

# Veterinarians Bill

8 December 2004

Attorney-General

## LEGAL ADVICE

### CONSISTENCY WITH THE NEW ZEALAND BILL OF RIGHTS ACT 1990:

#### Veterinarians Bill

1. We have considered the Veterinarians Bill (PCO 5457/15) (the "Bill") for consistency with the New Zealand Bill of Rights Act 1990 (the "Bill of Rights Act"). We understand that this Bill is to be considered by the Cabinet Legislation Committee on Thursday, 18 March 2004.
2. The Bill does not appear to be inconsistent with the rights and freedoms affirmed by the Bill of Rights Act. However, the Bill does raise a number of issues in relation to sections 19(1) and 25(c) of that Act.

#### Summary and Objectives of the Bill

3. The Bill replaces the Veterinarians Act 1994 (the "1994 Act"), which prescribes the requirements an applicant must meet to register as a veterinarian in New Zealand. It amends the key provisions of the 1994 Act and addresses a number of technical and administrative matters. The key amendments relate to the qualification requirements to be a veterinarian, the registration process, and the disciplinary powers of the Veterinary Council of New Zealand (the "Council").
4. With respect to the last of the key amendments, the Bill provides the Council with wider options for dealing with complaints than are currently available under the Act. This is to better align the Council's disciplinary powers with the severity of the alleged actions of veterinarians. The Bill also makes the penalties more comparable to those in the Health Practitioners Competence Assurance Act 2003.

#### Right to freedom from discrimination

##### *Section 19 of the Bill of Rights Act*

5. We have considered whether certain clauses of the Bill could give rise to various issues of discrimination under section 19 of the Bill of Rights Act. Section 19(1) of that Act provides the right to freedom from discrimination on the grounds set out in section 21 of the Human Rights Act 1993 (the 'Human Rights Act'). These grounds include, *inter alia*, disability, ethnic and national origin, and race.

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 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.

### **Language Requirement and Possible Discrimination on Grounds of Ethnic or National Origin and Race**

8. Clause 6(2) of the Bill provides that no person is entitled to be registered as a veterinarian unless the Council is satisfied that the person can communicate in and understand English to a standard appropriate to practice as a veterinarian in New Zealand. A similar requirement is set out in clause 13(2), which relates to limited registration as a veterinarian. We note that neither the Bill of Rights Act nor the Human Rights Act includes "language" as a prohibited ground of discrimination. However, we note that Canadian Courts have held that language is so directly related to race, colour, ancestry and place of origin that a distinction on the basis of language implies a distinction on the basis of race.<sup>[1]</sup>
9. 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 that Act. The section 5 inquiry 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 the objective.
10. We consider that the purpose of the language requirement is to enable veterinarians to relate to and converse with animal owners, service providers, other veterinarians and government officials, particularly in times of any major disease outbreak where they may have to deal with the public at large. Veterinarians need to be able to read and understand instructions on pharmaceutical products, which are mostly written in English, and advise owners of livestock on their use. In our view the ability to communicate in and understand English is a significant and important requirement for all veterinarians and, therefore, the first limb of the section 5 inquiry is satisfied.
11. We note that the degree of language proficiency is not set at an unreasonably high level. Applicants are required to have the ability to communicate in and understand English, as opposed to being fluent in the language. Moreover, the Ministry of Agriculture and Forestry has advised that if a veterinarian's degree qualification did not have instruction in English and the veterinarian

cannot provide a valid reference to indicate the person has adequate command of English, they will be given the opportunity to sit an internationally recognised English language test. In our view, the measures are rationally and proportionally connected to the above-mentioned objectives.

12. We consider that, although the language requirement raises an issue of inconsistency with section 19(1) of the Bill of Rights Act, it is justifiable in terms of section 5 of that Act.

