

Prisoners' and Victims' Claims Bill

17 December 2004

Attorney-General

LEGAL ADVICE

CONSISTENCY WITH THE NEW ZEALAND BILL OF RIGHTS ACT 1990:

Prisoners' and Victims' Claims Bill (241-1)

Our Ref: ATT114/1298

1. Further to our advice dated 6 December 2004, which indicated our conclusion that the Prisoners' and Victims' Claims Bill ("the Bill") was consistent with the New Zealand Bill of Rights Act 1990 ("BORA"), we have set out the basis of that conclusion below.

Introduction

2. The Bill creates specialised schemes for the award and receipt of monetary compensation under the BORA, the Human Rights Act 1993 and the Privacy Act 1993 in respect of claims brought by prison inmates and others subject to control or supervision as a result of a prison sentence ("inmate claims") and for the bringing of civil proceedings against plaintiffs who receive compensation for inmate claims by the victims of their offending. The Bill also suspends the operation of limitation periods for claims against prison inmates by victims for the period of inmates' incarceration.
3. The Bill raises two significant issues in respect of the BORA, which are considered further below:
 1. The effect of the Bill upon the availability of monetary compensation for breaches of BORA rights; and
 2. The consistency of the simplified procedure provided under the Bill for victims' claims with the right to natural justice under s 27(1) BORA.
4. In addition to these, it may be suggested that the Bill raises issues in respect of its retrospective application and more generally in respect of whether its focus upon litigation involving prison inmates amounts to discrimination. These are also considered further below, as are a number of minor BORA issues.

Constraints upon award and payment of monetary compensation

5. The first issue raised by the Bill arises in respect of the procedural constraints on both the award and the payment of monetary compensation in respect of inmate claims. The availability of monetary compensation, where appropriate, to a person whose rights have been breached is an underlying element of the

right to an effective remedy for breach and so to the protection and promotion of those rights under the BORA: see, for example, *Simpson v Attorney-General [Baigent's Case]* [1994] 3 NZLR 667, 676, 691, 703 and 718, relying upon art. 2(3) of the International Covenant on Civil and Political Rights.^[1]

Award of monetary compensation

6. Clause 13(1)(a) of the Bill provides that monetary compensation may not be paid in an inmate claim unless the plaintiff has made reasonable use of available complaints procedures. It thus imposes a substantive precondition on the availability of monetary compensation as a remedy, as it would follow that a claim by a plaintiff who had not made reasonable use of complaints procedures might be denied such compensation even if it were the only effective remedy.
7. However, that precondition is in our view justifiable by reason of the availability of specialised complaints procedures, as noted in cl. 7, and the desirability in the context of penal institutions and associated regimes of inmates making appropriate use of those procedures.
8. Further, and in any event, the discretion accorded to the responsible Court or Tribunal under cl. 13(2) to determine the scope of reasonable use in the circumstances appears to allow that Court or Tribunal to take into account the nature of the breach claimed in determining whether a plaintiff has satisfied that requirement. Given the obligation under s 6 of the BORA to interpret legislation consistently with that Act where possible, we consider that cl. 13(1)(a) would be interpreted so as to preclude the award of monetary compensation where, for example, there had been a failure in bad faith to make use of complaints mechanisms but not where such compensation is a plainly necessary remedy.
9. Second, clause 13(1)(b) provides that compensation is only to be paid where another remedy is not sufficient, while cl. 14(1) provides that the assessment of whether to award monetary compensation and, if so, in what amount must include consideration of a range of factors including mitigating steps taken by either party and various other factors. However, neither clause precludes an award of compensation where it is necessary to do so in order to provide an effective remedy and so no inconsistency arises.

