cultural groups, we do not consider an issue of *prima facie* discrimination arises in this instance.

Section 27(3) of the Bill Rights Act: The right to being, and to defend, civil proceedings brought by the Crown

12. Clause 9 of Schedule 2 provides that a member is not entitled to compensation if he or she is removed from office. Section 27(3) of the Bill of Rights Act affirms the right of a person when suing, or being sued, by the Crown to have that litigation conducted in the same way that litigation between two individuals would be conducted.

13. We have previously advised you that the right protects an individual's ability to enforce the law against the Crown in the conventional way in the ordinary court. That is different from guaranteeing a cause of action against the Crown. Still less does section 27(3) guarantee there will be a certain measure of success when a person sues the Crown. Rather, section 27(3) affirms rights relating to procedure by which Crown liability, where it exists under law, can be established at the suit of an individual person.

14. Following the decision of McGechan J in *Westco Lagan Ltd v Attorney-General*¹, section 27(3) does not affirm a right to immunity from alterations in the substance of the law that may serve to limit or remove any basis for Crown liability, and thus reduce or even eliminate the prospects of success by an individual in suing the Crown. This point applies even when litigation is current or concluded. Consequently, clause 9 of Schedule 2 falls outside of the range of section 27(3) of the Bill of Rights Act.

¹ *Westco Lagan Ltd v Attorney-General* [2001] 1 NZLR 40.

CONCLUSION ON THE FAMILIES COMMISSION BILL'S CONSISTENCY WITH THE BILL OF RIGHTS ACT

15. We have concluded that the Bill does not appear to be inconsistent with the Bill of Rights Act. In accordance with your instructions, we attach a copy of this opinion for referral to the Minister of Justice. A copy is also attached for referral to the Minister of Social Services and Employment, if you agree.

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Cc Minister of Justice
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