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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. We have considered whether the Children, Young Persons, and Their Families (Oranga Tamariki) Legislation Bill ('the Bill') is consistent with the rights and freedoms affirmed in the New Zealand Bill of Rights Act 1990 ('the Bill of Rights Act').
2. We have not yet received a final version of the Bill. This advice has been prepared with the latest version of the Bill (PCO 19892.1.17). We will provide you with further advice if the final version of the Bill includes amendments that affect the conclusions in this advice.
3. We have concluded that the Bill appears to be consistent with the rights and freedoms affirmed in the Bill of Rights Act. In reaching that conclusion, we have considered the consistency of the Bill with s 19(1) (freedom from discrimination), s 21 (unreasonable search and seizure) and s 27 (right to justice). 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 a range of legislative reform around intervention and care support services, information sharing and accountability mechanisms.
5. Particular provisions of the Bill may engage rights and freedoms affirmed in the Bill of Rights Act, specifically the rights to freedom from discrimination, security against unreasonable search and seizure, and justice.
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 seeks to amend the Children, Young Persons and Their Families Act 1989 ('the principal Act') and the Vulnerable Children Act 2014 by:
 - a. amending the purpose and principles of the principal Act to support an early intervention response to care and protection issues
 - b. introducing new obligations on the chief executive of the new Ministry and relevant agencies to address the needs of children and young people
 - c. introducing new regulation-making powers
 - d. amending the care and protection order regime
 - e. providing more support for 18 to 25 year olds to transition from care to independent living, and
 - f. amending elements of the vulnerable children's plan under the Vulnerable Children Act.
9. The proposed changes in the Bill are part of the legislative reform package to create a new operating model for the new Ministry.

Consistency of the Bill with the Bill of Rights Act

Section 19(1) – Freedom from discrimination

10. Section 19(1) of the Bill of Rights Act affirms the right to be free from discrimination, including on the grounds of age.
11. The key questions in assessing whether there is a limit on the right to freedom from discrimination are whether the legislation draws a distinction on one of the prohibited grounds of discrimination under s 21 of the Human Rights Act, and if so, whether the distinction involves disadvantage to one or more classes of individuals.¹
12. We have considered whether cl 79 limits the right to be free from discrimination on the grounds of age.
13. Clause 79 amends the principal Act to provide support for 18 to 25 year olds transitioning from care to independent living and adulthood. For example, under the new provisions, a young person may choose to remain in the care of their caregiver after their eighteenth birthday and until the age of 21, and may request support from the chief executive of the new Ministry in order to do so. Further, a young person aged between 18 and 25 may access advice and assistance (including financial) from the new Ministry to support a transition to independent living. Clause 79 is prima facie discriminatory against people older than 25 who may require the support provided for, but are ineligible on the basis of age.

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.

14. 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. The s 5 inquiry may be approached as follows:²
- 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?
15. We consider the distinction drawn by cl 79 to be justifiable. The objective of cl 79 is to support vulnerable young people to successfully transition from care to independence and adulthood. We understand that those who transition from state care to independent living are predominantly aged between 18 and 25, and therefore consider the distinction on the basis of age in cl 79 to be rationally connected to the objective.
16. The right is impaired no more than reasonably necessary. The upper age of 25 for support is in line with the Ministry for Youth Development’s definition of “young person” and it is also in line with support available to young people in other international jurisdictions. Parliament is entitled to appropriate latitude to achieve its objectives,³ including imposing ‘bright line’ rules which are easy to apply and which may not focus precisely on the merits of individual cases.⁴ Finally, the limit is in due proportion to the importance of the objective as it goes no further than is necessary to achieve the purpose of supporting young people to transition from care.
17. We therefore consider the Bill is consistent with the right to be free from discrimination affirmed by s 19(1) of the Bill of Rights Act.

Section 21 – Right to be secure against unreasonable search or seizure

18. Section 21 of the Bill of Rights Act affirms that everyone has the right to be secure against unreasonable search or seizure, whether of the person, their property or correspondence, or otherwise. The right protects a number of values including personal privacy, dignity, and property.⁵
19. The Privy Council in *New Zealand Stock Exchange v CIR* was “content to assume”⁶ that the Commissioner of Inland Revenue was conducting a search, for the purposes of s 21, when requesting information from the New Zealand Stock Exchange under statutory authority.

² *Hansen v R* [2007] NZSC 7 [123].

³ *Hansen* at [126] per Tipping J.