### **Mental and Physical Competency and Possible Discrimination on Grounds of Disability**

13. Clause 9(c) of the Bill provides that a person is not entitled to be registered as a veterinarian if the council is satisfied that the person cannot practice satisfactorily as a veterinarian because of a mental or physical condition. This provision is augmented by clause 51, which enables the Council to require a veterinarian to undertake a medical examination and, thereafter, suspend the veterinarian's registration if the veterinarian is unable to practice satisfactorily because of a mental or physical disability. In our view, this requirement appears to give rise to an issue of discrimination on the ground of disability.
14. We understand that these requirements acknowledge the minimum level of competency that veterinarians must have in their profession to be able to perform their tasks satisfactorily, and thereby support the welfare and humane treatment of animals so that people using their services have confidence in them. Veterinarians not only deal with animals and their owners, they also play an important role in food assurance systems, assist in ensuring that New Zealand's export markets for meat and dairy products are protected (i.e. that the country's export comply with importing country requirements), and assist in reducing bio-security risks to the country. In our opinion, the identified discrimination appears to be justified in terms of section 5 of the Bill of Rights Act. In reaching this view, we note that a veterinarian may refuse to undertake the medical examination (although the Council may suspend the veterinarian in any event). Further, the Council must give the veterinarian a reasonable opportunity to make submissions and be heard, and may revoke the suspension at any time if it is satisfied that the veterinarian can practice satisfactorily as a veterinarian.

### **Strict liability offences & right to be presumed innocent until proved guilty (section 25(c) Bill of Rights Act)**

15. Section 25(c) affirms the right to be presumed innocent until proved guilty. This means that an individual must not be convicted where reasonable doubt as to his or her guilt exists; therefore, the prosecution in criminal proceedings must prove, beyond reasonable doubt, that the accused is guilty. Strict liability and reverse onus offences give rise to an issue of inconsistency with section 25(c) because the accused is required to *prove* (on the balance of probabilities) the defence to escape liability; whereas, in other criminal proceedings an accused must merely *raise* a defence in an effort to create reasonable doubt. Where an accused is unable to prove the defence, then he

or she could be convicted even though reasonable doubt exists as to his or her guilt.

16. The Bill contains several reverse onus offences that require an accused to prove a defence, on the balance of probabilities. These offences give rise to issues of inconsistency with section 25(c) of the Bill of Rights Act.

#### *Alterations to Register*

17. Clause 20(5) of the Bill makes it an offence for a veterinarian to fail, without reasonable excuse, to notify the Registrar of Veterinarians that information contained in the register is no longer current and to correct that information.
18. The objective underlying the offence is to ensure that information contained on the register of veterinarians is kept up to date, particularly information about whether a veterinarian is suspended and, if so, the details of that suspension. Since the register is publicly accessible, this will ensure that an animal owner and other persons with whom a veterinarian has dealings have confidence in the skills and competency of the veterinarian and are able to contact the veterinarian if an emergency arises.
19. The effectiveness of the register would be undermined if it was not updated, and there was no sanction for failing to do so. Although the Council will provide information regarding any decision to suspend or alter the conditions of practice of a veterinarian, the veterinarian will need to advise the Registrar of other information that the Council considers necessary or desirable. In such cases, the reason why he or she failed to advise the Registrar of this is particularly within his or her realm of knowledge. It is also relevant that it is a public welfare regulatory (rather than truly criminal) offence and that the penalty is at the low end of the scale (a fine not exceeding \$500).

#### *Surrender of certificate*

20. Clause 26(2) of the Bill makes it an offence for a person whose name has been removed from the register, or whose registration has been suspended to fail to deliver, without reasonable excuse, his or her practising certificate to the Registrar. If the certificate is not delivered within ten working days after the date on which he or she has received the notice of removal or suspension, the person is liable on summary conviction to a fine not exceeding \$2,000.
21. This offence is proposed in order to ensure that persons whose name has been removed from the register, or whose registration has been suspended, deliver their practising certificate to the Registrar. If there was no such requirement, animal owners may be misled into believing that a person was still able to practice as a veterinarian and may be exposed to incompetent or unprofessional behaviour as a consequence. To uphold public trust and confidence in the regulatory regime, it is therefore appropriate that the onus for establishing the excuse is the responsibility of the accused.

#### *Breaching an order made during a disciplinary hearing*



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