

## ***Young Offenders (Serious Crimes) Bill 2006***

28 March 2006

Attorney-General

### LEGAL ADVICE

CONSISTENCY WITH THE NEW ZEALAND BILL OF RIGHTS ACT 1990:  
YOUNG OFFENDERS (SERIOUS CRIMES) BILL 2006

### INTRODUCTION

1. We have considered the Young Offenders (Serious Crimes) Bill 2006 (the "Bill") for consistency with the New Zealand Bill of Rights Act 1990 ('the Bill of Rights Act'). The Bill was introduced to the House of Representatives on Thursday, 16 March 2006 in the name of Ron Mark MP. We understand the Bill may receive its First Reading on the next Members' Day which is scheduled for Wednesday, 29 March 2006.
2. It has been necessary to prepare this advice within a very short timeframe and the Bill raises some very complex issues. Our view is that the Bill appears to be consistent with the rights and freedoms affirmed in the Bill of Rights Act.

### SUMMARY OF THE ADVICE

3. There is some uncertainty in New Zealand law as to the scope of the right to the benefit of a lesser penalty, as protected by section 25(g) of the Bill of Rights Act. Two judges of the Supreme Court have expressed a clear view that the right extends beyond legislative changes to the maximum penalty and includes changes to the penalty available to the sentencing court that occur by operation of law based upon an offender's age. If that view were to be adopted by other members of the Court, we would be bound to conclude that clause 14 of the Bill, allowing a court to impose a term of imprisonment on an offender who committed an offence the penalty for which is less than three months imprisonment when he or she was under 16 years of age but at the time of conviction is 16 years or older, prima facie infringes section 25(g). However, given the protective nature of the provision and the broad discretion of the sentencing court, we are of the view that it is justified in terms of section 5 of the Bill of Rights Act.
4. We have also considered potential issues of inconsistency with sections 9, and 14 of the Bill of Rights Act.

### OVERVIEW OF THE BILL

5. The purpose of the Bill is to address serious crimes being committed by young offenders by making the offenders accountable for their crimes more or less in the same way as adult offenders. It seeks to do this by:
  - Changing the legal position with respect to the age of criminal responsibility where serious offences are committed by children;

- Broadening the circumstances in which young offenders can be sentenced to imprisonment, to include cases where the offenders have been convicted of serious offences;
  - Placing, for the purposes of the jurisdiction of the Youth Court, other serious offences in the same category as murder and manslaughter when committed by children of or over 12 years of age.
6. For the purposes of the Bill and this advice, a "serious offence" is defined as any offence for which the maximum penalty is imprisonment for a term of not less than 3 months or a fine of not less than \$2000, and other offences where committed by an offender who has previously been convicted of an offence of that kind or who has more than 3 previous criminal convictions for offences of any kind (clause 14(4)).

## **THE BILL OF RIGHTS ACT ISSUES RAISED BY THE BILL**

### **Section 25(g) of the Bill of Rights Act: Right to benefit of lesser penalty**

7. Section 18 of the Sentencing Act 2002 ("the Sentencing Act") currently provides that "[n]o court may impose a sentence of imprisonment on an offender in respect of a particular offence, other than a purely indictable offence, if *at the time of the commission* of the offence, the offender was under the age of 17 years" (italics added). Clause 14(2) of the Bill proposes to amend this section in two ways:
- By reducing the age at which an offender may be sentenced to a term of imprisonment from 17 years to 16 years; and
  - By changing the focus of the section from the commission of offence to the conviction of the offender.
8. We have considered whether clause 14(2) is inconsistent with section 25(g) of the Bill of Rights Act. Section 25(g) provides that:

"Everyone who is charged with an offence has, in relation to the determination of the charge, the right, if convicted of an offence in respect of which the penalty has been varied between the commission of the offence and sentencing, to the benefit of the lesser penalty."