⁴ *R (on the application of Hooper) v Secretary of State for Work & Pensions* [2002] EWHC 191 at [115] – cited in *Howard v Attorney-General* [2008] 8 HRNZ 378 at [76 – 77].

⁵ See, for example, *Hamed v R* [2012] 2 NZLR 305 at [161] per Blanchard J.

⁶ *New Zealand Stock Exchange v CIR* [1992] 3 NZLR 1 (PC), cited in *New Zealand Airline Pilots’ Association Industrial Union of Workers Inc v CAANZ* HC Wellington CIV-2011-485-954, 13 July 2011, Kós J at [81].

20. The Bill introduces new information sharing powers. Those powers relate to information about children and young persons (and their families or others in a domestic relationship or living with the child or young person). In light of the Privy Council's view noted above, for the purposes of this advice we consider that access to information relating to a child or young person amounts to a search under s 21 of the Bill of Rights Act.

Information sharing powers introduced by the Bill

21. Clause 30 introduces new provisions specifying who can request information about children, young persons and their families, who can or needs to comply with a request for such information, to whom such information can be disclosed, the principles applicable to the collection and disclosure of such information, and the circumstances in which such information can be used, disclosed or withheld.
22. For example, new s 66 provides that the chief executive of the new Ministry, a care and protection coordinator or constable may request any information held by an agency⁷ relating to a child, young person, or their family if the information is necessary for determining whether the child or young person is in need of care or assistance, or for the purposes of any care and protection proceedings conducted under Part 2 of the principal Act.
23. Further, new s 66A allows the chief executive of the new Ministry or a constable to disclose any information obtained under s 66 in order to meet the purposes specified in s 66A. Those purposes include the prevention or lessening of the risk of harm to a child or young person. Limits on such disclosure are set out in new s 66B.
24. In each case where disclosure is allowed or required under the provisions introduced by cl 30, the purposes for which some information can or, in some cases, must be disclosed are clearly set out, including the purposes set out in new s 66A noted above.

Consistency with s 21 of the Bill of Rights Act

25. A search is consistent with s 21 of the Bill of Rights Act if it is "reasonable". The Supreme Court has held an unreasonable search cannot logically be demonstrably justified under s 5 of the Bill of Rights Act.⁸
26. In order for a statutory power to be consistent with s 21 the intrusion into these values must be justified by a sufficiently compelling public interest. The intrusion must be proportional to that interest and accompanied by adequate safeguards to ensure it will not be exercised unreasonably.
27. We consider that cl 30 does not authorise an unreasonable search or seizure for the purposes of s 21. The search powers are exercised in the public interest, namely to ensure the safety and wellbeing of children and young persons. The exercise of those search powers is guided by the principles and purposes set out in the new provisions. The provisions are also generally consistent with and adopt similar language to that used in the information privacy principles in the Privacy Act 1993.⁹

⁷ Within the meaning of s 2(1) of the Privacy Act 1993.

⁸ *Cropp v Judicial Committee* [2008] 3 NZLR 744 at [33]; *Hamed v R* [2012] 2 NZLR 305 at [162].

⁹ In particular, we note that information Privacy Principles 10 and 11 allow for the use and disclosure of personal information where necessary to prevent or lessen a serious threat to the life or health of an individual or to prevent the commission of offences.

28. Further, we consider that there are sufficient safeguards in cl 30 to ensure that search powers are not used unreasonably. Those safeguards include:
- a. information requested under new s 66 will not be used to investigate an offence and is not admissible in other proceedings
 - b. requests for information can be declined in certain circumstances, such as where disclosure would increase the risk of harm to a child or young person and that risk outweighs the benefits of disclosure, or where the information was disclosed in circumstances that would otherwise constitute a professional breach of confidence
 - c. where a child welfare and protection agency or independent person proposes to disclose information in accordance with the provisions in cl 30, in most cases the child or young person must first be consulted
 - d. if a child welfare and protection agency uses information relating to a child or young person to link or analyse data sets of information and produce combined data sets, it must publicly notify that fact and other specified information on its website on an annual basis under new s 66D, and
 - e. the Minister responsible for the Act may issue of code of practice for information sharing to provide guidance to child welfare and protection agencies and independent persons about the application of the information sharing provisions and how disputes about its interpretation and application should be resolved.
29. We therefore consider cl 30 appears to be consistent with s 21 of the Bill of Rights Act.

