LEGAL ADVICE

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5 December 2016

Hon Christopher Finlayson QC, Attorney-General

Consistency with the New Zealand Bill of Rights Act 1990: Children, Young Persons, and Their Families (Oranga Tamariki) Legislation Bill

Purpose

1. On 24 November 2016, we provided you with preliminary advice that the Children, Young Persons, and Their Families (Oranga Tamariki) Legislation Bill ('the Bill') appears to be consistent with the rights and freedoms affirmed in the New Zealand Bill of Rights Act 1990 ('the Bill of Rights Act').

2. We have received proposed amendments to the Bill and have considered whether it still appears to be consistent with the Bill of Rights Act. We understand that the Bill will be considered by Cabinet at its meeting on Monday 5 December 2016.

3. We have concluded that the Bill appears to be consistent with the rights and freedoms affirmed in the Bill of Rights Act. The Crown Law Office has been consulted on this advice and it agrees with our conclusion. In reaching that conclusion, we have considered the consistency of the Bill with s 19(1) (right to be free from discrimination). Our analysis is set out below.

Summary

4. The Bill proposes changes as part of the legislative reform package for the Ministry for Vulnerable Children, Oranga Tamariki ('the new Ministry'). This includes changes to the youth justice system and amendments to support improved outcomes for Māori children and young people.

5. Particular provisions of the Bill may engage the right to freedom from discrimination affirmed in the Bill of Rights Act.

6. To the extent that any rights and freedoms are limited by the Bill, we consider those measures are rationally connected to a sufficiently important objective, impair rights no more than is reasonably necessary, and are in due proportion to the importance of the objective.

7. We therefore conclude that the Bill appears to be consistent with the rights and freedoms affirmed in the Bill of Rights Act.

The Bill

8. The Bill amends the youth justice system in the Children, Young Persons, and Their Families Act 1989 ('the principal Act') to:

a. extend the definition of "young person" in the principal Act to mean a person under the age of 18 years

b. amend the powers of the court to order a child or young person be detained in custody pending hearing

c. amend the jurisdiction of the Youth Court and the liability of children and young persons to be prosecuted in the adult jurisdiction for criminal offences

d. provide for the transfer of a 17-year-old to the adult jurisdiction in relation to offences punishable by imprisonment of 14 years or more

e. amend the factors to be taken into consideration by the Youth Court when deciding whether to transfer proceedings to another court for sentencing, and

f. amend the Youth Court's ability, on the application of the chief executive of the Ministry of Vulnerable Children, Oranga Tamariki, to cancel a supervision with residence order made under s 311 of the principal Act.

9. The Bill also makes amendments to the principal Act to support improved outcomes for Māori children and young people.

10. Finally, the Bill makes consequential amendments to the Vulnerable Children Act 2004.

Consistency of the Bill with the Bill of Rights Act

Section 19(1) - Right to be free from discrimination

11. Section 19 of the Bill of Rights Act affirms that everyone has the right to freedom from discrimination on the grounds set out in the Human Rights Act 1993.

12. The key questions in assessing whether there is a limit on the right to freedom from discrimination are:[1]

a. does the legislation draw a distinction on one of the prohibited grounds of discrimination under s 21 of the Human Rights Act and, if so,

b. does the distinction involve disadvantage to one or more classes of individuals?

13. In determining if a distinction arises, consideration is given to whether the legislation proposes that two comparable groups of people be treated differently on one or more of the prohibited grounds of discrimination.[2] The distinction analysis takes a purposive and un-technical approach to avoid artificially ruling out discrimination.[3] Once a distinction is identified, the question of whether disadvantage arises is a factual determination.[4]

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[1] See, for example, *Atkinson v Minister of Health and others* [2010] NZHRRT 1; *McAlister v Air New Zealand* [2009] NZSC 78; and *Child Poverty Action Group v Attorney-General* [2008] NZHRRT 31.

[2] *Quilter v Attorney-General* [1998] 1 NZLR 523 (CA) at [573] per Tipping J (dissenting) relied on in *Atkinson v Minister of Health and others* [2010] NZHRRT 1 at [199]; *McAlister v Air New Zealand* [2009] NZSC 78 at [34] per Elias CJ, Blanchard and Wilson JJ and at [51] per Tipping J; and *Child Poverty Action Group v Attorney-Genera*l [2008] NZHRRT 31 at [137].

[3] *Atkinson v Minister of Health and others* [2010] NZHRRT 1 at [211]-[212]; *McAlister v Air New Zealand* [2009] NZSC 78 at [51] per Tipping J; and *Child Poverty Action Group v Attorney-General* [2008] NZHRRT 31 at [137].

