Wills Bill

7 August 2006

Attorney-General

LEGAL ADVICE
CONSISTENCY WITH THE NEW ZEALAND BILL OF RIGHTS ACT 1990:
Wills Bill (PCO 7080/11)
Our Ref: ATT395/14

1. We have considered the Wills Bill ("the Bill") for consistency with the New Zealand Bill of Rights Act 1990 ("BORA"). We have identified two issues of *prima facie* inconsistency to which we draw your attention. After considering the justifications for these provisions under section 5 of the BORA we have concluded that these provisions are not inconsistent with the BORA.

Potential Discrimination in Ability to Do a Testamentary Action

2. Clause 10 of the Bill provides that:

2.1 Persons of 18 years or over may do all testamentary actions (including make wills);

2.2 Persons under 18 years may do all testamentary actions if they are (or have been) married, in a civil union or in a *de facto* relationship;

2.3 Persons under 18 years may also make wills if they have agreed to marry or enter a civil union with another person (though the will is only valid on solemnisation of the relationship) or if they are military or seagoing persons (or about to be);

2.4 Otherwise, persons under 18 years may only do a testamentary action if they satisfy a Family Court that they understand the effect of a specific action or of such actions generally and have approval given by the Court.

3. This clause would distinguish between persons who are 18 or over (or who are under 18 but married, in a civil union or a *de facto* relationship), and persons who are under 18 and are not in such a relationship. The latter group have to go through the additional procedural hurdle of obtaining Family Court approval in order to do a testamentary action.

4. These distinctions are *prima facie* inconsistent with the freedom from discrimination on the grounds of age affirmed by section 19(1) of the BORA, which (through section 21 paragraphs (i) and (b)) provides that age restrictions above the age of 16, and discrimination on the grounds of marital status, require justification. We consider these grounds together, given their inter-relationship in the Bill.

Justified limitation

5. A prima facie limit on the right to be free from discrimination will be lawful if it can be justified under s 5 of the BORA. This assessment involves the identification of a legitimate government objective and an analysis of the reasonableness and proportionality of the Government's actions in seeking to attain that objective.

Comparison with other New Zealand age distinctions

6. Article 1 of the UN Convention on the Rights of the Child defines a child as a person under the age of 18 years "unless under the law applicable to the child, majority is attained earlier." Article 12(1) provides that "States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child."

7. In previous advice we have noted that age restrictions necessarily involve a degree of generalisation, without regard for the particular abilities or maturity of individuals within the distinguished age groups. Age restrictions are set in law at different points for different purposes. In some contexts (e.g. the Second Hand Dealers and Pawnbrokers Bill in May 2003) an age restriction has been justified in terms of section 5 of the BORA as a reasonable limit prescribed by law as can be demonstrably justified in a free and democratic society. In other contexts (eg the Care of Children Bill in May 2003), we have concluded that they cannot.

8. This Bill is concerned with the age at which the law should recognise the capacity of a person to do a testamentary action. This is a significant life decision that concerns decisions about close personal relationships and the disposition of property (on death). We consider that this involves considerations similar to several other sets of decisions authorised by law:

8.1 decisions to enter close personal relationships recognised by law – marriage under the Marriage Act 1955, a civil union relationship under the Civil Union Act 2004 or a *de facto* relationship (including for the purposes of the Property (Relationships) Act 1976). The age limit set by law for entering these relationships is 18, with the ability for 16 or 17 year olds also to enter these relationships with the consent of a parent or guardian or the Family Court;

8.2 section 26 of the Care of Children Act 2004 provides that a parent who is under the age of 18 may appoint a person to be a testamentary guardian of their child after the parent's death;

8.3 decisions about the use and disposition of property, such as the enforceability of contracts under the Minors' Contracts Act 1969, ability to pledge property under the Second Hand Dealers and Pawnbrokers Act 2004 the ability to be appointed as a director under the Companies Act 1993. The age limit set by law for entering these relationships is 18 (though those under 18 can get approval from a District Court to enter a contract) and otherwise, in general, is set at 20 by the Age of Majority Act 1970.

9. The age distinctions in these similar contexts are the same as those in the Bill (except for parents' appointments of testamentary guardians and the general age of majority). Where we have had previously to consider age distinctions in bills providing for the age of entry into marriage, civil union and de facto relationship, we have concluded that the restriction is

justified under section 5 due to the need to protect those who may not have sufficient maturity and capacity to understand the significance of entering into the relationship and the full effects of it.

