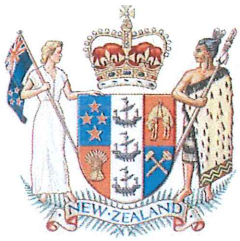

Report of the

ATTORNEY-GENERAL

under the New Zealand Bill of Rights Act 1990 on the Oranga Tamariki (Parent's and Guardian's Responsibility) Amendment Bill

Presented to the House of Representatives pursuant to Section 7 of the New Zealand Bill of Rights Act 1990 and Standing Order 265 of the Standing Orders of the House of Representatives

1. I have considered whether the Oranga Tamariki (Parent's and Guardian's Responsibility) Amendment 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. I have concluded the Bill limits the freedoms of association and movement, and from discrimination, affirmed in ss 17, 18, and 19 of the Bill of Rights Act and that limit cannot be justified under s 5 of that Act.

3. As required by s 7 of the Bill of Rights Act and Standing Order 265, I draw this to the attention of the House of Representatives.

The Bill

4. The Bill amends the Oranga Tamariki Act 1989 ('the principal Act'). Its stated purposes are to allow the Youth Court to recognise the link between the behaviour of parents and guardians and that of their children, and to provide an incentive for parents and guardians to stop and assess their own behaviour.

5. It empowers the Youth Court to make orders applying to parents or guardians of children or young people who have been released on bail pending a Youth Court hearing. Under new s 240A(1), the Youth Court can order a parent or guardian to:

   a. reside at a nominated address with the child or young person;

   b. observe a specified curfew;

   c. not consume alcohol or drugs;

   d. not associate with any specified person; or

   e. comply with any other order the Judge considers necessary to ensure the ongoing safety of the young person.

6. Failure to comply with an order is an offence with a maximum penalty of 12 months' imprisonment, a fine not exceeding $5,000, or both.

Inconsistency with ss 17 and 18 — Freedoms of association and movement

7. Section 17 of the Bill of Rights Act provides that everyone has the right to freedom of association. The ambit of s 17 is "broad and encompasses a wide range of associational activities".[1]

8. The Bill, at new s 240A(1)(d), enables the Youth Court to prohibit a parent or guardian of a child or young person released on bail from associating with any specified person. While the freedom of association is often invoked in an organisational context, s 17 has been held to include the right to associate with any other individual.[2] The Bill therefore creates a prima facie limit on the freedom of association.

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[1] *Turners & Growers Ltd v Zespri Group Ltd* (No 2) (2010) 9 HRNZ 365 (HC) at [72].
[2] *B v JM* [1997] NZFLR 529 (HC) at 532.

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9. Section 18 of the Bill of Rights Act affirms that everyone lawfully in New Zealand has the right to freedom of movement and residence in New Zealand. The Bill's new ss 240A(1)(a) and (b), which empower the court to order a parent or guardian reside at a nominated address or observe a specified curfew respectively, demonstrably impose prima facie limits on the freedom of movement.

10. I note that curfew orders may also engage the right to liberty of the person under s 22 of the Bill of Rights Act, which affirms the right not to be arbitrarily arrested or detained. For the purposes of this report I have focused on the freedom of movement, but consider that, to the extent s 22 is engaged, that limitation is likely to be similarly unjustified for the reasons I have articulated below.

Are the limitations justified under s 5 of the Bill of Rights Act?

11. Where a provision appears 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 demonstrably justified in a free and democratic society under s 5 of the Bill of Rights Act. The s 5 inquiry may be approached as follows:[3]

    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?

12. In my opinion the Bill's non-association, residence, and curfew orders fail to meet each of the elements of the second limb of the s 5 inquiry. I have set out my reasoning below.

Is the objective sufficiently important?

13. I consider the Bill's objectives are sufficiently important to justify some limitation on the freedoms of association and movement. The Bill's broad objectives, apparent from the general policy statement, include recognising the holistic drivers of youth crime, and holding parents and guardians to account when their children's behaviour is connected to a lack of adequate oversight. More specifically, as noted above the Bill's purpose clause identifies two objectives; to recognise the link between children's offending and their parents' and guardians' behaviour, and to make parents and guardians stop, assess their behaviour, and recognise its consequences on their children.

