

Report of the

ATTORNEY-GENERAL

under the New Zealand Bill of Rights Act
1990 on the Care of Children Bill

*Presented to the House of Representatives pursuant to
Section 7 of the New Zealand Bill of Rights Act 1990
and Standing Order 260, as varied by Sessional Order
of 5 September 2002, of the Standing Orders of the
House of Representatives*

1. I have undertaken an examination of the Care of Children Bill (PCO 4783/8) (“the Bill”) for consistency with the New Zealand Bill of Rights Act 1990 (“the Bill of Rights Act”). I conclude that clause 27 of the Bill, which provides that guardianship in respect of a child continues until that child reaches the age of 18, appears to be inconsistent with the freedom from discrimination on the grounds of age affirmed by s 19(1) of the Bill of Rights Act and s 21(1)(i) of the Human Rights Act 1993 and does not appear to be justifiable in terms of s 5 of the Bill of Rights Act. I do not consider there to be any other objection to the Bill.
2. As required by section 7 of the Bill of Rights Act and Standing Order 260, I draw this inconsistency to the attention of the House.

The Bill

3. The Bill is intended to replace the Guardianship Act 1968 and provide for arrangements for the care of children that will promote their welfare and best interests and will facilitate their development.

The Bill of Rights Issue

4. Under s 19(1) of the Bill of Rights Act and s 21(i) of the Human Rights Act, everyone has the freedom from discrimination on the grounds of age. Age is defined by the Human Rights Act as any age commencing with the age of 16 years. While age limits of any kind are likely to involve a degree of arbitrariness, the choice of 16 as a starting point under the Human Rights Act means that any differential treatment based upon an age over 16 that results in disadvantage is prima facie inconsistent with the right of non-discrimination and must be justified in terms of s 5.
5. It must be recognised that there is a wide range of minimum ages contained in legislation.¹ It is also noteworthy that the legal age of transition has tended to be reduced in recent years, presumably reflecting a community perception that younger people are able to exercise greater legal rights. This Bill itself is an example, in that the relevant age is reduced from 20 to 18 years.
6. Nevertheless, Parliament decided in relation to discrimination that 16 years was the appropriate threshold for differential treatment by reason of age. As a result of this it creates a starting point: legislation or practice which sets an older age must be justified under s 5 of the Bill of Rights.

¹ Several examples include:

Age of Majority Act 1970, s 4: full age is reached for all purposes of the law of New Zealand at 20 years;

Children, Young People and Their Families Act 1989, s 21: a ‘young person’ means any person who has attained the age of 14 but who has not yet turned 17;

Crimes Act 1961, s 21: No criminal proceedings may be brought against a person of or over the age of 10 years and under 14 years except where the offence is murder or manslaughter;

Marriage Act 1995, s 18: Parental consent to marriage is required for people under 20 years.

See, further, Ministry of Youth Affairs *Does Your Policy Need An Age Limit? A Guide to Youth Ages from the Ministry of Youth Affairs* (undated), 9.

Assessment

Prima facie inconsistency

7. The apparent inconsistency in the Bill arises from cl. 27, under which guardianship continues until the child reaches the age of 18, marries or enters into a de facto relationship. It should be noted that marriage and, for the purposes of the Bill, entry into a de facto relationship require parental consent under the ages of 20 and 18 respectively (s 18(2) of the Marriage Act 1955 and cl. 9(3) of the Bill).
8. A guardian may, with or for the child, exercise responsibility in a wide range of matters (cll. 14 & 15). The matters within the powers of a guardian are not exhaustively defined but do include matters such as that person's name, education, religious practice, entry into de facto relationships and other matters (cll. 9(3) and 15(2)). The control exercisable by the guardian will be limited by a right of recourse by 16 and 17 year olds to the Family Court in respect of "important matters" (cl. 40(1)). There is also specific provision for such young people in respect of other matters, including medical consent (cl. 35) and limiting the scope for parenting orders (cl. 33(2)(a) & 45(1)).
9. Nonetheless, a person who is 16 or 17 years of age and unmarried is, other than in relation to these specific exceptions, ultimately subject under cll. 14 and 15 of the Bill to the control of his or her guardian(s) in a way that an older person is not. There is therefore differential treatment of such people on the grounds of age.
10. Further, while that control is broadly to be exercised in the best interests of each child, it remains that such people lack autonomy across a potentially very broad range of matters, some or all of which are plainly important to each individual. Such lack of autonomy, regardless of its purpose, can only be regarded as disadvantageous treatment on the basis of age, contrary to s 19(1) of the Bill of Rights Act and s 21(1)(i) of the Human Rights Act.
11. The potentially disadvantageous character of decisions made by guardians in exercise of powers under the Bill is apparent from the provision in cl. 40 and in the current provision in s 14 of the Guardianship Act 1968 for a 16 or 17 year old to seek the intervention of the Family Court.
12. More widely, and as the Bill recognises, people of that age often undertake significant adult responsibilities and may often disagree on significant issues with their guardians. Against that background, the constraints imposed by the Bill cannot be regarded as inconsequential. Accordingly, my view is that there appears to be a prima facie inconsistency that must be considered in terms of s 5 of the Bill of Rights Act.

