

Oaths Modernisation Bill

26 April 2005

Attorney-General

LEGAL ADVICE

CONSISTENCY WITH THE NEW ZEALAND BILL OF RIGHTS ACT 1990:

OATHS MODERNISATION BILL 2005 – PCO 6268/7 Our Ref: ATT114/1371

1. We have vetted this Bill for consistency with the New Zealand Bill of Rights Act 1990 ("the BORA"). We consider that the Bill is consistent with the rights and freedoms contained in the BORA.
2. The Bill will "modernise" a range of statutory oaths, one statutory declaration, and the words of affirmation that may be used instead of an oath. It provides Maori translations for all of the oaths, and in relation to the amendments to affirmations and a declaration, that are contained in the Bill. The Bill also includes some other related and largely technical amendments.
3. In reaching the conclusion that the Bill is consistent with the BORA we have considered two possible issues of inconsistency, which are set out below.

Allegiance to the Sovereign

4. A number of the revised wordings for oaths and affirmations that are contained in the Bill require the swearing or affirmation of the individual's "true allegiance to Her [or His] Majesty [specify the name of the reigning Sovereign, as in: Queen Elizabeth the Second], Queen [or King] of New Zealand, her [or his] heirs and successors". (See for example, new ss 17, 18, 20, and 21 of the Oaths and Declarations Act 1957; new regulation 3 of the Defence Regulations 1990; and new s 37(1) of the Police Act 1958.)
5. In *Roach v Canada (Minister of State for Multiculturalism and Citizenship)* (CA) [1994] 2 FC 406 the appellant challenged the validity of the oath required under the Canadian Citizenship Act 1985 which required the deponent to swear "true allegiance to Her Majesty Queen Elizabeth the Second, Queen of Canada, Her Heirs and Successors." In particular, it was alleged that this oath of allegiance impacted on the appellant's republican beliefs and was contrary to his rights to freedom of expression, freedom of peaceful assembly, freedom of association, and his equality rights.
6. A majority of the Federal Court of Appeal upheld the lower Court's striking out of the appellant's claim. In reaching this conclusion, MacGuigan JA said that the appellant's rights:

"...cannot conceivably be limited by the oath of allegiance, since the taking of the oath in no way diminishes the exercise of those freedoms. The fact that the oath "personalizes" one particular constitutional provision has no constitutional relevance, since that personalization is derived from the Constitution itself That part of the Constitution relating to the Queen

is amendable, and so its amendment may be freely advocated, consistently with the oath of allegiance, either by expression, by peaceful assembly or by association."

7. MacGuigan JA concluded that the appellant could not "use his dream of a republican Constitution as a legal basis for denying the legitimacy of the present form of government".
8. Similarly, in *McGuinness v United Kingdom* (application no. 39511/98, unreported judgment 18 February 1999) the European Court of Human Rights considered the requirement for a successful electoral candidate to swear an oath of allegiance to the sovereign before taking up his or her seat or availing him or herself of the facilities of the House. The Court held that the requirement for elected representatives to swear such an oath of allegiance "forms part of the constitutional system of theState whichis based on a monarchical mode of government." In other words, the Court saw the oath as merely representing a affirmation of loyalty to the constitutional principles which support the workings of representative democracy in the United Kingdom.
9. On the basis of these judgments we have concluded that there is no *prima facie* issue of inconsistency with the BORA arising by virtue of the wording of any oath or affirmation that includes allegiance to the Queen. As the Courts in *Roach* and *McGuinness* recognised, any such requirement can be seen as a requirement to affirm or swear loyalty to the constitutional framework within which the office-holder will operate.

Potential impact on freedom of religion

10. Section 4(1) of the Oaths and Declarations Act 1957 provides that:

"Every person shall be entitled as of right to make his affirmation, instead of taking an oath, in all places and for all purposes where an oath is required by law, and every such affirmation shall be of the same force and effect as an oath."

11. Accordingly, affirmation is an alternative option for any person not wishing to swear an oath.
12. However, we note that the inclusion of oaths, and not the ceremonies or practices of other religious beliefs, might be argued to give rise to issues of inconsistency with the BORA (as being discriminatory under s 19 or as impacting on the right to manifest religious beliefs under s 15).
13. In *R v Anderson* (2001) CanLII 20027 (MBP.C.) 2 February 2001, the Manitoba Provincial Court considered a challenge to the constitutionality of certain provisions of the Manitoba Evidence Act. Under these provisions a Court may administer to every witness an oath or affirmation or some alternative administrative ceremony which the witness considers binding. In particular, the presence of the option of swearing an oath on the Bible was challenged on the basis that it infringed the right to freedom of religion, conscience and belief protected by s 2(a) of the Charter of Rights and Freedoms.
14. The Court held that the inclusiveness of the legislation (i.e. the availability of affirmation or other ceremonies to bind the witness):

"...need to be seen as an attempt by the government to ensure that the provisions in the Act which were designed to ensure truth telling were also reconcilable with the pluralistic values that underlies the Charter."

15. The Court did not consider that the purpose of the impugned provisions was religious; rather, their objective was ensuring, as far as possible, that witnesses testifying in Court will tell the truth.
16. A further challenge to the same provisions of the Manitoba Evidence Act was considered in *R v Robinson* (2004) CanLII 31391 (MBP.C.) 23 January 2004. In that case, counsel for the accused argued that religious privacy was at stake. In other words, it was not the availability of swearing an oath on the Bible that was offensive per se, but rather, the fact that a witness was effectively required to reveal his or her conscience.
17. The Court in *Robinson* concluded that there is no requirement for a witness to demonstrate any kind of religious practice in order to testify, and nor is a witness compelled to make any religious statements or reveal his or her conscience in order to give evidence. It also held that the provisions in question did not breach the equality rights protected by s 15 of the Charter.
18. To the extent that any issues of inconsistency with the BORA arise due to the inclusion of oaths but not the ceremonies or practices of other religious beliefs, these are justified limitations on the rights concerned because of the availability of affirmation as an alternative to swearing an oath.

Conclusion

19. We consider that the Oaths Modernisation Bill is consistent with the BORA. To the extent that any issue of inconsistency with the BORA arises due to the inclusion of oaths, and not the ceremonies or practices of other religious beliefs, we consider that these are justified limitations on the rights concerned.
20. Finally, we note that this advice is based on PCO 6268/7. We have been advised that a further version will be prepared prior to LEG's consideration of the Bill. In the event that any of the changes included in the final version give rise to significant BORA issues, we will provide you with further advice.

Yours sincerely

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