

2 February 2017

Hon Christopher Finlayson QC, Attorney-General

Consistency with the New Zealand Bill of Rights Act 1990: Broadcasting (Games of National Significance) Amendment Bill

Purpose

1. We have considered whether the Broadcasting (Games of National Significance) Amendment Bill ('the Bill'), a member's Bill in the name of Clayton Mitchell 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 19(1) (freedom from discrimination). Our analysis is set out below.

The Bill

3. The Bill amends the Broadcasting Act 1989 ('the principal Act'). Clause 5 of the Bill seeks to expand the functions of the Broadcasting Commission ('the Commission') to include promoting:
 - a. the live broadcast of New Zealand sport, and
 - b. sporting games and events of national significance.
4. Clause 5 of the Bill further requires that the Commission shall, in the exercise of those functions, ensure that the games of national significance listed in Schedule 1A of the Bill are broadcast live and free-to-air.

Consistency of the Bill with the Bill of Rights Act

Section 19(1) – Freedom from discrimination

5. Section 19 of the Bill of Rights Act affirms that everyone has the right to freedom from discrimination on the grounds set out in the Human Rights Act 1993, including sex¹ and disability.²
6. The key questions in assessing whether there is a limit on the right to freedom from discrimination are:³

¹ Human Rights Act 1993, s 21(1)(a).

² Human Rights Act 1993, s 21(1)(h).

³ 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 or more of the prohibited grounds of discrimination under s 21 of the Human Rights Act and, if so,
 - b. does the distinction involve material disadvantage to one or more classes of individuals?
7. In determining if a distinction arises, consideration is given to whether the legislation proposes that two comparable groups of people be treated differently on one or more of the prohibited grounds of discrimination.⁴ The distinction analysis takes a purposive and untechnical approach to avoid artificially ruling out discrimination.⁵ Once a distinction on prohibited grounds is identified, the question of whether disadvantage arises is a factual determination.⁶

Does the Bill draw a distinction on one or more of the prohibited grounds of discrimination?

8. Schedule 1A of the Bill provides a list of sporting events which are games of national significance for the purposes of the Bill.
9. The Bill does not include a definition, or a set of criteria, that would help interpret what can be considered a “game of national significance” beyond the list included in Schedule 1A.
10. Looking at Schedule 1A in totality, there is no express distinction made on the grounds of sex or disability. The relevant sporting events are drafted in inclusive terms, frequently expressly providing that sporting events involving both adult men and women are considered games of national significance.
11. If the list is analysed in terms of individual sports, however, the Bill could be construed as providing that certain competitions or teams comprised entirely of one sex participate in games of national significance, while equivalent teams or competitions for the other sex do not.
12. For example, all Football World Cup matches and domestic football international matches involving the New Zealand All Whites are expressly included in Schedule 1A. The New Zealand All Whites is a name used to refer to the men’s national football team only. Equivalent games played by the Football Ferns (the women’s national football team) are not expressly listed in Schedule 1A.
13. Similarly, while the Bill includes the Summer Olympic Games and the Winter Olympic Games in the list of games of national significance, the Summer and Winter Paralympics or Deaflympics are not expressly included.

⁴ *Quilter v Attorney-General* [1998] 1 NZLR 523 (CA) at [573] per Tipping J (dissenting) relied on in *Atkinson v Minister of Health and others* [2010] NZHRRT 1 at [199]; *McAlister v Air New Zealand* [2009] NZSC 78 at [34] per Elias CJ, Blanchard and Wilson JJ and at [51] per Tipping J; and *Child Poverty Action Group v Attorney-General* [2008] NZHRRT 31 at [137].

⁵ *Atkinson v Minister of Health and others* [2010] NZHRRT 1 at [211]-[212]; *McAlister v Air New Zealand* [2009] NZSC 78 at [51] per Tipping J; and *Child Poverty Action Group v Attorney-General* [2008] NZHRRT 31 at [137].

⁶ See for example *Child Poverty Action Group v Attorney-General* [2008] NZHRRT 31 at [179]; and *McAlister v Air New Zealand* [2009] NZSC 78 at [40] per Elias CJ, Blanchard and Wilson JJ.

14. However, Schedule 1A also requires that “[any] other sporting event funded by the Major Events Development Fund or any high performance New Zealand sportsperson who has received government funding for development and is participating at an international level” must be broadcast live and free-to-air.
15. This provision would currently mean that, for example, the Football Ferns and the Paralympics are likely to meet the definition of national significance despite not being expressly listed in Schedule 1A.
16. Further, New Zealand’s international obligations to promote the equal participation of women⁷ and persons with disabilities⁸ in sport and recreation means this aspect of the statutory scheme would likely have an inclusive effect.
17. In addition, Schedule 1A makes a number of other distinctions in determining what constitutes a game of national significance. For example, games played overseas are generally included only where they are the pinnacle events of their sport, such as a World Cup, or the Commonwealth Games and the Olympics. Games played domestically, however, are sometimes included in every instance, not only for pinnacle events. At other times lines are drawn based on the particular format of the game or event. One-day international cricket matches played in New Zealand are included, for example, whilst Test match cricket is not.
18. As such, our view is that it cannot be inferred that the Bill draws a distinction on the grounds of sex or disability based on the individual sports and events that are expressly mentioned in Schedule 1A.
19. On that basis, we consider the concept of “games of national significance” in the Bill (including the list of games set out in Schedule 1A) does not draw a distinction on the grounds of either sex or disability and, consequently, there is no *prima facie* discrimination. The Bill therefore appears to be consistent with s 19(1) of the Bill of Rights Act.

Conclusion

20. 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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⁷ Convention on the Elimination of All Forms of Discrimination Against Women, Article 13.

⁸ Convention on the Rights of Persons With Disabilities, Article 30.