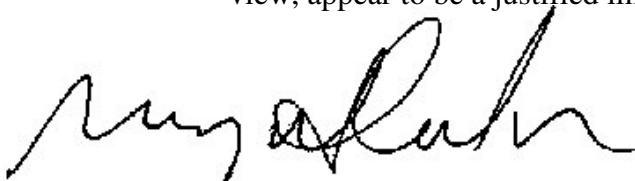
Justification under s 5 of the Bill of Rights Act

13. Under s 5 of the Bill of Rights Act, the rights affirmed by that Act may be subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society. I have considered whether cl. 27 is a justifiable limit on the right of non-discrimination in terms of s 5.
14. The broad reason for cl. 27 is that children lack the level of maturity, experience or competence to decide matters such as those set out in cl. 15(2). The decision-

making powers accorded guardians under the Bill are intended to provide assistance and guidance through a child's development. More widely, the vesting of powers in guardians forms part of the legal protection afforded to children under law and is generally regarded as inherently beneficial to children.

15. There is empirical evidence of the vulnerability of people around the ages of 16 to 18, although the relevant age band varies in the material provided from 16-18 years to 15-21 years, and of the continuing dependence of most 16 and 17 year olds upon their parents or guardians. It is also noted that 18 is the age for competence in some areas, for example in relation to the enforceability of contracts under the Minors' Contracts Act 1969 and appointment as a director under the Companies Act 1993. It is also the default age for the end of childhood under the Convention on the Rights of the Child. Finally, it is noted that that Convention and a number of other international instruments require states party, including New Zealand, to provide various protections to people under 18.
16. Nonetheless, in my view, the age limit contained in the Bill does not appear to be justified in terms of s 5 of the Bill of Rights Act for several reasons:
 - 16.1 It has not been possible to establish that a single and essentially fixed age limit is appropriate to the broad range of matters over which a guardian has ultimate control under the Bill;
 - 16.2 The limit contained in the Bill is not consistent with other age limits both in the Bill itself and in other legislation;
 - 16.3 The necessity of the limit as a means of affording guidance and protection to young people cannot be shown; and
 - 16.4 The recourse provided to 16 and 17 year olds through the Family Court and through the exceptions under the Bill and elsewhere do not remove the broader problem of the age limit.
17. On the first of these, and as cl. 14 and the examples canvassed in cl. 15(2) of the Bill indicate, the matters over which a guardian may exercise control are extremely broad. Further, these matters vary considerably both in their importance and in the level of maturity, experience or competence that they require. It is not, in my view, possible to conclude that such a wide range of matters are all inappropriate for 16 and 17 year olds to decide for themselves.
18. Secondly, the different levels of competence required in different areas covered by the Bill are recognised elsewhere in the Bill and in other legislation. For example, medical treatment, religious observance and education are all matters identified in cl. 15(2) as falling within the responsibility of the guardian. However, the Bill itself provides that a person over the age of 16 may consent to medical procedures while, under s 25A of the Education Act 1989, anyone over the age of 16 *or* that person's parent or guardian may choose for that person to be released from particular school classes for religious or cultural reasons. More widely, and as noted above, statutory minimum age limits vary considerably across matters including criminal responsibility, sexual consent, eligibility for social welfare benefits and various licences and permits. Many of these age limits relate to matters of fundamental importance to a child.

19. Thirdly, it does not appear possible to justify the conferral of such broad powers upon guardians by reference to the need to guide and protect young people, including the obligations arising under the Convention on the Rights of the Child and elsewhere. I note in relation to the Convention that it specifically recognises that guidance is to be consistent the growing capacities of children over time (art. 5).
20. The imposition of broad responsibilities upon guardians and/or the state does not necessitate the provision of broad and potentially intrusive powers. Much of the empirical material noted above indicated the value of having a guardian involved in or assisting young people with significant decisions, rather than of giving the guardian the last word. Moreover, some such powers, such as control over a child's name or religious denomination, are very unlikely to be required for guidance or protection.
21. Finally, the provision for recourse to the Family Court under cl. 40 does not provide sufficient flexibility to address these concerns. As noted, the Court has competence only in relation to important matters and, further, the current low use of the equivalent provision in s 14 of the Guardianship Act suggests that it is not effective as a broad measure. Court recourse by young people does not appear to be a practical limitation on the broad powers afforded by the Bill. However, it may be noted that if the role of the Court were reversed, allowing 16 or 17 year olds to make such decisions subject to Court determination on application by the guardian, the problem would be resolved.
22. Further, the other exceptions contained in the Bill and in other legislation in relation to 16 and 17 year olds are relatively narrow and, again, do not alter the more general problem represented by the broad powers afforded by the Bill.
23. In summary, the limitation imposed by cl. 27 of the Bill upon the right of non-discrimination on the ground of age affirmed by s 19(1) BORA does not, in my view, appear to be a justified limitation upon that right in terms of s 5.



Hon Margaret Wilson
Attorney-General