[3] *Hansen v R* [2007] NZSC 7 at [123].

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Is there a rational connection between the limit and the objective?

14. I do not, however, consider that the provision for non-association, curfew, and residence orders is rationally connected to these objectives. The only prerequisites for the Youth Court to make these orders are the fact of parenthood or guardianship, and that the child has been charged with an offence and released on bail pending a hearing before the Youth Court. There is no requirement for the Youth Court to establish a clear connection between the parent's or guardian's behaviour and the child's alleged offending. Furthermore, these settings imply that the child has in fact offended, when the charge will not yet have been heard or proved. Without a clear link to the objective, I do not consider a rational connection is sufficiently established to justify the Bill's limit on freedom of association.

Is the impairment of the right no greater than reasonably necessary, and in due proportion to the importance of the objective?

15. Even if a rational connection were present, I consider the Bill's limits on the freedoms of association and movement are both more than reasonably necessary to achieve its objectives, and disproportionate to those objectives' importance.

16. In practical terms, the minimum impairment inquiry involves consideration of whether the objective might sufficiently be achieved by another method involving less cost to the right in question.[4] One example might be providing for orders directed toward improving the parent's or guardian's parenting skills and behaviour. I note that orders requiring parents or guardians to undergo counselling specific to their needs are already available under s 74 of the principal Act, where a child or young person has been declared in need of care and protection.

17. As already identified, there is no requirement under the Bill to establish any link between the child's alleged behaviour, which may remain unproven, and the behaviour of their parent or guardian. Nor is there a requirement of wrongdoing, intentional or otherwise, on the part of the parent or guardian before an order restricting their rights can be imposed. Without these elements, which are key to the Bill's rationale, the limit cannot be in due proportion to the importance of the objectives. The criminal sanctions for non-compliance with an order underscore this disproportionality.

Conclusion in relation to ss 17 and 18 – freedoms of association and movement

18. I therefore consider the Bill appears to be inconsistent with the freedoms of association and movement in ss 17 and 18 of the Bill of Rights Act.

Inconsistency with s 19 — Freedom from discrimination

19. Section 19(1) of the Bill of Rights Act affirms the right to be free from discrimination on the prohibited grounds in the Human Rights Act 1993 ('the Human Rights Act').

20. Legislation will limit the freedom from discrimination where it draws a distinction on one of the prohibited grounds of discrimination under s 21 of the Human Rights

[4] *Hansen v R,* above at n 3, [126].

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Act, and that distinction involves a material disadvantage to a protected group.[5] A distinction will arise if the legislation treats two comparable groups of people differently on one or more of those prohibited grounds; whether disadvantage arises is a factual determination.[6]

21. Family status, which means, among other things, having the responsibility for part-time care or full-time care of children or other dependants, is a prohibited ground of discrimination under the Human Rights Act.[7] As the Bill renders only parents and guardians liable to restrictive orders, and serious penalties for non-compliance with those orders, it appears to draw a distinction involving disadvantage to a protected class of individuals. In the context of recognising the links between children's alleged offending and others' behaviour, comparable groups of people might include siblings and other relatives, friends, and anyone else close to or influential on the child or young person.

22. I consider the Bill's exclusive target of parents and guardians fails to recognise that other people in a child's life may be just as, if not more, influential on the child's misbehaviour and offending. While I am prepared to recognise some rational connection between the Bill's objectives and the limit on the freedom from discrimination, parents and guardians are deemed wholly responsible, and held exclusively to account, in a way that is disproportionate and goes further than reasonably necessary to achieve the Bill's objectives.

23. I therefore consider the Bill also appears to be inconsistent with the freedom from discrimination in s 19(1) of the Bill of Rights Act.

Conclusion

24. For the above reasons, I have concluded the Bill appears to be inconsistent with ss 17, 18 and 19 of the Bill of Rights Act and the inconsistencies cannot be justified under s 5 of that Act.

Hon David Parker
Attorney-General

19th *March 2018*

[5] 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.

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

[7] Human Rights Act 1993, s 21(1)(l)(i).

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