Section 27 - Right to justice

30. The rights in s 27 of the Bill of Rights Act affirm the requirement for decision-makers to act in accordance with certain procedures that are considered fundamental to the rule of law.
31. Clause 82 inserts new ss 445E and 445F which affect the law relating to bringing proceedings against the Crown in the following ways:
- a. new s 445E(a) provides that no court proceedings may be brought in relation to any matter that falls within the scope of an established complaints mechanism, unless a complaint has first been made and determined, and any review right established under that mechanism has first been exercised
 - b. new s 445E(b) provides that no one may issue court proceedings against the Crown in relation to any purported breach of duty of care by the chief executive, except for the child or young person to whom the duty of care is allegedly owed, and
 - c. new s 445F limits the Crown's vicarious liability for any actions or omissions of a child or young person who is required to be in care, or anything suffered by a child or young person in care or custody as a consequence of an act or omission by a person who is not the Crown or a delegate, employee or contactor of the Crown.
32. These provisions have the potential to limit the following elements of the right to justice affirmed in s 27 of the Bill of Rights Act.

Section 27(2) – Right to judicial review

33. Section 27(2) of the Bill of Rights Act provides that every person whose rights, obligations, or interests protected or recognised by law have been affected by a determination of any tribunal or other public authority has the right to apply, in accordance with law, for judicial review of that determination.
34. The right to judicial review is intended to ensure that a person with an interest in a decision can challenge the lawfulness of that decision. The 1985 White Paper ‘A Bill of Rights for New Zealand’ recognised that the phrase “in accordance with law” that appears in s 27(2) may impose a limit on the power of judicial review, but that “any attempt completely to deprive the High Court of its review powers would violate the guarantee.”¹⁰
35. As noted above, new s 445E(a) provides that no court proceedings may be brought in relation to any matter that falls within the scope of an established complaints mechanism, unless the complaints process is first followed. While s 445E(a) relates to court proceedings generally, we note that it has the potential to affect judicial review proceedings relating to such matters.
36. The courts interpret clauses limiting judicial review strictly and attempt to limit their effect as much as possible by presuming that Parliament does not intend to empower statutory authorities to conclusively determine questions of law.¹¹
37. However, new s 445E(a) does not seek to oust judicial review entirely, it is merely delayed until after a complaint has been made and determined. The courts are more willing to give effect to such clauses.¹² Therefore, we consider that new s 445E(a) does not materially limit judicial review.
38. For the purposes of this advice, we have also considered whether new s 445E(b) limits s 27(2) of the Bill of Rights Act. New s 445E(b) only relates to proceedings that allege a breach of duty of care. This provision concerns tort proceedings rather than a judicial review cause of action. In our view, s 27(2) of the Bill of Rights Act is therefore not engaged by new s 445E(b).
39. We therefore consider the Bill appears to be consistent with the right to apply for judicial review affirmed by s 27(2) of the Bill of Rights Act.

Section 27(3) – Right to bring civil proceedings against the Crown

40. Section 27(3) of the Bill of Rights Act affirms the right to bring civil proceedings against the Crown and have those proceedings heard in the same way as proceedings between individuals.
41. Section 27(3) has been interpreted by the courts as a right that relates to procedural matters in litigation.¹³ The provision affirms the right of a person who sues, or is being sued by the Crown to have that litigation conducted in the same way that litigation between two individuals would be conducted.

¹⁰ ‘A Bill of Rights for New Zealand: A White Paper’ [1984-1985] I AJHR A6 at [10.175].

¹¹ See, for example, *Bulk Gas Users Group Ltd v Attorney General* [1983] NZLR 129 (CA); and *Zaoui v Attorney-General* [2004] 2 NZLR 339, (2003) 7 HRNZ 494 (HC).

¹² *R v Cornwall CC; Ex parte Huntington* [1994] 1 All ER 694 (CA).

¹³ *Westco Lagan Ltd v Attorney-General* [2001] 1 NZLR 40 (HC).

42. We consider that cl 82 makes substantive amendments to the law, namely when particular proceedings may be brought against the Crown, who has standing to bring particular proceedings against the Crown, and limits to the Crown's vicarious liability. As noted above, s 27(3) of the Bill of Rights Act is directed at procedural matters in litigation. In our view, the changes introduced by cl 82 do not affect the procedural rights of persons litigating against the Crown. We therefore consider that cl 82 is consistent with the right affirmed by s 27(3) of the Bill of Rights Act.

Conclusion

43. 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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