[4] See, for example, *Child Poverty Action Group v Attorney-General* [2008] NZHRRT 31 at [179]; and *McAlister v Air New Zealand* [2009] NZSC 78 at [40] per Elias CJ, Blanchard and Wilson JJ.

14. We have considered whether the Bill limits the right to be free from discrimination on the grounds of age and race in relation to:

    a. raising the upper age limit of the youth justice jurisdiction

    b. transfer of a 17-year-old charged with an offence punishable by imprisonment for 14 years or more to the adult jurisdiction, and

    c. additional principles to be applied when making a decision about a child or young person who is Māori and new duties on the chief executive in relation to improving outcomes for Māori children and young people.

Raising the upper age limit of the youth justice system

15. Section 21 of the Human Rights Act prohibits discrimination on the grounds of age for persons aged 16 years and over.[5]

16. The Bill amends the definition of "young person" in the principal Act to include 17-year-olds in the youth justice system. The Bill also consequently amends the definition of "child" in the Vulnerable Children Act to mean "a person who is under the age of 18 years".

17. These provisions draw a distinction between those aged 17 and those aged 18 and above for the purposes of the youth justice system. The clauses arguably create a disadvantage to those aged 18 and above as these persons will not have access to the benefits provided by the youth justice system.

18. For the purposes of this analysis, we therefore consider this clause to be a *prima facie* limitation on s 19(1) of the Bill of Rights Act.

Is the limitation justified and proportionate under s 5 of the Bill of Rights Act?

19. Where a provision is found to limit 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 s 5 of that Act.

20. The s 5 inquiry may be approached as follows:[6]

    a. does the provision serve an objective sufficiently important to justify some limitation of the right or freedom?

    b. if so, then:

        i. is the limit rationally connected with the objective?

        ii. does the limit impair the right or freedom no more than is reasonably necessary for sufficient achievement of the objective?

        iii. is the limit in due proportion to the importance of the objective?

[5] Human Rights Act 1993, s 21(1)(i).
[6] *Hansen v R* [2007] NZSC 7 [123].

21. The youth justice system will always involve a measure of discrimination on the basis of age. However, we consider the amendments to exclude those aged 18 and above from access to the Youth Court still retain the basic justification of having a youth justice system, which is to provide for the rehabilitation and reintegration of young people. It is a matter of policy as to where the line is drawn.

22. We understand the policy objective in raising the age limit for young people in the youth justice system is to decrease the level of reoffending among young people. Evidence indicates that including 17-year-olds in the youth justice system would reduce the reoffending rate of 17-year-olds within the Youth Court by 15 percent. We consider this to be a sufficiently important objective, and that the limit is rationally connected with the objective to reduce reoffending.

23. The right is impaired no more than reasonably necessary. The age of 18 is often used as a proxy for the level of responsibility and maturity required to make significant financial and legal decisions. This is reflected, for example, in the voting age and residential tenancies provisions. The proposal also aligns the principal Act with the United Nations Convention on the Rights of the Child ('the UNCROC'). The UNCROC defines a "child" as "every human being below the age of 18 years unless under the law applicable to the child, majority is attained earlier". For these reasons, we also consider the limit to be in due proportion to the importance of the objective.

24. We therefore consider including 17-year-olds in the youth justice system appears to be consistent with the right to be free from discrimination affirmed by s 19(1) of the Bill of Rights Act.

Transfer of a young person aged 17 years to the District Court or High Court for serious offending

25. The Bill includes a further distinction on the prohibited ground of age. The Bill inserts new s 276A into the principal Act to require the Youth Court to transfer a 17-year-old to the District Court or High Court where they are charged with an offence punishable by imprisonment of 14 years or more ('a serious offence'). We note this is a mandatory transfer to the adult jurisdiction. Discretion for the Youth Court to transfer young people to the adult jurisdiction for sentencing exists under the principal Act, and is further developed under the Bill.

26. The clause draws a distinction between 16-year-olds and 17-year-olds who have been charged with a serious offence. The Bill creates a material disadvantage for 17-year-olds who have been charged with such an offence, as they would be subject to tougher penalties in the adult criminal jurisdiction than their younger counterparts who may have committed the same offence.

27. We therefore consider provisions requiring the Youth Court to transfer 17-year-olds accused of committing serious offences to the adult jurisdiction to be a *prima facie* limitation on s 19(1) of the Bill of Rights Act.

Is the limitation justified and proportionate under s 5 of the Bill of Rights Act?

28. The objective of requiring the Youth Court to transfer 17-year-olds charged with serious offences to the adult jurisdiction is to maintain public confidence in the justice system. It is also intended to act as a deterrent by sending a message to young people and the public that some 17-year-olds, due to their age, will be subject to tougher penalties in a

District or High Court. We consider these objectives to be sufficiently important to justify some limit on s 19(1).

