

## ***KiwiSaver Bill***

13 February 2006

Attorney-General

### **LEGAL ADVICE**

#### **CONSISTENCY WITH THE NEW ZEALAND BILL OF RIGHTS ACT 1990: KIWISAVER BILL**

1. We have considered whether the KiwiSaver Bill (PCO 6164/13) (the "Bill") is consistent with the New Zealand Bill of Rights Act 1990. We understand that the Bill is likely to be considered by the Cabinet Legislation Committee at its meeting on Thursday, 16 February 2006.
2. Our view is that the Bill appears to be consistent with the rights and freedoms affirmed in the Bill of Rights Act. In reaching this conclusion, we considered potential issues of inconsistency with sections 19(1), 21, and 25(c), of the Bill of Rights Act.
3. We understand that a subsequent version of the Bill with minor amendments **may** go to the Cabinet Legislation Committee on Thursday, 16 February 2006. Further, we understand from officials that any changes to the Bill are unlikely to give rise to Bill of Rights Act issues. If any of the amendments do give rise to a Bill of Rights Act issue, we will advise you immediately.
4. The Bill proposes to establish the KiwiSaver scheme to encourage in individuals a long-term savings habit and asset accumulation with the aim of increasing individuals' well being and financial independence, particularly in retirement. Specifically, the Bill sets out provisions for:
  - employees and other persons to become KiwiSavers;
  - the deduction and management of KiwiSaver contributions;
  - regulation of individual KiwiSaver schemes and providers; and
  - rules setting out the main terms and conditions of individual KiwiSaver schemes.

#### **SUMMARY OF THE BILL OF RIGHTS ACT ISSUES**

5. Below is a summary of how the issues of inconsistency with sections 19(1), 21, and 25(c) of the Bill of Rights Act arise. A more detailed analysis of these issues follows this summary.
6. We considered whether issues with the right to be free from discrimination as affirmed by section 19(1) of the Bill of Rights Act arise in the Bill on the grounds of age, ethnic and national origin, and employment status because of limits placed on eligibility to the KiwiSaver scheme.
7. The Bill empowers the Government Actuary to compel the production of documents and information in order to investigate an individual KiwiSaver scheme for which a complaint has

been received. These powers give rise to an issue under section 21 of the Bill of Rights Act (the right to be free from unreasonable search and seizure).

8. The Bill contains a reverse onus offence which gives rise to an issue under section 25(c) of the Bill of Rights Act (right to be presumed innocent until proved guilty).
9. Where an issue arises, a provision 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.<sup>[1]</sup> We have reached the conclusion that, upon consideration of these issues under section 5 of the Bill of Rights Act, the Bill appears to be consistent with the rights and freedoms contained in the Bill of Rights Act.

## **SECTION 19(1): RIGHT TO BE FREE FROM DISCRIMINATION**

10. Section 19(1) of the Bill of Rights Act provides the right to freedom from discrimination on the grounds set out in section 21 of the Human Rights Act 1993. The prohibited grounds for discrimination include:

- age (which means any age commencing at the age of 16 years old and over);
- ethnic and national origin (which includes nationality or citizenship); and
- employment status (which means being unemployed or a recipient of a benefit under the Social Security Act 1964 or an entitlement under the Injury Prevention, Rehabilitation, and Compensation Act 2001).

11. 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:

i Does the legislation 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?

12. If these questions are answered in the affirmative, we consider that the legislation gives rise to an issue under section 19(1) of the Bill of Rights Act. As noted above, where this is the case, the legislation falls to be justified under section 5 of the Bill of Rights Act.

### *Eligibility for 16 - 17 year olds*

13. Clause 8 (Who automatic enrolment rules apply to) provides that the automatic enrolment rules apply to every employee who starts a new job, with an employer that is not an exempt employer, and is aged 18 years or over. This clause draws a distinction between persons who are 16 and 17 year olds, and those over the age of 18 years for the purposes of automatic enrolment in a KiwiSaver scheme.
14. However, no manifest disadvantage arises because a person who is 16 or 17 years of age will be able to participate in the KiwiSaver scheme by "opting in" directly with a KiwiSaver scheme provider under clause 24 (Certain persons may opt in) and clause 26 (Persons under

18 must opt in by contracting directly with provider of KiwiSaver scheme). We understand that a person who opts in becomes a member of a KiwiSaver scheme and is eligible for the same benefits as other members (ie: the KiwiSaver Rules in Schedule 1 which, for example, enable all members to make a withdrawal for a first home or in case of serious financial hardship).