10. In relation to the property-related Acts, we have not recommended that the Attorney-General issue a report under section 7 of the BORA for inconsistency with the BORA, though in one instance we reported our view that the issue was finely balanced. In that instance, it was relevant that the Bill covered a wide range of potential actions. Similarly, our conclusion that the age restrictions in the Care of Children Bill was not justified was influenced, as highlighted in our advice, by the existence of a broad range of matters that were affected by the age restriction in that Bill. We concluded that such a wide range of matters were not all inappropriate for 16 and 17 year olds to decide for themselves. The Bill considered here is not subject to that problem.

International Comparisons

11. The approach to age restrictions in the Bill is generally consistent with other comparable jurisdictions with bills of rights. In particular, with the exception of Quebec, each of the provinces and territories of Canada provide that wills made by minors (being persons under 17-19 years, depending on the state) are invalid except:

11.1 in all provinces and territories except Newfoundland and the Yukon, where a minor is or (with the exception of Prince Edward Island) has been married;

11.2 in Alberta, if a minor "has or has had a spouse or adult interdependent partner' and in Saskatchewan, is or was 'cohabiting in a spousal relationship";

11.3 in Ontario, if a minor is "contemplating marriage and the will states that it is made in contemplation of marriage to a named person except that such will is not valid unless and until the marriage to the named person takes place";

11.4 in all provinces or territories, if a minor is a member of the Armed Forces of Canada or is a mariner or seaman.

12. In Quebec, minors (under 18), may not dispose of any part of their property by will, except articles of little value. Only Newfoundland sets the age at which a will is invalid at under 17; all other provinces and territories set the age of invalidity at under 18-19 years of age.

13. In relation to the United Kingdom, the Wills Act 1837 (as amended by Family Law Reform Act 1969) provides that wills made by persons under 18 are not valid. The Family Law Reform Act 1969 reduced the age at which a person can validly make a will from 21 to 18. There is no exception for married persons, but soldiers and mariners under 18 are able to make a will. However, Scotland is one rare jurisdiction that grants testamentary capacity to persons under the age of 18 without any limitations.

14. In relation to Australia, the age at which a will can validly be made has also been reduced from 21 to 18 in all states and territories. Most of the states and territories have exceptions for persons under 18 wishing to make specific testamentary dispositions if approved by a court and, in some cases by the Public Trustee. Almost all of the states have exceptions for

married persons and for wills made in contemplation of marriage but only upon solemnisation of the marriage contemplated.

Consideration of the Justification for the Bill

15. The key question is whether there is sufficient justification for setting the age limit for doing testamentary actions at the age of 18 rather than at 16. The primary rationale appears to be the importance of testamentary actions, and the central objective that such actions should be done by persons with sufficient maturity and capacity to understand the nature and consequences of their actions. Closely associated with this objective is the concern that persons, who otherwise have sufficient maturity and capacity to perform testamentary actions, undertake those actions freely and without undue pressure or influence.

16. The presumption of the Bill is that persons of 18 years and over are of sufficient maturity to do testamentary actions, whereas persons who are under 18 are not, unless specifically judged to be.

17. It can be argued that persons of 16 or 17 years, who are more likely still to be at secondary school, may be more susceptible to influence by factors such as peer pressure in the school environment, or pressure from family members. Given their legal rights in relation to property and contracts they may also be less likely to have significant property in respect of which to do a testamentary act. So the likely need of 16 and 17 year olds to do a testamentary act may be less, and the risk of error in them doing an act may be greater, than that of persons of 18 years and over.

18. However, we note that there is a paucity of robust evidence that supports the precise correlation of age and susceptibility to external pressures. We also note that other mechanisms in the general law are available to address undue influence and lack of testamentary capacity, though the thresholds are relatively high.

19. The Bill enables those 16 and 17 year olds to do testamentary actions by gaining consent through a specified procedure – through approval by a Family Court. In this respect, the Bill is consistent with the current law on the capacity of persons of 16 or 17 years of age to enter important relationships recognised by law (marriage, civil union or *de facto* relationships) through a specified consent process.

20. The exception in the Bill that allows persons of 16 or 17 years who have entered such a relationship to do testamentary actions reflects that those persons have already obtained the requisite consents and approvals to form these relationships. It also reflects the increased likely need for this group to make dispositions of property by will, as does the provision in the Care of Children Act that enables a parent to appoint a testamentary guardian.