29. However, we note that the Regulatory Impact Statement for the policy considered that evidence from empirical studies suggests that, in the justice system generally, the threat of imprisonment generates a small general deterrent effect. Further, the effect on young people is likely to be even less, as the parts of the brain that govern risk-taking behaviour, impulse control, and process long-term consequences are yet to fully develop.[7]

30. We also understand that the provisions in the Bill are intended to address public concerns about including 17-year-olds in the youth justice system. It is unclear whether requiring the Youth Court to transfer 17-year-olds charged with serious offences to the adult jurisdiction will maintain public confidence in the justice system. However, Butler and Butler note that:[8]

> "While sometimes age is used as a reasonably arbitrary cut-off point to determine eligibility for, say, social welfare entitlements, and this can be acceptable, in other circumstances age reflects more or less unthinking assumptions about the capacities of persons within certain age categories that seek to stereotype or stigmatise all individuals within the group."

31. We consider that lines have to be drawn within the youth justice system, given that it is an inherently age-based system focused on the rehabilitation and reintegration of young people. As discussed above, despite the provisions requiring mandatory transfers of 17-year-olds to the adult jurisdiction for serious offending, the basic justifications of the youth justice system are retained and it is a matter of policy as to where lines are drawn.

32. The question then becomes whether the limit impairs the right any more than reasonably necessary to achieve the objective.

33. We note that it is estimated that the proposal may result in 88 cases involving 17-year-olds charged with a serious offence being dealt with in the adult jurisdiction in 2019. We understand this is a small portion of the population of 17-year-olds charged with offences. We have also taken into account the fact that:

    a. the provisions only apply to the most serious offences

    b. the affected 17-year-olds are currently subject to the adult jurisdiction for all offences under the existing criminal justice regime, and

    c. even without new s 276A, those 17-year-olds who are co-defendants with an adult or elect a jury trial would in any case continue to be dealt with in the adult jurisdiction under the existing provisions of the principal Act.

34. We therefore consider the proposal impairs the right to be free from discrimination no more than reasonably necessary and is proportionate to the importance of the objective to maintain confidence in the justice system.

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[7] Regulatory Impact Statement *Including 17 year-olds, and convictable traffic offences not punishable by imprisonment, in the youth justice system* (2016) at 20.
[8] Butler & Butler (2005) at [17.8.17].

35. We consider the proposal for mandatory transfer of 17-year-olds charged with serious offences to the adult criminal jurisdiction is consistent with the right to be free from discrimination affirmed by s 19(1) of the Bill of Rights Act.

Discrimination on the grounds of race between Māori and non-Māori

36. Section 21 of the Human Rights Act also prohibits discrimination on the grounds of race.

37. The Bill makes amendments to the principal Act to support improved outcomes for Māori children and young people. To that end, the Bill introduces new principles to be applied when making a decision about a child or young person who is Māori.

38. The Bill also introduces additional duties on the chief executive of the new Ministry in order to improve outcomes for Māori children and young people and ensure that the principles of the Treaty of Waitangi are recognised in the delivery of care and protection measures. For example, the chief executive must ensure that relevant care and protection policies and practices aim to reduce current disparities by setting measurable outcomes for Māori children and young persons.

39. The chief executive must also ensure that the new Ministry develops strategic partnerships with iwi and Māori organisations in order to ensure improved outcomes for Māori children and young persons.

40. Arguably, the requirements outlined above draw a distinction on the basis of race. This is because they distinguish between Māori and non-Māori children, young persons, and organisations in an effort to achieve improved outcomes for Māori children and young persons. Nevertheless, in our view, the provisions do not give rise to discrimination because they do not create any substantive disadvantage.

41. In reaching this view, we note the courts have also placed considerable emphasis on the proper consideration of matters of importance to Māori in decision making under other legislation.[9]

42. While the specific interests of Māori children and young people may be taken into account in individual cases, we do not consider this to equate to a disadvantage for any particular group. We also consider that increased partnership with iwi and Māori organisations in the delivery of care and protection services for Māori does not constitute a material disadvantage for other groups.

43. We therefore conclude that these provisions of the Bill appear to be consistent with the freedom from discrimination on the grounds of race affirmed in s 19(1) of the Bill of Rights Act.

[9] See, for example, *McGuire v Hastings Council* [2002] 2 NZLR 577, 594 (per Lord Cooke of Thorndon).

Conclusion

44. We have concluded that the Bill appears to be consistent with the rights and freedoms affirmed in the Bill of Rights Act.

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