

18 January 2018

Hon David Parker, Attorney-General

Consistency with the New Zealand Bill of Rights Act 1990: Child Poverty Bill

Purpose

1. We have considered whether the Child Poverty 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 20782/1.23). 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) and s 27(3) (right to bring civil proceedings). Our analysis is set out below.

The Bill

4. The purpose of the Bill is to help achieve a significant and sustained reduction in child poverty and to enhance the overall well-being of children. To these ends, the Bill:
 - a. specifies child poverty measures
 - b. requires the setting of child poverty reduction targets
 - c. requires reports relating to child poverty to be produced and published by the Government Statistician, and
 - d. requires the Government of day to adopt, publish, and review a Government Strategy for improving the well-being of all children.
5. The Bill also makes a number of consequential amendments, including renaming the Vulnerable Children Act 2014 the "Children's Act 2014" and the Vulnerable Children's Plan the "Oranga Tamariki Action Plan".

Consistency of the Bill with the Bill of Rights Act

Section 19(1) – Freedom from discrimination

6. 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').

7. The key questions determining whether legislation limits the freedom from discrimination are:¹
 - 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?
8. 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.²
9. Section 21(1)(i) of the Human Rights Act prohibits discrimination on the basis of age for persons over the age of 16. Clause 5 of the Bill defines ‘child’ as a person who is under the age of 18. This distinction arguably disadvantages those aged 18 years and over vis-à-vis 16 and 17 year olds, as the Bill is not aimed at reducing poverty in relation to those individuals.
10. In our view, however, no material disadvantage arises because of this distinction. The particular provisions of the Bill, alongside the availability of other efforts to reduce poverty for those over 18 years of age, render any disadvantage theoretical or, in any case, too minimal to constitute a *material* disadvantage.³
11. We therefore consider the Bill appears to be consistent with s 19(1) of the Bill of Rights Act.

Section 27(3) – Right to bring civil proceedings

12. 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.
13. The right affirmed in s 27(3) is “aimed at procedures which govern the assertion or denial of rights in the course of court or equivalent proceedings; and is not aimed at the creation of other rights in themselves.”⁴ Put another way, s 27(3) protects the procedural rights of those litigating against the Crown but does not restrict the power of the legislature to determine what substantive rights the Crown or other parties are to have.
14. Clause 28 of the Bill provides that the only remedies or relief that a court may grant for non-compliance with the child poverty reduction targets are a declaration (made by the High Court or, on an appeal, by the Court of Appeal or the Supreme Court) of that non-compliance, and costs. No form of monetary compensation or relief, or injunctive relief, is available as a remedy for non-compliance with the targets.

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 See, for example, *Child Poverty Action Group v Attorney-General* above n 1 at [179]; and *McAlister v Air New Zealand* above n 1 at [40] per Elias CJ, Blanchard and Wilson JJ.

³ See, for example, *Child Poverty Action Group v Attorney-General* (2011) 9 HRNZ 687 at [83].

⁴ *Westco Lagan Ltd v Attorney-General* [2001] 1 NZLR 40 at [63].

15. In some circumstances, restrictions on the range of available remedies may act as a procedural bar if they have the effect of rendering the proceedings irrelevant.⁵ However, we consider that, in this context, cl 28 is most properly characterised as dealing with issues of substantive law. Clause 28 as a whole provides that the targets established in the Bill do not create any enforceable substantive legal rights against the Crown.
16. The duties imposed by the Bill are “macro-level” public policy or political accountability duties, rather than duties relating to specific individuals. Clauses 28(3) and (4) of the Bill require the relevant Minister to present any declaration of non-compliance with the targets to the House of Representatives as soon as practicable, including advice on the Government’s response to the declaration. This appears to be a reasonable manner of achieving the Bill’s stated objective and, in any case, does not render declaration proceedings brought by an individual irrelevant.
17. We therefore consider the Bill appears to be consistent with s 27(3) 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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⁵ Ministry of Justice, ‘The Handbook of the Bill of Rights Act 1990: An Introduction to the Rights and Freedoms in the Bill of Rights Act for the Public Sector’ (Wellington, Ministry of Justice, 2004), pg. 148.