

Police Complaints Authority (Conditional Name Protection) Amendment Bill

5 March 2003

Attorney-General

Legal Advice

Police Complaints Authority (Conditional Name Protection) Amendment Bill:
Consistency With The New Zealand Bill Of Rights Act 1990

INTRODUCTION

1. We have considered the Police Complaints Authority (Conditional Name Protection) Amendment Bill, a Member's Bill in the name of Dr Paul Hutchison, for consistency with the New Zealand Bill of Rights Act 1990 (the "Bill of Rights Act"). This Bill was introduced to the House on 5 December 2002 and is likely to be read for the first time at the next Member's day, which is scheduled for Wednesday 5 March 2003.
2. While the matter is finely balanced, we consider that on balance the Bill does not appear to be inconsistent with the rights and freedoms affirmed by the Bill of Rights Act.
3. We have consulted with the Crown Law Office on this advice and they agree with the view taken.
4. The following summary provides you with:
 - a brief overview of the contents of the Bill,
 - a note of the provision of the Bill which appears to raise issues under one of the sections of the Bill of Rights Act, and
 - our conclusion as to the Bill's consistency with the Bill of Rights Act.
5. This summary is followed by a fuller analysis which discusses each of the issues raised under the Bill of Rights Act noting, where relevant, the justificatory material in each instance.

SUMMARY

Overview of the Bill

6. The Police Complaints Authority (Conditional Name Protection) Amendment Bill seeks to amend the Police Complaints Authority Act 1988 (the "principal Act") by inserting a new section 19A. This new section provides that, where any investigation is being conducted by the Authority, no person may publish the name of a Police officer who is under investigation for an incident involving the use of firearms which contributed to the death or serious injury of any person. This amendment would reverse the current practice whereby

names of officers involved in firearms incidents can be published unless the officer obtains a court order suppressing his or her personal details.

7. The Bill provides that name protection will continue until such time as the investigation is completed, or:
 - The Authority permits publication; or
 - The officer is charged with a crime related to the investigation; or
 - A High Court Judge concludes that the public interest is best served by not protecting the identity of the officer.

Issue of consistency with the Bill of Rights Act

8. The Bill raises a *prima facie* issue with section 14 of the Bill of Rights Act (the right to freedom of expression). The proposed new section 19A provides for a bar on the publication, in any report or account relating to the investigation, of the name of any member of the Police involved in a firearms incident or any information likely to lead to the identification of the Police officer or his or her family. We consider that this clause serves the purpose of enabling the Police Complaints Authority to carry out a thorough and unhindered investigation into the incident. As this is an important and significant objective, and a number of protections are built into the Bill to protect the right to freedom of expression, this *prima facie* inconsistency appears justifiable.

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

9. Although we consider the issues in this Bill to be finely balanced, we have concluded that the Bill does not appear to be inconsistent with the Bill of Rights Act.

FULLER ANALYSIS: THE BILL OF RIGHTS ACT ISSUE RAISED BY THE BILL

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

10. The prohibition in proposed new section 19A on the disclosure of the name of an officer involved in a firearm incident while an investigation into the incident is completed by the Police Complaints Authority, raises a *prima facie* issue of inconsistency with the right to freedom of expression issues under section 14 of the Bill of Rights Act. This issue arises as the right to freedom of expression, as protected by section 14, includes the freedom to seek, receive, and impart information and opinions of any kind in any form. Clearly, a prohibition on the ability to impart the name of a Police officer under investigation infringes on the freedoms protected by this right. Similarly, the prohibition would impact on the freedom to seek and receive this information.

Section 5 of the Bill of Rights Act: Justified limitations

11. Where a provision is found to be *prima facie* inconsistent with a particular right or freedom, it 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 the Bill of Rights Act.

12. In *Moonen v Film and Literature Board of Review*, [1] the Court of Appeal developed a set of guidelines that are of assistance when assessing whether a provision constitutes a justified limitation in terms of section 5 of the Bill of Rights Act. The inquiry required by *Moonen* is essentially two-fold; whether the provision serves an important and significant objective; and whether there is a rational and proportionate connection between the provision and that objective.

