



LEGISLATION ADVISORY COMMITTEE

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19 February 2013

Scott Simpson MP
Chair
Justice and Electoral Select Committee
Parliament Buildings
P O Box 18 041
WELLINGTON 6160

Dear Mr Simpson

FAMILY COURT PROCEEDINGS REFORM BILL 90/1

Introduction

1. This submission is made by the Legislation Advisory Committee
2. The Legislation Advisory Committee was established to provide advice to the Government on good legislative practice, legislative proposals, and public law issues. It has produced, and updates, Guidelines on the Process and Content of Legislation as appropriate benchmarks for legislation, which have been adopted by Cabinet.
3. The terms of reference of the LAC include:
 - to scrutinise and make submissions to the appropriate body on aspects of Bills introduced into Parliament that affect public law or raise public law issues;
 - to help improve the quality of law-making by attempting to ensure that legislation gives clear effect to government policy, ensuring that legislative proposals conform with the LAC Guidelines, and discouraging the promotion of unnecessary legislation.

Context

4. The Bill is a significant omnibus Bill, proposing changes to 9 family, justice **and** related Acts. Given the scope of the proposed changes, the Bill seeks to give effect to a number of new or amended policies affecting state involvement in and support for resolution of family disputes.
5. It is not the Legislation Advisory Committee's function to evaluate or comment on the policy settings contained in Bills. The Committee's submissions therefore concentrate on potential public law impacts from the Bill, and any technical ways in which the Bill can be improved, including by reference to the LAC Guidelines.

Submissions

Understandable and accessible legislation; clarification of principles governing family dispute resolution

6. A critical concern in the LAC Guidelines, and with all legislation is that it be understandable and accessible.¹ The Guidelines accept that there is no single answer to drafting clear legislation that correctly and clearly conveys legislative intent and purpose. Different audiences and subjects may require different approaches. However, all legislation should be clear and unambiguous, and be sufficiently detailed and precise to be effective.²
7. The Legislation Advisory Committee submits that the current provisions in the Bill concerning the new instrument of **family dispute resolution (FDR)** are neither clear nor precise enough to be effective. The provisions are contained in **clauses 59 and 60** of the Bill.
8. The legislative content regarding FDR is lacking in detail, to the extent that it is unclear what the Bill provides for. The concept and scope of the new mechanism of FDR is not adequately defined. The Bill provides some definitions of new terms relevant to FDR, including a definition of family dispute resolution: see **cl 59**. But these definitions are circular or are oblique; the definition of "family dispute resolution" merely provides that:

"family dispute resolution is family dispute resolution provided by a family dispute resolution provider", for the purpose of assisting the parties to resolve their dispute out of court, and with the welfare and best interests of affected children the first and paramount consideration.
9. It may be intended that further detail will come through regulations. If this is the case, it is still strongly preferable that the Bill establish by statute at least the governing principles and scope of family dispute resolution. Such principles could then appropriately be supplemented by operational and other details, through regulations.

Privilege and FDR

¹ See LAC Guidelines, chapter 2.4.

² LAC Guidelines chapter 2.4.2.

10. Also with respect to FDR, the Legislation Advisory Committee considers that the proposed privilege section (new s 3E of the Family Disputes (Resolution Methods) Act, **cl 60** of the Bill) does not adequately protect confidentiality of the parties. Statements made to an FDR facilitator are protected, but those made to others are not – leaving open the prospect of one party later relying in Court on statements allegedly made by another party, at FDR. Such a provision would be contrary to good dispute resolution practice, and may tend to undermine the without prejudice privilege that informal dispute resolution typically relies on.
11. The Committee submits that the privilege section should be amended to maintain confidentiality of all statements at or emerging from FDR, other than the specific reporting already provided for, through FDR forms.

Constitutional issue: consistency with New Zealand Bill of Rights Act 1990 (NZBORA)

12. The Legislation Advisory Committee submits that there is an NZBORA issue with respect to this Bill. In our view, s 27 of NZBORA, access to justice, is placed in issue by the proposed prohibitions and restrictions in **cl 5** of the Bill (proposed new s7A of the Care of Children Act 2004). The restrictions would affect parties in Care of Children matters, preventing them from being legally represented in Court on most matters prior to defended hearings. The prohibition on representation includes settlement conferences, except where the Court adjourns to allow a party to get legal advice (not representation) on a proposed settlement.
13. In our view, the new restrictions are likely to have potentially material effects on parties' access to justice. We come to this view, acknowledging that a right to choose whether to be legally represented is not automatic in all dispute situations. In our view, the inability to be legally represented, for instance during the conducting of a potentially determinative settlement conference, is quite unusual and has the capacity to disadvantage parties.
14. We therefore submit that the Select Committee proceed on the basis that there is at least a potential inconsistency with s 27 of the NZBORA; and that the Select Committee therefore should determine whether the provisions of proposed s7A, with or without amendment, are or can be justified as reasonable restrictions on rights and freedoms, under s 5 of NZBORA.
15. We acknowledge that the Crown Law Office has provided a different NZBORA analysis in its Report to the Attorney-General.³ The Crown Law report acknowledges that s 27 is in issue, but concludes that s 27 requirements are “substantially met”, by the allowing of representation once a judge determines a matter will go to a hearing, and by allowing an adjournment for legal advice, before settlement conferences conclude an agreement. We doubt that either of these protections will be sufficient to remove the potential damage to rights, in many cases. In our view, given that there are likely to be more than merely technical impacts on an important component of access to

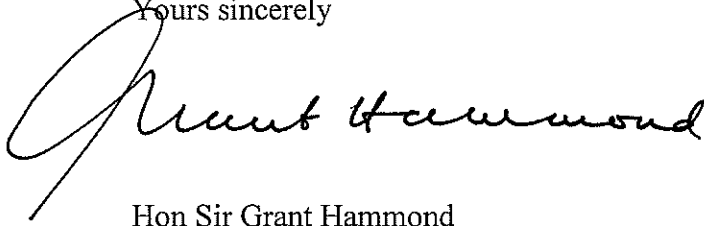
³ BORA Report

justice, the correct and preferable approach will be to deal with what the Bill proposes as a potential inconsistency, and consider whether the diminution to rights is justifiable, in NZBORA section 5 terms.

Conclusion

16. Thank you for taking the time to consider the Committee's submission. The Committee does not wish to be heard on this submission.

Yours sincerely

A handwritten signature in black ink, appearing to read "Grant Hammond". The signature is written in a cursive style with a large initial 'G'.

Hon Sir Grant Hammond
Chair