#### ***Scope of the Right***

9. There are two possible ways that clause 14 may impact on section 25(g) of the Bill of Rights Act. First, the amended provision is inconsistent with the right to the benefit of a lesser penalty if applied to offences committed by persons under the age of 16 years prior to the date on which the Bill comes into force. We note that clause 4 of the Bill sets out a transitional provision relating to offences and, consequently, clause 14 will apply only to offences committed after the date on which the Bill comes into force. Therefore the clause does not give rise to an inconsistency by reason of any legislative variation of penalty.
10. The second possible way that clause 14 may impact on section 25(g) of the Bill of Rights Act relates to the fact that an offender who is younger than 16 years of age when he or she

commits an offence may be liable to a term of imprisonment if the offender is convicted of the offence on or after his or her sixteenth birthday.

11. The issue, therefore, is whether section 25(g) of the Bill of Rights Act is limited to legislative variations of the penalty, or whether it extends to changes in the penalty available to the sentencing court by reason of a change in the age of an offender since the commission of the offence.
12. Section 25(g) was considered in the recent Supreme Court decision of *Mist v The Queen* (SC CRI 12/2005) ("*Mist*"). In that case, although not necessary to do so, Elias CJ and Keith J considered that the section 25(g) right to the benefit of a lesser penalty covered not only the situation where a penalty has been altered between commission and conviction by amending legislation, but also the situation where the circumstances of the offender change. That is, an offender is protected by the section 25(g) right if, after they offend, their circumstances change in a way that would make a heavier penalty applicable at the time of conviction. They specifically considered a change in age to be a change in circumstances.
13. Keith J and Elias CJ favoured this interpretation in light of one of the rationales of the principle of non-retrospectivity – that is, that the law needs to be accessible and foreseeable. They considered that while it is arguable that the law will be known and accessible – in the sense that it is on the statute book at the time the offence was committed – the element of foreseeability was not satisfied. They considered that the penalty was not clear to young offenders because it is dependant on their age at the time of conviction and, given the inevitable uncertainties with respect to the speediness of court processes, that is impossible to foresee.
14. Applying the same reasoning, it is arguable that clause 14 is inconsistent with section 25(g) of the Bill of Rights Act.
15. However, the other Supreme Court judges in *Mist* declined to express a view on the scope of the right protected by section 25(g). They determined the case on the basis of the wording of section 4 of the Criminal Justice Act which was in different terms. There is little law from overseas jurisdictions that is of assistance (Elias CJ and Keith J rejected contrary views expressed by the European Court of Human Rights (the "European Court") and the Privy Council).

#### *Whether any inconsistency can be remedied by section 6 of the Sentencing Act*

16. We have considered whether the limitation that clause 14 places on the right to the benefit of a lesser penalty would be negated by section 6 of the Sentencing Act. Section 6 provides that an offender has the right, if convicted of an offence in respect of which the penalty has been varied between the commission of the offence and sentencing, to the benefit of the lesser penalty. We note that, section 6(2) grants the benefit of the lesser penalty "despite any other enactment or rule of law". This wording is very similar to the predecessor to section 6 (section 4 of the Criminal Justice Act), which proved to be stronger than section 25(g) of the Bill of Rights Act. Because of its terms 'notwithstanding any other enactment' and the fact that it protects a fundamental human right, it has been held to prevail over other inconsistent legislative provisions.
17. However, it is clear, particularly from the judgments in *R v Pora*[\[1\]](#) that Parliament may still override the general protection in section 6 of the Sentencing Act by using clear words. The

provision under consideration in *Mist* did not expressly state at what time the qualifying age must be reached in order to be eligible for a sentence of preventive detention. Accordingly, it was possible to read that provision consistently with a broad interpretation of section 4 of the Criminal Justice Act. Clause 14, however, clearly states that the age to be considered is that at the date of conviction. Given such clear and unambiguous words, we do not think that section 6 of the Sentencing Act can be used to remedy any inconsistency in the event that the view of Elias CJ and Keith J in *Mist* as to the scope of the right is adopted.

18. We therefore consider that clause 14 authorises measures that arguably limit the right affirmed in section 25(g) of the Bill of Rights Act. However, it does so only insofar as it enables a court to impose sentences of imprisonment on persons under the age of 16 years who commit an offence that is not a 'serious offence'. This is because, by reason of clause 14(3), a sentence of imprisonment is always available in respect of young people who commit serious offences. Accordingly, for those persons there is no variation in the penalty by reason of their age.