21. In the context of a will, an advantage of the Family Court approval mechanism is that it offers a degree of protection to 16 and 17 year olds seeking to do valid testamentary actions. If there is a Family Court approval on the record certifying the capacity of the 16 or 17 year old to make a will, it would be more difficult to challenge the validity of such a will posthumously for lack of capacity, than it would be if 16 and 17 year olds could freely make wills.

22. In our view, when such finely balanced value judgments call to be made the question, whether or not other alternatives to the Family Court approval mechanism exist, falls within the margin of appreciation that is commonly afforded to governments in the realm of social policy.

23. In terms of justification under section 5 of the BORA, overseas authority in Canada and the United Kingdom is relevant (though occurring in different constitutional contexts in terms of the relationship between judiciary and legislatures). There, courts now recognise the ability of Parliament to pass valid legislation which limits rights within "a range of reasonable alternatives", and have afforded a degree of deference to the legislature in this field: *R v Director of Public Prosecutions Ex p Kebilene* [2000] 2 AC 326 at 381; *RJR MacDonald Inc v Canada (Attorney-General)* [1995] 3 SCR 199 at para 160; *Libman v Quebec (Attorney-General)* [1997] 3 SCR 569 at 605-6. The question is not necessarily whether the proposed limitation on a right or freedom is the least intrusive limitation possible, but whether it lies within the range of alternatives of limitations that are reasonably unintrusive. New Zealand courts have not fully considered arguments about such an approach here.

24. On the basis of these considerations we have concluded that the *prima facie* discrimination on the grounds of age and marital status can be considered to be justified under section 5 of the BORA as a reasonably proportionate response to an important and significant objective.

Potential Discrimination of Effect on a Will of Marital Status

25. Clauses 18 and 19 of the Bill:

25.1 provide that a will made by a person of 18 years or older is revoked if the testator marries or enters into a civil union (unless the will is made in contemplation of the new relationship); and

25.2 provide that an end to a marriage or civil union (brought about by a separation order or order dissolving a marriage or civil union under the Family Proceedings Act 1980) makes void certain provisions in a will (in relation to appointment of or disposition to the testator's spouse or partner) unless the will makes it clear that the testator intended the provision to be effective; but

25.3 Do not provide that either of the above two effects are caused by entry into, or ending of, a *de facto* relationship.

26. These clauses therefore distinguish between persons who are married or in a civil union on the one hand and persons who are in a *de facto* relationship. They thereby constitute a *prima facie* inconsistency with the freedom from discrimination on the grounds of marital status affirmed by section 19 of the BORA.

27. We note that the Bill reforms the current law – which provides that marriage revokes a will and divorce disentitles a former spouse but beginning or ending a civil union or *de facto* relationship does not. The Bill therefore removes discrimination that exists in the current law.

28. We also note that, in relation to the entering into or ending of a marriage or a civil union, these provisions have a significant impact in over-riding a testator's stated intended disposition and having a potentially disinheriting effect.

29. The policy justification provided for not requiring the entry into or end of a *de facto* relationship from having the same significant impact is the uncertainty of establishing, with precision, the time at which a *de facto* relationship is entered into or ends. Unlike a marriage or civil union, there is no precise act of will required by law that precisely signifies the entry into or ending of a *de facto* relationship. This would be necessary in order to apply these provisions of the Bill to a *de facto* relationship. Yet the time of a *de facto* relationship beginning or ending can be uncertain and imprecise. This is recognised by the approach of the Property (Relationships) Act 1976 in listing, in section 2D, nine different matters that are relevant to a court determining the existence or non-existence of a *de facto* relationship.

30. Given the ability of a person entering or exiting from a *de facto* relationship to make or change a will if they wish to, and the potentially significant interference in, and disinheriting effect of applying these provisions of the Bill to *de facto* relationships, we conclude that the *prima facie* inconsistency of these provisions with the BORA is justified in terms of section 5 as a proportionate response to an important and significant objective.

Conclusion

31. Accordingly, we advise that we have not identified any inconsistency in the Bill with the BORA. This opinion has been peer reviewed by Val Sim.

32. We attach a copy of this opinion for forwarding to the Minister and Associate Minister of Justice for his information if you wish.

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Special Counsel