A significant and important objective?

13. The explanatory note to the Bill states that "... legislation is necessary [to protect Police officers and their families] after the High Court's landmark decision on *A plaintiff v Wilson and Horton*." In that judgment the High Court was asked to consider an application for an interim injunction to prevent the publication of the name of a Police officer who fatally shot a member of the public.
14. As the applicant had not been charged with an offence (although he was under investigation by the Police Complaints Authority) section 140 of the Criminal Justice Act 1985 allowing the Court to prohibit publication of names did not apply. Therefore, the injunction was sought under three separate causes of action based on defamation, privacy and section 25 (right to a fair trial) of the Bill of Rights Act. The High Court dismissed the application on all three grounds. Notably, the Court also held that there was no legitimate privacy interest for a Police officer carrying out a public duty in a public place. [2] It also held that fair trial arguments could not succeed at a stage when neither criminal nor private prosecutions were actually apprehended. [3]
15. It is apparent, from the decision in *Wilson and Horton*, that there is a window of opportunity, between when the incident occurs and the laying of any charge, for anyone who wishes to do so to publish information relating to the identity of the officer. This Bill seeks to close that window. The stated intention of the Bill is to protect the security and well-being of Police officers and their families.
16. We consider that the Bill also serves a significant and important objective by preserving the integrity of the investigation by the Police Complaints Authority. Restrictions on the coverage of the incident will provide the Authority with an opportunity to conduct its investigation into fire-arms incidents unhindered by heightened media interest created by the public disclosure of the officer's identity. Clearly, the personal safety of Police officers and their families is also an important objective.

A rational and proportionate connection?

17. We also consider that the clause is rationally and proportionally connected to its objective. In forming this view, we note that the prohibition in the Bill is

limited to incidents involving injuries and fatalities caused as a consequence of the use of firearms. The explanatory note to the Bill states that this is because of New Zealand's conservative tradition of Police not normally carrying firearms. It follows that the level of public interest in such incidents may be greater than incidents involving motor vehicles for example. This would appear to us to be borne out by the particularly high level of media scrutiny and public interest in the events that followed the fatal shooting of Stephen Wallace. Accordingly, there appears to be a greater need for the protection afforded by this Bill.

18. In addition, the Bill would allow the name protection to be waived in some circumstances. Both the Police Complaints Authority and the High Court will have discretion to allow publication. The High Court's discretion in this regard is predicated on their determination that "the public interest is best served by not protecting the identity of the member of the police". Both the High Court and the Police Complaints Authority would need to exercise their discretion consistently with the Bill of Rights Act (including section 14).

19. On its face, a proposal for blanket suppression of Police officers' identity in certain classes of cases is contrary to the principle of equality before the law; ordinary citizens do not have an automatic statutory protection of this kind. On the other hand, the Police are sometimes required to exercise exceptional powers in the interests of enforcing the law and protecting the public. Also, in practice, members of the Police are much more likely to be subject to an extended period of investigation between the incident and the laying of any charge, and therefore be subject to a longer period during which the protection afforded by section 140 of the Criminal Justice Act does not apply.

Conclusion

20. In our view, although proposed new section 19A is *prima facie* inconsistent with section 14 of the Bill of Rights Act, it is justifiable as a reasonable limit on the right to freedom of expression in terms of section 5 of the Bill of Rights Act.

CONCLUSION

21. On balance, 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 Dr Paul Hutchison MP, if you agree.

Val Sim Allison Bennett
Chief Legal Counsel Principal Legal Adviser

cc Minister of Justice
Dr Paul Hutchison MP
Copy for your information

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Footnotes

1. Moonen v Film and Literature Board of Review[2000] 2 NZLR 9.
2. A v Wilson & Horton 6 HRNZ 106, 109 para 12
3. A v Wilson & Horton 6 HRNZ 106, 109 para 14