15. We note that an argument could also be made that persons 16 and 17 years of age are at an advantage in comparison to persons 18 to 65 years of age because the automatic enrolment rules do not apply (ie: they are not compulsorily enrolled). However, we do not consider that this argument can be sustained because persons 18 to 65 years of age have the ability to opt out of any individual KiwiSaver scheme they are automatically enrolled into (clauses 12 to 16 of the Bill).[\[2\]](#)

### *Eligibility extinguishes at New Zealand Superannuation Age*

16. Any person who is over the New Zealand superannuation age (currently 65 years of age) is not eligible to enter into the KiwiSaver scheme under either the automatic enrolment rules (clause 8 - Who automatic enrolment rules apply to) or the "opt in" option (clause 24 - Certain persons may opt in). These clauses draw a distinction between persons over the New Zealand superannuation age and those under the New Zealand superannuation age. The effect of this distinction is that a person over the New Zealand superannuation age is unable to enter into the KiwiSaver scheme to improve financial independence during retirement. Therefore, the proposed amendment gives rise to an issue under section 19(1) of the Bill of Rights Act on the grounds of age.
17. As noted earlier, the significant and important objective behind the Bill is to encourage a **long-term** savings habit and asset accumulation with the aim of increasing individuals' well being and financial independence, particularly in retirement. The eligibility to enter and contribute to a KiwiSaver scheme has been targeted to people under the New Zealand superannuation age who are in a stronger position to achieve the goal of long-term savings and asset accumulation in preparation for retirement. We note that any members who join before reaching the New Zealand superannuation age are not required to withdraw their funds; they are able to continue to contribute to the KiwiSaver scheme. Therefore, we consider that the eligibility for entry into a KiwiSaver scheme is rationally and proportionately connected to the Bill's objective.
18. We consider the limitation clauses 8 and 24 place on the right to be free from age discrimination as affirmed in section 19(1) of the Bill of Rights Act is justified.

### *Requirement to be a New Zealand citizen or to hold New Zealand Residency or Work Permit etc*

19. The Bill requires (clause 5(2) - Application) that to be eligible to enter a KiwiSaver scheme a person must be a New Zealand citizen or be a person who may undertake employment in New Zealand in accordance with section 5 of the Immigration Act 1987. Section 5 of the Immigration Act 1987 includes people who are exempt from the requirement to hold a permit under the Act, and a person who is the holder of:
- a residence permit;
  - a work permit;

- a temporary permit (modified so that the person may undertake employment); or
  - a limited purposes permit granted for the purposes of employment.
20. An argument could be made that the restriction placed by clause 5(2) of the Bill gives rise to an issue of discrimination on the ground of ethnic or national origin which includes nationality or citizenship because eligibility is restricted to persons who are a New Zealand citizen or persons holding (or exempt from holding) an appropriate permit. However, in our view the distinction in these clauses is purely on the basis of eligibility for people to work legally in New Zealand – it extends to all persons who are eligible to work in New Zealand regardless of their ethnic or national origin.

### *Eligibility for Unemployed Persons and Beneficiaries*

21. Clause 8 (Who automatic enrolment rules apply to) provides that the automatic enrolment rules apply to every **employee** who starts a new job with an employer that is not an exempt employer, and is aged 18 years or over. This clause draws a distinction between persons who are employed, and those that are unemployed or the recipient of a benefit (beneficiaries) for the purposes of automatic enrolment in a KiwiSaver scheme.
22. However, no manifest disadvantage arises because unemployed persons and beneficiaries will still be able to participate in the KiwiSaver scheme by "opting in" under clause 24 (Certain persons may opt in).

### *Conclusion*

23. In our view, the *prima facie* issues with section 19(1) of the Bill of Rights Act that do arise in this Bill are justified in terms of section 5 of that Act.

## **SECTION 21: RIGHT TO BE SECURE AGAINST UNREASONABLE SEARCH AND SEIZURE**

24. Section 21 of the Bill of Rights Act provides:

Everyone has the right to be secure against unreasonable search or seizure, whether of the person, property, correspondence or otherwise.

25. Section 21 provides the right to be secure against unreasonable search and seizure. There are two limits to the section 21 right. First, section 21 is applicable only in respect of those activities that constitute a "search or seizure". Second, where certain actions do constitute a search or seizure, section 21 protects only against those searches or seizures that are "unreasonable" in the circumstances.
26. Clauses 166, 167, and 169 of the Bill<sup>[3]</sup> constitute powers of search and seizure for the purposes of section 21 of the Bill of Rights Act. The requirement to produce documents under statutory authority constitutes a search for the purposes of section 21 of the Bill of Rights Act.<sup>[4]</sup> We have considered these three clauses for consistency with section 21 of the Bill of Rights Act.

