

25 March 2004

Attorney-General

LEGAL ADVICE
CONSISTENCY WITH THE NEW ZEALAND BILL OF RIGHTS ACT 1990:
NEW ZEALAND SUPERANNUATION AMENDMENT BILL

1. We have considered whether the New Zealand Superannuation Amendment Bill (the "Bill") (PCO 5475/6) is consistent with the New Zealand Bill of Rights Act 1990 ("Bill of Rights Act"). We understand that the Bill will be considered by the Cabinet Legislation Committee at its meeting on Thursday, 1 April 2004.
2. The Bill will:
 - repeal the Retirement Income Act 1993; and
 - include, with some alterations, the provisions relating to the functions and powers of the Retirement Commissioner in the New Zealand Superannuation Act 2001.
3. We have concluded that the Bill does not appear to be inconsistent with the Bill of Rights Act.
4. In reaching this conclusion, we considered potential issues of inconsistency with sections 19(1) and 27(3) of the Bill of Rights Act. Our analysis of these potential issues is set out below.

ISSUES OF INCONSISTENCY WITH THE BILL OF RIGHTS ACT

Section 19(1): the right to be free from discrimination

5. 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. These grounds include, *inter alia*, ethnic or national origin, sex, and disability.
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:
 - (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?

7. If these questions are answered in the affirmative, we consider that the legislation gives rise to a *prima facie* issue of "discrimination" under section 19(1) of the Bill of Rights Act. Where this is the case, the legislation falls to be justified under section 5 of the Bill of Rights Act.

Clause 5, new section 84(3)(c) – Appointment of Commissioner

8. Clause 5, new section 83(3)(c) states that any person who is the subject of a specific order under the Protection of Personal and Property Rights Act 1988 (the "PPPR Act") is not able to be appointed as the Commissioner. Individuals who are subject to a specific order may have a disability potentially giving rise to a distinction on the prohibited ground of disability (section 21(h) Human Rights Act).
9. The effect of this provision is to treat persons subject to a PPPR Act order differently from those who are not subject to an order. Bearing in mind the responsibilities and liabilities attached to the office of Commissioner, and the protections in the PPPR Act concerning the making of orders under that Act, we consider such a disqualification is justified in terms of section 5 Bill of Rights Act.

New schedule 6, clause 12(2) - Commissioner to be good employer

10. New schedule 6, clause 12(2) requires the Commissioner to operate a personnel policy that recognises of the aims, aspirations, and employment requirements of Māori, and the need for involvement of Māori as employees. Clause 12(2) also requires the Commissioner to recognise the aims, aspirations, and cultural differences of ethnic and minority groups; and the employment requirements of women, and persons with disabilities. In some cases, specific measures for identified groups can raise *prima facie* issues of discrimination under section 19(1) of the Bill of Rights Act.
11. However, given that clause 12(2) is worded in such a way as to be inclusive of all cultural groups and sectors of the community, we do not consider an issue of *prima facie* discrimination arises in this instance. This is because the Commissioner:
 - (a) must be a "good employer", which includes operating a personnel policy containing provisions generally accepted as necessary for the fair and proper treatment of employees in their employment (including having an equal employment opportunities programme);
 - (b) must impartially appoint suitably qualified persons to a position; and
 - (c) is required only to recognise aims, aspirations, and/or employment requirements of Māori, ethnic and minority groups, women, and persons with disabilities (i.e: the provision does not require preferential treatment).

Section 27(3): the right to bring, and to defend against, civil proceedings involving the Crown

12. 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. Clause 5, new section 91 (No compensation for cessation of office) provides that a person is not entitled to compensation if he or she is removed from office. This clause could be perceived as giving rise to an issue under section 27(3) of the Bill of Rights Act.
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. Section 27(3) does not guarantee there will be certain measures of success when a person sues the Crown. Rather, it 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* [2001] 1 NZLR 40, 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, new section 91 falls outside the right to bring, and to defend against, civil proceedings involving the Crown.

CONCLUSION

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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