Judicial Retirement Age Bill

11 October 2006

Attorney-General

LEGAL ADVICE
CONSISTENCY WITH THE NEW ZEALAND BILL OF RIGHTS ACT 1990:
Judicial Retirement Age Bill PCO 7199/6
Our Ref: ATT395/19

1. I have reviewed this Bill ("the Bill") for consistency with the New Zealand Bill of Rights Act 1990 ("BORA") and conclude that it is consistent with that Act. I have set out the reasons for that conclusion below.

2. The Bill amends the mandatory retirement age for Judges, Associate Judges of the High Court, coroners and Community Magistrates, currently 68, to 70. The explanatory note to the Bill expresses the purpose of a fixed retirement age as follows (para. 2):

"Security of tenure and its counterpart, a compulsory retirement age, are key protections for judicial independence. These provisions enable the fearless performance of judicial functions by freeing Judges from concerns about their future term of office."

3. The explanatory note indicates that the proposed increase in the retirement age reflects concerns both that the current age causes a loss of valuable knowledge and experience and presents a barrier to potential judicial appointees who may wish to work beyond the age of 68 but are by convention limited in their future employment following judicial service.

4. In imposing a mandatory retirement age, the Bill necessarily gives rise to *prima facie* discrimination on the grounds of age, contrary to s 19(1) BORA and s 21(1)(i) of the Human Rights Act 1993. It follows that it is necessary to consider whether that *prima facie* discrimination is justifiable. Section 5 BORA provides:

"Subject to section 4 of this Bill of Rights, the rights and freedoms contained in this Bill of Rights may be subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."

5. The same principle is expressed in the United Nations Human Rights Committee *General Comment 18: Non-discrimination* at para. 13:[1]

"... not every differentiation of treatment will constitute discrimination, if the criteria for differentiation are reasonable and objective and if the aim is to achieve a purpose which is legitimate under the Covenant."

6. The Court of Appeal has discussed the question of justification on several occasions.[2] Broadly, the Court's approach requires consideration of three questions:

6.1 What objective is Parliament endeavouring to achieve by the provision limiting the right, and how important is that objective?

6.2 Is the provision rationally connected to the objective?

6.3 Is the means chosen to achieve the objective "proportionate" given the nature of the right being limited and the importance of the objective sought to be achieved by the limitation?

7. Clearly, the independence of the judiciary is an objective of fundamental importance, as reflected in part in the right to a hearing of criminal charges by an "independent and impartial court" in s 25(a) BORA and more widely in the right to an independent tribunal under art. 14(1) of the International Covenant on Civil and Political Rights, which is endorsed in the long title to BORA.[3]

8. Turning to the question of whether mandatory judicial retirement is rationally connected and proportionate to that objective, it is noted that, in general, mandatory retirement ages are unlawful in New Zealand.[4]

9. However, and as is indicated by the reference to compulsory retirement as a counterpart to secure tenure in the explanatory note to the Bill, mandatory retirement ages for the judiciary seek to reconcile the general principle of appointment and continued employment on the basis of performance with judicial independence. On the one hand, it is recognised that, in general, advancing age is likely to be accompanied by diminution of mental and other faculties. On the other, judicial officers hold office during good behaviour and may be removed only in truly exceptional circumstances.[5] The provision of a mandatory judicial retirement age balances these considerations by ensuring tenure to a fixed date.

10. As is apparent from the explanatory note, mandatory retirement ages for judges are a common, although not universal, means of reconciling these concerns.[6] It is also noted that the age of 70 is common among jurisdictions that do adopt mandatory retirement ages.[7] The appropriateness of mandatory retirement ages is also recognised the *Basic Principles on the Independence of the Judiciary* endorsed by the United Nations General Assembly, which although non-binding at international law nonetheless reflect international consensus in this area.[8]

11. Some jurisdictions, notably the United States federal courts, have lifetime tenure without a retirement age while others, notably transnational courts and the Constitutional Court of South Africa, have term appointments with or without a mandatory retirement age.[9] However, lifetime tenure would not address the concerns identified above, while term appointments would raise problems either of judicial independence, if such appointments were renewable, or, if not renewable, of providing adequate security to attract judicial appointees noted in paragraph 3.

12. For these reasons, I conclude that the continued imposition of a mandatory retirement age for judicial officers is rationally connected and proportionate to the objective of judicial independence and is, for that reason, justifiable. It follows that the Bill is consistent with BORA.

13. Please let me know if I can be of any assistance. This advice has been reviewed, in accordance with Crown Law Office protocol, by Val Sim, Crown Counsel.

Yours sincerely

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Footnotes

1 Cited in *Quilter v Attorney-General* [1998] 1 NZLR 523 (CA), 562 and *Hemmes v Young* [2005] 2 NZLR 755 (CA), 775-776.

2 *Noort* v *MOT* [1992] 3 NZLR 260; *Moonen v Literature Board of Review* [2000] 2 NZLR 9; *Moonen v Literature Board of Review (No 2)* [2002] 2 NZLR 754.

3 NZTS 1978, No. 19. The long title provides, in relevant part, that the BORA is enacted "[t]o affirm New Zealand's commitment to the International Covenant on Civil and Political Rights".

4 *Fogelberg* v *Association of University Staff of New Zealand* (2000) 6 HRNZ 206 (HC).

5 Constitution Act 1986, s 23.

6 Para. 3, citing retirement ages of 70 (United Kingdom, Australia, Ireland and some states of the United States) and 75 (Canada). See, further, L Epstein, J Knight & O Shvetsova "Comparing Judicial Selection Systems" (2001) 10 *William and Mary Bill of Rights Law Journal* 7, 22 noting that 12 of 27 European countries then surveyed imposed mandatory retirement, with an average mandatory retirement age of approximately 68, and suggesting that others of those countries limit tenure through term appointments.

7 See nn. 6 and 9.

8 See GA Res. 40/32, 29 November 1985, and GA Res. 40/146, 13 December 1985. Paragraph 12 states:

"Judges, whether appointed or elected, shall have guaranteed tenure until a mandatory retirement age or the expiry of their term of office, where such exists."

9 Above n. 6 (United States), but see also criticism of that position in, for example, D J Garrow "Mental Decrepitude on the U.S. Supreme Court: The Historical Case for a 28th Amendment" (2000) 67 *University of Chicago Law Review* 995; as to term appointments, see Epstein et al., above n. 6, and also for example, Constitution of the Republic of South Africa 1996, s 176(1) (appointment for a non-renewable 12 year term and mandatory retirement at 70); European Convention on Human Rights and Fundamental Freedoms, art. 23(6) (providing for a renewable 6 year term and mandatory retirement at 70 for judges of the European Court of Human Rights); Statute of the International Court of Justice, art. 13(1) (providing for a renewable nine year term).

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