## Investigations

27. Clause 166 (Government Actuary may carry out investigation as to whether KiwiSaver scheme is operating in accordance with the Act) provides that the Government Actuary may carry out an investigation as to whether a KiwiSaver scheme is complying with the Bill. In carrying out an investigation the Government Actuary may request from the Commissioner of Inland Revenue ("the Commissioner") any information, papers, documents, records or things that are held by the Commissioner that are necessary or desirable for the Government Actuary to carry out that investigation.
28. We consider that the power to investigate whether a scheme is complying with the Act and to require the Commissioner to supply information in clause 166 is reasonable and, therefore, consistent with section 21 because:
- the purpose of the investigation powers in clause 166 is limited to ensuring compliance with the statutory requirements set out in the Act (clause 166(1)). Because the purpose of the KiwiSaver scheme is to encourage a long-term savings habit to ensure that people have sufficient funds when they retire we agree that it is important to have effective measures to ensure that those responsible for handling an individual's savings are doing so in a lawful and responsible manner;
  - the power to request information from the Commissioner in clause 166 is limited to those situations where the Government Actuary considers it necessary or desirable to enable the Government Actuary to carry out its investigative function (clause 166(2));
  - without the power to investigate and require information the Government Actuary would be powerless to act on complaints from members or concerns that a scheme was not acting in accordance with the statutory requirements. This lack of power would undermine the power the Government Actuary has in clause 150 (Powers of Government Actuary in event of scheme operating in contravention of this Act, etc) to deal with schemes that are found to be acting in contravention of the Act and indeed the intent of the Scheme itself; and
  - as the Inland Revenue will be administering the scheme the Commissioner will hold or have access to relevant information that may not be held by others to whom this Act applies. Enabling the Government Actuary to require the Commissioner to supply information will ensure that the Government Actuary will have all the relevant information from all parties.

## Power to Require Information

29. Clause 167 (Power of Government Actuary to require information) enables the Government Actuary, for the purposes of performing or exercising any of his or her functions under the Act, to require the trustees or administration manager of a KiwiSaver scheme to supply specified information in respect of the scheme. Clause 167(3) enables the Government Actuary, for the purpose of investigating whether a scheme is operating in accordance with the Bill, to require any person to produce papers, information, documents, records or things in respect of the scheme.
30. We consider that the power to require information in clause 167 is reasonable and, therefore, consistent with section 21 because:

- the power to require trustees or administration managers to provide information is limited to those situations when the Government Actuary is performing his or her functions, duties or powers under the Act (clause 167(2));
- the trustees, administration managers, and members will hold or have access to the sort of information that a Government Actuary will require in order to perform his or her functions under the Act. Requiring these persons to produce the necessary information is the most feasible way for the Government Actuary to gain access to the information they require to exercise their powers, especially where a complaint has been made about a KiwiSaver scheme;
- the ability to request papers from persons (as opposed to trustees) in clause 167(3) may only be used:

- if on reasonable grounds the exercise of the powers is necessary to enable the Government Actuary to carry out his or her investigative powers; and

- if the person to who the request applies has failed to comply with a previous request to produce the papers and documents requested within a reasonable time; and

- if the Government Actuary believes on reasonable grounds that it is not reasonably practical to obtain the required information from another source or if it is necessary to obtain the information to refute or verify information obtained from another source (clause 167(4)).

## **Disclosure of Information**

31. Clause 169 (Duty of certain persons to disclose information to Government Actuary) places a duty on persons who hold office as an administration manager, investment manager, actuary, or auditor of a KiwiSaver scheme who forms an opinion that there is a serious problem with the KiwiSaver scheme to disclose to the Government Actuary information relating to the affairs of the KiwiSaver scheme obtained in the course of holding that office.

32. We consider that the powers in clause 169 are reasonable and, therefore, consistent with section 21 because:

- the requirement is limited to the information which the person obtained in their official position and to situations where the person forms an opinion that there is a serious problem<sup>[5]</sup> with the KiwiSaver scheme (clause 169(2));
- a broad immunity from proceedings for those who are required to disclose information under clause 169 and act in good faith is established under clause 170 (Protection of administration managers, investment managers, actuaries, and auditors). For example, for a person to who clause 169 applies discloses information in good faith: no civil, criminal, or disciplinary proceedings lie against a person; a person may not be removed from office or have their contract terminated; and no information received by the Government Actuary under clause 169 is admissible as evidence in proceedings against that person; and
- a KiwiSaver scheme, as stated above, will be responsible for handling an individual's investment, therefore it is essential that effective procedures are in place to ensure that

where a serious problem is identified the Government Actuary has access to all relevant information to enable it to effectively address the problem. Without the requirement of disclosure KiwiSaver schemes would be able to evade monitoring and would effectively undermine the intent of the Bill and powers of the Government Actuary when a scheme is acting in contravention of the Bill (see clause 150).