Payment of monetary compensation

10. Thirdly, the payment of monetary compensation to plaintiffs in inmate claims is subject to a number of procedural constraints. Under cl. 16 of the Bill, monetary compensation is paid to the Secretary for Justice and is subject both to deduction of legal aid, reparation and related debts under cl. 17 and, under cll. 19-24, 46 and 48 to retention pending the making and determination of claims by any victim of the plaintiff's offending.
11. The effect of these provisions is that a plaintiff awarded monetary compensation in an inmate claim may be prevented from receiving some or all of the amount awarded and, in any event, the payment of compensation

would be delayed for some time whether or not claims against the plaintiff are made.

12. In respect of the first of these, the deduction of amounts from compensation is not, however, inconsistent with the obligation to provide an effective remedy. The fact that a plaintiff may not receive the benefit of some or all of a judgment sum because he or she has debts or other liabilities to others does not render that judgment ineffectual as a vindication of the right breached.
13. In respect of the second, the delay in payment of compensation pending the making of claims does amount to a prima facie constraint on the availability of an effective remedy for breach of the plaintiff's rights. However, the imposition of such a delay can be understood as proportionate in light of the intention of the Bill to lessen the disincentives encountered by victims of criminal offending in seeking civil redress against offenders by affording an opportunity to bring claims after an award of compensation has been made and before the proceeds of inmate claims can be dissipated. Further, the delay is limited to what is reasonably necessary by the provision under cl. 24 for the prompt payment of withheld monetary compensation where no victims can be identified and the time limits under cl. 26 for making claims.

Victims' Special Claims Procedure

14. The Bill creates a separate, and procedurally simplified, scheme for claims against plaintiffs who receive compensation for inmate claims by the victims of their offending. The replacement of the conventional civil claims procedure could be seen to raise issues of procedural fairness under s 27(1) of the BORA.
15. The Bill provides the following:
 - 15.1 Claims are to be determined on the papers (cl. 32), with oral submissions only in exceptional cases (cl. 35);
 - 15.2 Findings from criminal trials are to be received as conclusive evidence (cl. 34);
 - 15.3 A right of appeal to the High Court, but only on a question of law (cl. 47(1)); and
 - 15.4 The Tribunal is accorded broad discretion to admit other evidence, whether or not admissible in a court (cl. 55).
16. Of these, the first and fourth of these provisions are discretionary powers of the Tribunal and so, in order to be valid, must be exercised in accordance with BORA protections, including s 27(1): see *Drew v Attorney-General* [2002] 1 NZLR 58, 72. It would follow that, where fairness required an oral hearing or the rejection of particular evidence, s 27(1) would require the Tribunal to do so.
17. The second issue is the receipt of findings from criminal trials as conclusive evidence. The effect of this provision is to permit facts agreed, relied upon for

conviction or otherwise proven at trial to be taken as conclusive in a claim before the Tribunal and so precluded from challenge. Here, procedural fairness is reliant upon – but in our view sufficiently guaranteed by – the fairness of the trial procedure in making such findings.

18. The third issue is the limited right of appeal. We note, however, that fairness can be ensured by an appeal on a point of law and that s 27(1) does not go so far as to require a substantive appeal or a further right of appeal beyond the High Court.

Retrospectivity

19. It may also be suggested that the Bill gives rise to two other issues under BORA. The first of these is that various provisions of the Bill have retrospective effect:

19.1 Inmate claims fall within the general scope of the Bill whether the act or omission concerned occurred before or after commencement (cl. 6(1)(a)(i));

19.2 More specifically, inmate claims are subject to the scheme concerning the award of monetary compensation noted in paragraph 5 above whether brought before or after commencement, unless the claim has been determined at first instance before commencement (cl. 12(1));

19.3 All payment of compensation after commencement in respect of inmate claims are subject to the scheme for such payments noted in paragraph 0 above, whether the claim was brought before or after commencement (cl. 16(1)); and

19.4 The suspension of limitation periods in respect of claims by victims against offenders applies whether the claim was brought before or after commencement (cl. 59(2)).

