Legal Services Bill

26 July 2010

ATTORNEY-GENERAL

Legal Services Bill - Consistency with the New Zealand Bill of Rights Act 1990 (PCO 14368/7.1)
Our Ref: ATT395/137

1. I have reviewed this Bill for consistency with the New Zealand Bill of Rights Act 1990. While the Bill gives rise to questions under ss 19, 23, 24, 25 and 27 of the Bill of Rights Act, I conclude that the Bill appears to be consistent with that Act.

2. The Bill will replace the Legal Services Act 2000 and will implement reform to the system for delivering legal aid in civil and criminal proceedings. In doing so, the Bill preserves much of the structure of the Legal Services Act 2000 but disestablishes the Legal Services Agency and provides that legal aid is to be administered by a Legal Services Commissioner (described in cl. 70) who will answer to the Secretary for Justice.

3. The Bill raises the following issues under the Bill of Rights Act:

   3.1 Clauses 8.3 provides that in determining whether an applicant has sufficient means to enable him or her to obtain legal assistance the Commissioner must have regard to the applicant’s income and capital as set out in Schedule 1. This schedule makes provision for the resources of other persons to be treated as the applicant’s if they are aged between 16 and 19. This raises an issue with the right to freedom from discrimination on the grounds of age under s 19 of the Bill of Rights Act.

   3.2 Clause 69 provides for the delivery of legal services to those in need of legal aid by salaried providers which may override choice of preferred counsel by applicants. This raises an issue with s 24(c) of the Bill of Rights Act.

   3.3 Clause 83 of the Bill seeks to provide for improved quality control over providers of legal aid services and in the course of doing so places limits on the capacity of a legal services provider to judicially review certain decisions of the Secretary of Justice. This raises an issue with s 27(2) of the Bill of Rights Act.

   3.4 Clause 111 creates an offence for which there is a reverse onus. This raises a question about s 25(c) of the Bill of Rights Act.

Definition of Income and Capital in Schedule 1

4. For the purpose of criminal legal aid applications, the Commissioner must make an assessment as to whether the applicant has sufficient means to instruct a lawyer. In doing so the Commissioner must have regard to their income and capital calculated under Schedule 1.
5. Clause 4(4) of the Schedule 1 provides that where a minor [1] over the age of 16 makes an application for legal aid, the resources of their parent, foster parent or step-parent may be taken into account.

6. There is therefore differential treatment between persons aged 16 to 19 years of age and those aged 20 years and older, as those in younger age group will have a parent or other person’s resources counted as their own in an assessment of eligibility or their liability for repayments. Arguably, taking into account the resources of the young applicant’s parents may causes the type of disadvantage that section 19 protects against (being that arising from prejudice and negative stereotyping that perpetuates legal, social or political disadvantage faced by a marginalised group in our society), leading to a prima facie limit on s 19.

7. Even if the provision did amount to prima facie discrimination on the grounds of age, it would be justifiable under s 5. The distinction is intended to recognise the fact that many young people in the age group 16 to 19 years will not yet have attained complete financial independence from their parents. Further the Commissioner has a discretion whether or not to take into account the resources of a parent. The circumstances in which the Commissioner may do so are limited to situations where there is a commitment to support the minor, or the minor is living with the parent, foster parent, or step-parent.

**Methods of delivery of legal services**

8. Clause 69 provides that the Secretary for Justice may employ salaried lawyers to provide legal services under the Act. This will enable the employment of public defenders.

9. Whilst the right to counsel guaranteed by s 24(c) of the Bill of Rights Act is in general a right to instruct counsel of choice, a person who requires state funded legal representation does not have a right to counsel of choice. [2] There is therefore no inconsistency with s 24 of the Bill of Rights Act.

**Natural Justice – the right to bring judicial review proceedings**

10. Clause 83 provides that a decision by the Secretary as to the approval of a provider may not be the subject of a judicial review application, unless the decision has first been reviewed by the Review Authority and a judicial review application must be filed within 20 working days from the date of the Authority’s decision.

11. In imposing the time limit cl 83 imposes a restriction on s 27(2) which affirms a right “...to apply, in accordance with law, for judicial review [of a determination]”. [3]

12. Clause 83 therefore limits the right, and gives rise to a prima facie inconsistency.

13. The time limit and the requirement to go first to the Review Authority are justifiable under s 5. They restrict but do not oust the right to seek a judicial review, or render the right incapable of effective exercise and apply only to lawyers. They are a proportionate response to problem of delays in the administration of the legal aid system which have a direct bearing on public confidence in the system.

**Offence with reverse onus**
14. Clause 111(a) of the Bill creates an offence that places a reverse onus on the accused person [4] and accordingly limits the right to the presumption of innocence affirmed by s 25(c). Clause 111(a) provides that an aided person or applicant commits an offence if they fail, without reasonable excuse to comply with any provision of the Act or regulations made under it that require them to furnish information, answer questions or produce any document or thing.

15. It can be a justifiable limit in terms of s 5 of the Bill of Rights Act to place such an onus on to a defendant where the defendant is voluntarily involved in a regulated activity such as here. [5] The point was noted with possible approval but not decided in *R v Hansen* [2007] 2 NZLR 1. [6]

16. Here, the matters of excuse in respect of the failure to comply with regulatory requirements in the Bill are likely to be peculiarly within the knowledge of the person concerned. [7]

17. For those reasons I conclude that no issue of inconsistency arise in relation to these reverse onus offence provisions.

In accordance with Crown Law practice, this advice has been peer reviewed by Jane Foster, Crown Counsel.

Austin Powell
Crown Counsel / Team Leader

Footnotes:

1. This is not defined in the legislation. We assume that the definition from the Age of Majority Act 1970 will apply.
3. The 1985 White Paper said of the provision that became s27(2) that it “sets out and gives enhanced status to the basic constitutional right to go to court to challenge the legal validity of government actions. It should serve as a check to privative clauses in Acts purporting to restrict the power of judicial review.”
4. See s 67(8) of the Summary Proceedings Act 1956
5. See for example *R v Wholesale Travel Group* [1991] 3 SCR 154 (Supreme Court of Canada) and *AG v Malta* (ECtHR, App 16641/90).
6. See paragraphs [43], [66] and [227].

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