Summary Proceedings Amendment Bill (No 2)

12 October 2010

Attorney-General

Summary Proceedings Amendment Bill (No 2) (PCO14802/4.0): Consistency with the New Zealand Bill of Rights Act 1990
Our Ref: ATT395/147

1. I have reviewed this Bill on an urgent basis for consistency with the New Zealand Bill of Rights Act 1990. While the Bill raises a possible issue with the right in s 25(c) to be presumed innocent until proven guilty according to law, I conclude that the Bill appears to be consistent with the Act.
2. The Bill proposes to amend Schedule 1 of the Summary Proceedings Act 1957 to include three minor theft related offences into the list of offences which can be tried summarily. The Ministry of Justice has advised that these offences were omitted from this schedule in error in enacting the Summary Proceedings Amendment Act 2008. The three Crimes Act 1961 offences that are subject to the amendment are:

   2.1 Section 223(d) – theft of property not exceeding $500 in value;

   2.2 Section 241(c) – obtaining or causing loss by deception, not exceeding $500 in value; and

   2.3 Section 247(c) – receiving property not exceeding $500 in value.

3. All three offences are subject to a maximum penalty of 3 months' imprisonment.
4. The omission of these offences from the Schedule means that they have been, since 26 June 2008, purely indictable offences. It appears that this error was overlooked until a recent decision of Judge Marshall in the District Court drew attention to it. [1] As a result, since 26 June 2008 a large number of convictions for these offences have been obtained summarily, when they ought to have been obtained following the procedure for indictable offences.
5. The Bill proposes to validate these convictions, by providing that nothing done by a Court in relation to these offences is a nullity or otherwise invalid "only because" the offence was not referred to in the appropriate schedule (clause 5). [2]
6. The Bill of Rights Act does not specify a particular process by which a conviction must be entered (except in relation to the right to a jury trial in s 24(e), which does not apply to these offences), but rather requires in s 25 that the trial process be substantively fair.
7. The specific right in s 25(c) to be presumed innocent "until proved guilty according to law" similarly does not import a concept that a failure to follow the correct legislatively prescribed process will by itself breach the Bill of Rights. Jurisprudence on s 25 is clear that the particular rights listed in the subsections to s 25, including s

25(c), are essentially specific applications of the overriding right to a fair trial in subsection 25(a). [3] Further, it is apparent that the right to be presumed innocent relates to matters of substantive proof, rather than procedural matters. [4] The failure to follow the indictable process will therefore by itself not constitute a breach of s 25(c).

8. However, it is noted that the change in process from indictable to summary could for some offences result in a substantive change in the presumption of innocence by the operation of s 67(8) of the Summary Proceedings Act 1957. This provides:

> Any exception, exemption, proviso, excuse, or qualification, whether it does or does not accompany the description of the offence in the enactment creating the offence, may be proved by the defendant, but, ... need not be negatived in the information, and, whether or not it is so negatived, no proof in relation to the matter shall be required on the part of the informant.

9. The effect of this subsection is that the burden of proof for matters of excuse or qualification falling within this provision shifts from the prosecution to the defence in summary proceedings, but not when the offence is tried indictably. [5] A defendant facing a charge summarily that should have been proceeded against indictably therefore may have faced a different burden of proof. The shift of the burden of proof may have been justified in the sense that the offences are minor and the matters may be within the knowledge of the defendant, [6] but because the summary process was not authorised for these offences, the "prescribed by law" element of the justification test under s 5 of the Bill of Rights Act may not be met.
10. However, the Court of Appeal in *R v Gorrie* [7] has confirmed that s 67(8) does not apply to the claim of right in the definition of wilful damage in s 11 of the Summary Offences Act 1981, and that the prosecution is obliged to establish that element. The Court's reasoning is equally applicable to claims of right in the definitions of theft and obtaining or causing loss by deception in the Crimes Act 1961. It is not apparent that that any other matters of excuse or qualification would be held to be within the scope of s 67(8) for the three offences covered by this Bill, following that decision.
11. It therefore appears that the use of the summary procedure is unlikely to have resulted in any change to the burden of proof affecting the presumption of innocence for these charges, such as to raise an inconsistency with s 25(c).
12. Finally, if there were an exceptional case where a fundamental error had occurred such that there had been a failure to meet fair trial rights or minimum standards of criminal procedure, the validating provision proposed by the Bill would be read restrictively and the Court would retain jurisdiction to allow a remedy. [8]
13. In accordance with Crown Law practice, this advice has been peer reviewed by Ian Carter, Crown Counsel. Rachael Hoare, Assistant Crown Counsel, has assisted in the preparation of this advice.

Victoria Casey
Crown Counsel

Footnotes:

1. *Police v Selwen* (CRI2010-019-3388, District Court at Hamilton, 21 June 2010). His Honour considered that this was a case of clear drafting error and held the conviction validly entered. An appeal has been filed but not yet heard.
2. There is doubt about whether this measure is necessary, in terms of whether the convictions would in any event be upheld as valid.
3. Rishworth et al *The New Zealand Bill of Rights* (Oxford University Press, 2003) at 664.
4. Butler and Butler, *The New Zealand Bill of Rights Act: A Commentary* (LexisNexis, Wellington, 2005) at 23.4.17 (although noting the brief suggestion to the contrary in Rishworth et al, above, at 676). For discussion of the scope of equivalent provisions in other jurisdictions, see M Nowak *CCPR Commentary* (2nd ed, N P Engel, Kehl, Germany, 2005), p 329-331, Joseph et al *The International Covenant on Civil and Political Rights* (2nd ed Oxford University Press, Oxford, 2004) at paras 14.70-14.74, and General Comment 32 (Human Rights Committee) (relating to Article 14(2) of the International Covenant of Civil and Political Rights); Richard Clayton and Hugh Tomlinson (eds) *The Law of Human Rights* (2nd ed, OUP, New York, 2009) at 11.253-11.261 and S Trechsel, *Human Rights in Criminal Proceedings* (OUP, 2005), pages 153-191 (relating to Article 6(2) of the European Convention on Human Rights); and Hogg *Constitutional Law in Canada* (5th ed supplemented, Thomson Canada Ltd, 2007) at 51.5 (relating to section 11(d) of the Canadian Charter).
5. This was confirmed by the Court of Appeal in *R v Rangi* [1992] 1 NZLR 385.
6. See *R v Rangi,* above, at 387; Rishworth et al, above n 3, at 682.
7. [2008] 3 NZLR 620.
8. *R v Smith* [2003] 3 NZLR 617 (CA) at [54].