

23 November 2016

Hon Christopher Finlayson QC, Attorney-General

Consistency with the New Zealand Bill of Rights Act 1990: Film, Videos and Publications Classification (Interim Restriction Order Classification) Amendment Bill

Purpose

1. We have considered whether the Film, Videos and Publications Classification (Interim Restriction Order Classification) Amendment Bill ('the Bill'), a member's Bill in the name of Chris Bishop MP, 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 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 14 (freedom of expression) and s 19(1) (freedom from discrimination). Our analysis is set out below.

The Bill

3. The Bill amends the Films, Videos and Publications Classification Act 1993 ('the principal Act') to modify the options available for restriction of publications via interim restriction orders.
4. Interim restriction orders may be imposed by the President of the Film and Literature Board of Review ('the Board') and the High Court during a review of a classification decision or on appeal of a decision to the High Court. Currently, interim orders are only able to impose a complete ban on publication.
5. The Bill would allow the President of the Board or the High Court to impose interim orders on publications which only restrict distribution to certain groups or for certain purposes. These groups include persons who have attained a specified age not exceeding 18 years and specified persons or classes of persons. This is consistent with the restrictions which can be placed on permanent classification orders.

Consistency of the Bill with the Bill of Rights Act

Section 14 – Freedom of Expression

6. Section 14 of the Bill of Rights Act affirms the right to freedom of expression, including the freedom to seek, receive, and impart information and opinions of any kind in any form.
7. The Bill enables interim restrictions on publications and therefore limits freedom of expression.

8. 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:¹
- 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?
9. We consider that the limitation is justifiable under s 5 of the Bill of Rights Act because:
- a. the objective of limiting the distribution of objectionable material while a review of the classification of material is conducted is a sufficiently important objective
 - b. allowing the President of the Board and the High Court to restrict the distribution of materials to certain people, or in certain situations, is rationally connected to that objective, and
 - c. the orders the Bill deals with are only temporary while a review is conducted, and the Bill ensures the order can be less restrictive than currently possible under the principal Act, ensuring that freedom of expression is impaired no more than is reasonably necessary and the limit is proportionate to the importance of the objective.
10. In reaching this conclusion, we have also considered that the circumstances in which an interim restriction order can arise are limited to a review of the Board's classification decision, or an appeal of the review or decision of law. Accordingly, interim decision orders are made ex post facto a classification decision, which may have limited the right under s 14. This Bill is therefore unlikely to limit s 14 of the Bill of Rights Act more than is currently possible under the principal Act.
11. For these reasons, we conclude that any limits to the freedom of expression imposed by the Bill are justified under s 5 of the Bill of Rights Act.

Section 19(1) – Freedom from discrimination

12. Section 19(1) of the Bill of Rights Act affirms the right to be free from discrimination on the prohibited grounds set out in the Human Rights Act 1993 ('the Human Rights Act').
13. The key questions determining whether legislation limits the freedom from discrimination are:²

¹ *Hansen v R* [2007] NZSC 7 [123].

² 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.

- a. does the legislation draw a distinction on one of the prohibited grounds of discrimination under the Human Rights Act?
 - b. if so, does the distinction involve disadvantage to one or more classes of individuals?
14. A distinction will arise if the legislation treats two comparable groups of people differently on one or more of the prohibited grounds of discrimination. Whether disadvantage arises is a factual determination.³
15. Section 21(i) of the Human Rights Act prohibits discrimination on the basis of age for persons over the age of 16. Clauses 4 and 5 of the Bill allow interim restriction orders made by the President of the Board or the High Court to restrict the availability of publications to people who have attained a specified age not exceeding 18. This limits the right to be free from discrimination on the basis of age under s 19(1) of the Bill of Rights Act, as the ability to access some publications may be limited for those under 18 years of age through an interim order made pursuant to ss 49A(a) and 69A(a).
16. We consider the restriction is justified as the purpose of limiting the distribution of objectionable material to vulnerable populations is sufficiently important. Limiting the distribution based on age is rationally connected to that objective. The fact that these classifications would be temporary ensures that the limit is no more than reasonably necessary, and proportionate to the importance of the objective.
17. For these reasons, we conclude that any limits to the freedom from discrimination imposed by the Bill are justified under s 5 of the Bill of Rights Act.

Conclusion

18. 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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³ See, for example, *Child Poverty Action Group v Attorney-General* above n 2 at [179]; and *McAlister v Air New Zealand* above n 2 at [40] per Elias CJ, Blanchard and Wilson JJ.