20. As the Legislation Advisory Committee has noted, the application of new legislation to existing claims or proceedings raises important issues of legislative principle.^[2]

21. However, while BORA deals expressly with retrospectivity in s 26(1), it does so only in the context of criminal offences and penalties rather than the civil matters with which the Bill is concerned. The Court of Appeal has emphasised that the scope of s 26 is limited to the criminal process, rather than to related civil proceedings: *Daniels v Thompson* [1998] 3 NZLR 22, 34. It may be noted in passing that the reasoning of the Court also establishes that the prohibition on double jeopardy does not apply in respect of civil matters and so does not arise in relation to the Bill.

22. Further, the contention that a broader prohibition on retrospectivity arises under BORA as an element of the right to natural justice affirmed by s 27(1) BORA was broadly rejected in *Westco Lagan Ltd v Attorney-General* [2001] 1 NZLR 40, 54-55. Commentators have also suggested that the application of

legislation to pending litigation with the effect of depriving a litigant of the proceeds of litigation engages s 27(3) BORA, which provides:^[3]

"Every person has the right to bring civil proceedings against, and to defend civil proceedings brought by, the Crown, and to have those proceedings heard, according to law, in the same way as civil proceedings between individuals."

23. However, this contention was also rejected in *Westco Lagan*, above, where it was held (at 55):

"Section 27(3) ... cannot restrict the power of the legislature to determine what substantive rights the Crown is to have. Section 27(3) merely directs that the Crown shall have no procedural advantage in any proceedings to enforce rights if such rights exist."

24. The question is therefore whether the retrospective provisions in the Bill afford the Crown a procedural advantage in pending proceedings. Of those noted above, cl. 16(1) and 59(2) do not affect the position of the Crown in pending proceedings at all but rather alter the capacity of victims to claim against offenders.

25. Clause 12(1)(a) does affect pending proceedings involving the Crown that have not been determined at first instance by subjecting those proceedings to the constraints in cl. 13(1) and 14 noted at paras. 6 and 9 above. These do not confer any procedural advantage upon the Crown in terms of *Westco Lagan*, above. It follows that no issue arises under s 27(3).

Discrimination

26. The second issue that may be suggested in respect of the Bill is whether the differential treatment of prison inmates under the Bill amounts to discrimination contrary to BORA. However, the status of being a prison inmate is not a prohibited ground of discrimination in terms of s 19(1) BORA and s 21(1) of the Human Rights Act 1993 and no issue arises for that reason.

27. It is also noted that in any event differential treatment does not amount to discrimination where it involves a reasonable and objective distinction for a legitimate purpose: see, for example, *Quilter v Attorney-General* [1998] 1 NZLR 523, 552. The differential treatment of inmate claims under the Bill can be understood in these terms by reference to the different context and character of inmate claims, most notably the availability of specialised complaints procedures and the importance of encouraging use of those procedures, as noted in paragraph 7 above, and, as noted at paragraph 13 above, the practical difficulty faced by victims in seeking to recover compensation from offenders.

Minor issues

28. Lastly, it should be noted that the Bill contains a number of discretionary powers that engage BORA rights:

28.1 The power of the Special Claims Tribunal ("Tribunal") to require the provision of information (cl. 36) engages the right of free expression under s 14 BORA and, arguably, the rights of persons in detention under ss 22 and 23; and

28.2 The power of the Tribunal to restrict publication of its proceedings (cl. 38) also engages the right of free expression under s 14.

29. However, such discretionary powers must be exercised consistently with BORA, as required by s 6 of that Act and as noted in *Drew*, above, and accordingly no issue of inconsistency arises.

Yours sincerely

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Footnotes

1. Each State Party to the present Covenant undertakes:

(a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;

(b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;

(c) To ensure that the competent authorities shall enforce such remedies when granted.

2. *Guidelines on Process and Content of Legislation* (2001 ed.) 51-53.

3. See, for example, Palmer *New Zealand's Constitution in Crisis* (1992) 69.