### **Section 25(a) of the Bill of Rights Act: the right to a fair trial**

19. In light of further comments by Elias CJ and Keith J's in *Mist*, we also consider that clause 14 raises an issue of inconsistency with the right to a fair trial, protected by section 25(a) of the Bill of Rights Act.
20. As noted by Elias CJ and Keith J, young offenders facing the prospect of heavier penalties at their next birthday may decide not to exercise their right to a fair trial as affirmed by section 25(a) of the Bill of Rights Act:

"Allowing such a possibility may mean [...] that such young persons will no longer have an effective safeguard against arbitrary prosecution, conviction and punishment."

The unpredictability of the criminal justice process, being dependant on such matters as the state of court lists, the availability of witnesses and counsel, pre-trial rulings and jury disagreement, might dissuade a defendant on the verge of turning 16 from undertaking the process, thereby potentially inciting a false guilty plea.

### **Are these *prima facie* breaches justified limitations under section 5?**

21. Where provisions are found to be *prima facie* inconsistent with particular rights or freedoms, they may nevertheless be consistent with the Bill of Rights Act if they can be considered "a reasonable limit" that is "justifiable" in terms of section 5 of the Bill of Rights 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 that objective.<sup>[2]</sup>
22. We note that the right protected by section 25(g) has generally been considered to be one that allows few, if any, limitations (see comments of the Court of Appeal in *Poumako*)<sup>[3]</sup>.
23. This means that if adopted, the views of Elias CJ and Keith J would have a significant effect upon the manner in which New Zealand gives effect to its international obligations with respect to youth justice pursuant to the Convention on the Rights of the Child (UNCROC) and the International Covenant on Civil and Political Rights (ICCPR). Articles 37, 38 and 40 of

UNCROC impose obligations upon States Parties to provide certain protections for young people in the context of the criminal justice system. Whilst some of those protections relate to the age of the young person as at the date of the commission of the offence (see particularly Article 37(a) UNCROC and Article 6(5) ICCPR), others are clearly related to the age of the person as at the date at which they are sentenced. This is particularly the case with respect to the imposition of a sentence of imprisonment. It is common practice for States Parties to implement those obligations by means of protective provisions limiting the imposition of a penalty of imprisonment on young people and providing for a separate youth justice procedure, based upon the age of the offender as at the date on which they are being dealt with by the courts, rather than the age at the date the offence was committed.

24. UNCROC does not require that States Parties implement an absolute prohibition with respect to imprisonment of young persons. Weaker protective provisions that do not engage section 25(g) would suffice, such as a presumption that imprisonment should not be imposed on a young person. In this sense the absolute protection contained in clause 14 with respect to non-serious offences, goes further than the requirements of UNCROC. We think it would be an anomalous result, and one unintended by Elias CJ and Keith J, if the right protected by section 25(g) of the Bill of Rights Act were to be interpreted so as to prevent the State from implementing a stronger protection of children's rights under UNCROC, such as an absolute prohibition. Accordingly, if the right is to be given such a broad interpretation as suggested by Elias CJ and Keith J, we think the right may be subject to justifiable limits, particularly in relation to protective provisions in the youth justice sphere.
25. Having reached this conclusion we have gone on to consider whether the limitation imposed on section 25(g) is justified in terms of section 5 of the Bill of Rights Act. We consider that an argument can be raised that clause 14 serves an important and significant purpose, namely it protects young people who commit offences that are not 'serious' from being sentenced to a term of imprisonment. Indeed it gives effect to New Zealand's obligations pursuant to UNCROC and the ICCPR.
26. The potential problem with the provision is that it only provides an absolute protection from imprisonment if the person is convicted prior to turning 16. It might be argued that the provision does not infringe the section 25(g) right as little as possible and is therefore not proportionate.
27. However, the sentencing court retains a discretion as to whether or not a term of imprisonment should be imposed on a person who committed a non-serious offence whilst under the age of 16 but is not convicted of such an offence until after he or she turns 16. We would expect that the sentencing court would take into account the fact that the person was a young person at the time the offence was committed when imprisonment was not available. Even apart from section 25(g), this would be a powerful factor in determining the appropriate sentence. Clearly the extent to which the rights in section 25 of the Bill of Rights Act have been engaged will need to be factored in by the sentencing judge. If, for example, the person was charged with the offence prior to turning 16 but there was some delay in the offender being brought before the court,<sup>[4]</sup> it would be highly unlikely that a term of imprisonment would be appropriate. By way of contrast, where the delay in the offender being brought before the court is due entirely to the offender's own conduct, it may be appropriate to give less weight to the fact that the offence was committed before the age of 16.