33. We, therefore, conclude that these provisions do not constitute unreasonable searches and seizures in terms of section 21 of the Bill of Rights Act.

## **SECTION 25(c): PRESUMPTION OF INNOCENCE**

34. Section 25(c) of the Bill of Rights Act provides:

Everyone who is charged with an offence has, in relation to the determination of the charge, the right to be presumed innocent until proved guilty according to law.

35. Section 25(c) ensures that an individual must not be convicted where reasonable doubt as to her or his guilt exists, meaning the prosecution in criminal proceedings must prove, beyond reasonable doubt, that the defendant is guilty. Reverse onus offences give rise to an issue of inconsistency with section 25(c) because the defendant is required to prove (on the balance of probabilities) an excuse to escape liability; whereas, in other criminal proceedings a defendant must merely raise a defence in an effort to create reasonable doubt. Where a defendant is unable to prove an excuse, then she or he could be convicted even though reasonable doubt exists as to her or his guilt.
36. The Bill contains one reverse onus offence. Clause 175 (Offence to fail to provide information under this Part) provides that a person commits an offence who refuses or fails, without reasonable excuse, to provide certain information. We have considered whether clause 175 is justifiable in terms of section 5 of the Bill of Rights Act.
37. The objective behind the offence is to ensure that the Government Actuary and a KiwiSaver scheme's members have access to information about a KiwiSaver scheme. Access to this information will enable the Government Actuary to monitor and investigate schemes and determine whether schemes comply with the regulatory requirements. Access to information will ensure that members are able to make financial decisions based on sound, reliable information and prevent schemes from evading monitoring.
38. We note the Ministry of Economic Development's explanation that this offence is essential to achieving these objectives. The offence has been cast as a reverse onus to ensure that the onus is on the individual or scheme to comply with the regulatory requirements established under the Bill. We agree that it would be difficult for the Government Actuary or a member to provide detailed information about the thought and administrative processes that led to the scheme's failure to comply with the requirements. Such information is particularly within the realm of the individual's knowledge.
39. We also note that the level of penalty for this offence is not high for first time offenders when compared with other penalties in the Bill, and provides a graduated scale of penalty for those who repeatedly fail to supply information requested by the Government Actuary. The penalty for a person who fails without a reasonable excuse to supply the requested information is less than where a person, for example, refuses to supply the information.

40. In our view clause 175 constitutes a justified limitation on the right to be presumed innocent as affirmed by section 25(c) of the Bill of Rights Act.

## CONCLUSION

41. Overall, we have formed the view that the KiwiSaver Bill appears to be consistent with the Bill of Rights Act. In reaching this conclusion, we have given particular emphasis to the purpose of this legislation, and the need to create a workable KiwiSaver scheme.

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## Footnotes

1 In applying section 5, the Ministry of Justice has regard to the guidelines set out by the Court of Appeal in *Ministry of Transport (MOT) v Noort* [1993] 3 NZLR 260 *Moonen v Film and Literature Board of Review* [2000] 2 NZLR 9; and *Moonen v Film and Literature Board of Review* [2002] 2 NZLR 754 and Supreme Court of Canada's decision in *R v Oakes* (1986) 26 DLR (4<sup>th</sup>)

2 Clause 12 (Time limit for opting out), clause 13 (How to opt out); clause 14 (Extension of opt out period), clause 15 (Commissioner must give notice to employer of opt-out); and clause 16 (Effect of opt out).

3 Clause 166 (Government Actuary may carry out investigation as to whether KiwiSaver scheme is complying with this Act), clause 167 (Power of Government Actuary to require information), and clause 169 (Duty of certain persons to disclose information to Government Actuary).

4 *New Zealand Stock Exchange v Commissioner of Inland Revenue* [1992] 3 NZLR 1 (PC).

5 Clause 169(3) defines serious problem as the KiwiSaver scheme is not operating in accordance with the Act or regulations under the Act or fails to meet the requirements of the Act; or if the financial position of the KiwiSaver scheme, or the benefits or the management of the KiwiSaver scheme is inadequate

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