



---

Report of the

# ATTORNEY-GENERAL

under the New Zealand Bill of Rights Act  
1990 on the Volunteers Employment  
Protection Amendment Bill

---

*Presented to the House of Representatives pursuant  
to Section 7 of the New Zealand Bill of Rights Act  
1990 and Standing Order 260 (2) of the Standing  
Orders of the House of Representatives*

I have considered the Volunteers Employment Protection Amendment Bill (the "Bill") for consistency with the New Zealand Bill of Rights Act 1990 (the "Bill of Rights Act"). I have concluded that clause 5 of the Bill appears to be inconsistent with section 27 (1) of the Bill of Rights Act, and does not appear to be justified in terms of section 5 of the Bill of Rights Act. As required by section 7 of the Bill of Rights Act (and Standing Order 260) I draw this to the attention of the House of Representatives.

I wish to stress that in finding this provision to be inconsistent with the Bill of Rights Act, it is not the idea of providing employment protection for territorial force volunteers who are deployed overseas that has given rise to the inconsistency. Rather it is the particular means by which the Bill seeks to protect these volunteers that constitutes an unjustified limit on the right to the observance of the principles of natural justice.

### **The Bill**

Clause 5 of the Bill (by inserting a proposed new Part 2 into the Volunteers Employment Protection Act 1973) would prohibit an employer from terminating the employment of a territorial force volunteer while that employee is posted overseas, unless the employee gives his or her consent or the employer is able to establish one of the defences that are set out in the Bill. However, the proposed new section 24 (1) of the Act states:

"Where any volunteer alleges that the volunteer's employer has, within the preceding 12 months and in contravention of section 19, terminated the volunteer's employment or given the volunteer notice terminating the volunteer's employment, the volunteer may apply **ex parte** to the Employment Tribunal for an order reinstating the volunteer in the volunteer's position or cancelling the notice terminating the volunteer's employment." (emphasis added)

As neither the Bill nor the 1973 Act contain a reference to a disputes resolution process, the effect of section 24 would appear to be to prevent an employer from invoking the defences set out in the proposed new section 21 of the Act. Nor is there an apparent means by which an employer can appeal the awarding of an order granted under section 24 in spite of the passing reference to such a process contained in the proposed new section 25. The order therefore appears to be final.

### ***Prima Facie* Breach of Section 27 (1) of the Bill of Rights Act**

Section 27 (1) of the Bill Of Rights Act states:

"Every person has the right to the observance of the principles of natural justice by any tribunal or public authority which has the power to make a determination in respect of that person's rights, obligations, or interests protected or recognised by law."

The principles of natural justice include the right for both parties to a dispute to be heard (see *Franic v Wilson* [1993] 1 NZLR 318). The right to be heard allows, in this case, an employer to present facts that give rise to a defence in accordance with section 21 of the amended Act to the appropriate tribunal. However, as an application under section 24 of the amended Act is for an *ex parte* order, there is no opportunity for the

employer in this case to be heard. The ex parte application process contained in this Bill is therefore prima facie inconsistent with section 27 (1) of the Bill of Rights Act (see *B v District Court at Hamilton* (1995) 13 FRNZ 413).

The important question is whether that limit can be said to be "reasonable and justified" in terms of section 5 of the Bill of Rights Act (as applied by the Court of Appeal in *Moonen v Film and Literature Board of Review* [2000] 2 NZLR 9).

### **Is the Bill a justified limitation in terms of section 5 of the Bill of Rights Act?**

The objective behind the proposed new section 24 of the amended Act would appear to be to restore the position of the employee to that which he or she would have been in if his or her employment had not been terminated or had notice not been given terminating his or her employment. However, the Bill's explanatory note does not explain why the ex parte orders available to territorial force volunteers are required, and in particular, why territorial force volunteers require any further protection (in the form of applications for final ex parte orders) as to their employment status above the level of protection which is available to them under employment law generally.

Accordingly, I have concluded that there is insufficient information available to me to conclude that the objective of the Bill is important and significant and that it substantively justifies some limits on the rights to the observance of the principles of natural justice.

However, in terms of section 5 of the Bill of Rights Act, I have considered whether there is a rational and proportionate connection between the Bill's objective and the measures proposed to effect that objective, in the event that such an objective is seen to be important and significant. In the case of this Bill, the inquiry is whether the proposed new section 24 implements the objective of restoring the position of the employee to his or her former position of employment in a rational and proportionate manner that impairs the employer's right to the observance of the principles of natural justice as little as possible.

On balance, I consider that there is a rational relationship between the provision allowing ex parte applications and the objective of providing territorial force volunteers with a degree of employment protection while they serve overseas.

However, I am of the view that there are difficulties in saying that the requirements in the proposed new section 24 are proportionate to that objective. The bill provides for a final rather than an interim ex parte order. The Bill does not contain a mechanism allowing an employer to raise defences available under the Bill, or appeal rights. These features exceed what is necessary or reasonable. For example, the Parental Leave and Compensation Act 1987, the Employment Contracts Act 1991, and Employment Relations Act 2000 all include measures designed to protect employees who have been unjustifiably dismissed. Affected employees under these Acts can apply for interim orders reinstating them to their former positions pending the outcome of a formalised dispute resolution process. As interim orders are provisional, neither party is subjected to irrevocable change or serious injustice. Both parties can present evidence and information to the decision-making body, thereby fulfilling the requirements of natural justice.

Taking these factors into account, it is not clear that the use of final ex parte orders in the proposed new section 24 limits the observance of the principles of natural justice only to an extent that is proportionate to the objective of the Bill.

### Conclusion

I conclude that clause 5 of the Volunteers Employment Protection Amendment Bill appears to be inconsistent with section 27 (1) of the New Zealand Bill of Rights Act 1990, and does not appear to be justified in terms of section 5 of the Bill of Rights Act.



Hon Margaret Wilson  
Attorney-General