28. We are mindful that any inconsistency could be removed by removing the protective provision altogether. We do not think that the right protected by s25(g) of the Bill of Rights Act necessarily requires that when enacting a protective provision for young people the age must refer to the date of commission of the offence, rather than age at date of conviction or sentencing. Ultimately, the 'fairness' (to use the words of Elias CJ and Keith J) of imposing a term of imprisonment on a person who commits a non-serious offence whilst under the age of 16 but who is not convicted of the offence until after they turn 16, will depend upon all the circumstances of the case. Whilst we think it will be a rare case in which such a sentence of imprisonment would be appropriate, we think that the sentencing discretion is sufficient to avoid inconsistency with the Bill of Rights Act.

### **Other rights and freedoms considered**

29. For sake of completeness, we will briefly note the other rights and freedoms protected in the Bill of Rights Act that were considered in respect of the Bill.

30. Section 19(1) of the Bill of Rights Act was raised as the Bill changes the legal position with respect to the age of criminal responsibility when serious offences are committed by children. By using the age of an offender as a criterion for determining whether the offender will be criminally liable for his or her actions, the Bill gives rise to a disadvantageous distinction between different classes of individuals based on the age of those individuals. However, age is defined in the Human Rights Act as referring to "any age commencing with the age of 16 years" (section 21(1)(1)(i)). Since the disadvantageous distinction does not arise on one of the prohibited grounds of discrimination, we consider that the Bill is not inconsistent with the right to be free from discrimination.

31. The right not to be subjected to disproportionately severe treatment or punishment (section 9 of the Bill of Rights Act) was raised in respect of the reduction in the age at which criminal proceedings may be brought against young offenders. We note that in *T and V v United Kingdom*,<sup>[5]</sup> the European Court was asked to decide whether the attribution of criminal responsibility to a child as young as ten violated the equivalent provision of the European Convention of Human Rights. Rejecting the applicant's claim, the Court noted that since the Convention was a living instrument, it was legitimate when deciding whether a measure was acceptable under one of its provisions to take account of the standards prevailing amongst States Parties. The Court found that there was not a commonly accepted minimum age for the imposition of criminal responsibility in Europe. Moreover, no clear tendency could be ascertained from examination of the relevant international texts and instruments.<sup>[6]</sup> In light of this, we consider that the ability of the Crown to bring criminal proceedings against offenders as young as ten does not violate section 9 of the Bill of Rights Act.

### **Conclusion**

32. We consider that the Bill contains a clause that arguably amounts to a prima facie infringement of the rights to the benefit of a lesser penalty and to a fair trial as affirmed by sections 25(g) and 25(a) of the Bill of Rights Act 1990, respectively. However, in light of the protective nature of the provision and the broad sentencing discretion of the court, we consider that the clause can be considered a justified limitation in terms of section 5 of that Act.

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## Footnotes

1 [2001] 2 NZLR 37

2 See *Moonen v Film Literature Board of Review* [2000] 2 NZLR 9, and *R v Oakes* (1986) 26 DLR (4th)

3 [2000] 2 NZLR 695

4 If the delay amounted to 'undue delay' occasioned by the Crown, the right protected by section 25(b) of the Bill of Rights would also be engaged.

5 (2000) 30 EHRR 121

6 For instance, Rule 4 of the UN Standard Minimum Rules for the Administration of Juvenile Justice (the Beijing Rules) which, although not legally binding on States, might provide some indication of the existence of an international consensus, does not specify the age at which criminal responsibility should be fixed but merely invites States not to fix it too low. Similarly, Article 40(3)(a) UNCROC requires States Parties to establish a minimum age below which children shall be presumed not to have capacity to infringe the criminal law, but contains no provision as to what that age should be. See *T v United Kingdom*, para 71

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