

3 May 2017

Hon Christopher Finlayson QC, Attorney-General

## **Consistency with the New Zealand Bill of Rights Act 1990: Marriage (Court Consent to Marriage of Minors) Amendment Bill**

### **Purpose**

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1. We have considered whether the Marriage (Court Consent to Marriage of Minors) Amendment Bill ('the Bill'), a member's Bill in the name of Joanne Hayes 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) of the Bill of Rights Act (freedom from discrimination). Our analysis is set out below.

### **The Bill**

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3. The Bill seeks to amend the provisions of the Marriage Act 1955 ('the principal Act') relating to consent to marriage of minors. Currently, that Act provides that minors may not obtain a licence to marry without the consent of a parent, parents or a guardian. Where consent is refused, a minor can apply for a Family Court Judge to consider giving consent to the marriage.
4. The Bill removes those provisions, and replaces them with a requirement that a minor must obtain the consent of a Family Court Judge to marry. The Bill sets out the evidence that must be considered by the Judge in deciding whether to give consent.
5. The Bill is intended to respond to concerns that some 16 and 17 year olds may be forced to enter into marriage.

### **Consistency of the Bill with the Bill of Rights Act**

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#### **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:<sup>1</sup>

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<sup>1</sup> 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 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.<sup>2</sup>
9. Section 21(1)(i) of the Human Rights Act prohibits discrimination on the basis of age for persons over the age of 16. The Bill places the additional administrative and cost burden of needing to apply to the Family Court for consent to marry for 16 and 17 year olds only. There is no comparable requirement for those aged 18 or over. As a result, the Bill could be seen as unlawfully discriminating against 16 and 17 year olds who genuinely consent to marriage.
10. Where a provision is found to limit a particular right or freedom, it may nevertheless be consistent with the Bill of Rights Act if it can be considered a reasonable limit that is justifiable in terms of s 5 of that Act. The s 5 inquiry may be approached as follows:<sup>3</sup>
  - a. does the provision serve an objective sufficiently important to justify some limitation of the right or freedom?
  - b. if so, then:
    - i. is the limit rationally connected with the objective?
    - ii. does the limit impair the right or freedom no more than is reasonably necessary for sufficient achievement of the objective?
    - iii. is the limit in due proportion to the importance of the objective?
11. To the extent that the Bill creates a material disadvantage for those aged 16 and 17, we consider it is justifiable. The principal Act already contains a safeguard in relation to the marriage of 16 and 17 year olds by requiring consent of a parent or guardian. This is because 16 and 17 year olds have the legal status of children. The policy objective of the Bill, to protect 16 and 17 year olds from forced marriage, is sufficiently important to justify an additional safeguard being put in place for this group.
12. We also consider the limit is rationally connected to the objective and impairs the right no more than reasonably necessary. The court has the ability to consider the range of available evidence to determine whether a 16 or 17 year old genuinely consents to a proposed marriage in a specific case, and may still grant the ability for that 16 or 17 year old to marry where it considers this to be appropriate.
13. For these reasons, we conclude that any limits to freedom from discrimination imposed by the Bill are justified under s 5 of the Bill of Rights Act.

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<sup>2</sup> 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.

<sup>3</sup> *Hansen v R* [2007] NZSC 7 [123].

## **Conclusion**

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14. 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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