



Report of the

ATTORNEY-GENERAL

under the New Zealand Bill of Rights Act
1990 on the Eden Park Trust Amendment
Bill

*Presented to the House of Representatives pursuant to
Section 7 of the New Zealand Bill of Rights Act 1990
and Standing Order 261 of the Standing Orders of the
House of Representatives*

1. I have considered the Eden Park Trust Amendment Bill (“the Bill”) for consistency with the New Zealand Bill of Rights Act 1990 (“the Bill of Rights Act”). Clauses 20.8(d), 20.9(d) and 20.9(e) of the trust deed, a Schedule to the Bill, authorise measures which appear to limit the right to be free from discrimination affirmed in s 19(1) of the Bill of Rights Act. These limitations cannot be justified in terms of s 5 of that Act. As required by s 7 of the Bill of Rights Act and Standing Order 261, I draw this to the attention of the House of Representatives.

Purpose of the bill

2. The Bill amends the Eden Park Trust Act 1955. That Act, among other things, constitutes and incorporates the Eden Park Trust Board (the “Trust Board”), declares the trusts upon which property is held by the Trust Board, and sets out the legal framework for the powers, duties, and functions of the Trust Board.
3. The purpose of the Bill is to implement new governance arrangements for Eden Park agreed by the Government, the Trust Board, and the Eden Park Board of Control, the terms of which are set out in the trust deed which will be a Schedule to the Act. The new governance provisions are necessary to facilitate the redevelopment of Eden Park in advance of the 2011 Rugby World Cup.

Inconsistency with s 19(1) of the Bill of Rights Act

4. I have considered whether cl 20.8(d), 20.9(d) and 20.9(e) of the trust deed could give rise to an issue of discrimination on the grounds of disability under s 19 of the Bill of Rights Act. Disability is defined as including physical disability or impairment, physical illness, psychiatric illness, intellectual or psychological disability or impairment, or any other loss or abnormality of psychological, physiological or anatomical structure or function.
5. Clause 20 of the trust deed governs the appointment and removal of trustees. Clause 20.9(d) provides that an individual is incapable of being appointed, reappointed or holding office as a trustee if she or he is mentally disordered within the meaning of the Mental Health (Compulsory Assessment and Treatment) Act 1992 (“MH(CAT)”). Clause 20.9(e) provides that an individual is similarly incapable if she or he is the subject of an order under the Protection of Personal and Property Rights Act 1988 (“PPPRA”). Clause 20.8(d) states that the appointment of a trustee shall be vacated if the trustee is incapable of holding office on the grounds in cl 20.9.
6. For purposes of the MH(CAT), an individual is “mentally disordered” only where she or he is suffering from an abnormal state of mind (whether of a continuous or intermittent nature) of such a degree that it poses a serious danger to the health or safety of that person or of others, or seriously diminishes the capacity of that person to take care of herself or himself.
7. A Court may issue orders under the PPPRA where it determines that an individual lacks capacity, in whole or in part, to manage her or his personal or

property interests, or lacks capacity to communicate her or his wishes with respect to those interests. Relevant factors to the determination include the ability to communicate choices, understand relevant information, appreciate the consequence of a situation and rationally manipulate information. Temporary orders may also be issued where the Court has reasonable grounds to believe an individual may be incompetent.

8. Clauses 20.8(d), 20.9(d) and 20.9(e) use an individual's status as mentally disordered or subject to an order under the PPPRA as a proxy for competence. This results in disadvantage to individuals who by virtue of that status will be precluded from serving as a trustee. Therefore these clauses may engage the right to freedom from discrimination on the ground of disability. I consider these provisions are *prima facie* inconsistent with s 19(1) of the Bill of Rights Act and must therefore be justified under s 5 of that Act.

Justification under s 5 of the Bill of Rights Act

9. Where a Bill is found to be *prima facie* inconsistent with a particular right or freedom, it may nevertheless be found to be consistent with the Bill of Rights Act if the inconsistency is considered to be a reasonable limit which is justifiable under s 5. The inquiry under this section is essentially two-fold: does the provision serve an important and significant objective; and is there a rational and proportionate connection between that objective and the provision?¹
10. It appears the objective of cl 20.8 and 20.9 is to ensure that only individuals who are competent may serve as trustees. This is a significant and important objective under s 5 of the Bill of Rights Act.
11. For the provisions to be justified, however, there must be a rational and proportionate connection between the objective and the means through which it is to be achieved. I have considered whether the proposed measures will meet their goals effectively, and whether there is another way of reasonably achieving these objectives without limiting the right to freedom from discrimination or limiting it to a lesser extent.

Status as "mentally disordered" under MH(CAT) as a proxy to determine competence to serve as a trustee

12. A trustee appointed under the trust deed is empowered to exercise all of the rights, powers and privileges in relation to assets of the trust and required to exercise the care, diligence and skill required of a prudent trustee. This requires the competence to make financial and investment decisions regarding trust assets and to resolve all issues that arise in the course of administering the trust. The question, therefore, is whether an individual is unable to perform these functions merely by virtue of her or his status as mentally disordered under MH(CAT).

¹ In assessing the Bill under s 5 of the Bill of Rights Act I have considered the guidelines provided in *Ministry of Transport (MOT) v Noort* [1992] 3 NZLR 260 and *R v Hansen* [2007] 3 NZLR 1 (SC).

13. The definition of mental disorder under MH(CAT) has both broad and limited components. The definition is broad in the sense that it applies to a wide range of mental abnormalities, whether intermittent or continuous in nature. The definition is limited in that it only applies where a particular abnormality poses a serious danger to the safety of self or others or results in a seriously diminished capacity of self-care.
14. This definition represents an attempt to move away from identity-based criteria where individuals are defined by their identity as mentally ill persons. The goal is to prevent negative labelling and decisions based on irrelevant grounds which are inherent in identity-based criteria. An individual's status as "mentally disordered" under MH(CAT) is not meant to determine her or his capacity by reference to other legislation.
15. In practice, classification as mentally disordered can serve as the basis for a compulsory treatment order under MH(CAT). These orders are tailored to the particular circumstances of the case and the specific danger or diminished capacity identified. Often the determination of danger to oneself or capacity of self-care is independent of an individual's general level of functioning and achievement in the community (for example in cases involving individuals suffering from bulimia or those who fail to comply with directions to take life-supporting medication such as insulin). The MH(CAT) contains a spectrum of orders of varying degrees of severity (including community based treatment orders) and assumes the capacity of individuals subject to that Act to make decisions in a number of areas.
16. It is not appropriate to adopt the test for mentally disordered under MH(CAT) as a proxy for competence to serve as a trustee. The MH(CAT) test relies on statutory criteria promulgated for other purposes, including criterion (such as dangerousness) which are not relevant to the question of whether an individual has capacity to make decisions relating to the administration of a trust. Many individuals who are mentally disordered and even those subject to compulsory treatment orders may nonetheless be competent to fulfil the functions of a trustee. Thus, I consider the use of "mental disorder" as a proxy in cl 20.9(d) (and, by reference, cl 20.8(d)) of the trust deed is neither sufficiently related to the objective of ensuring competence nor adequately tailored to achieve that goal in the least restrictive manner.
17. For the above reasons, I have concluded that cl 20.9(d) and cl 20.8(d) cannot be justified under s 5.

The existence of an order under PPPRA as a proxy to determine competence to serve as a trustee

18. The use of an order under PPPRA as a proxy to determine competence to act as a trustee raises a slightly different issue. Unlike MH(CAT), the PPPRA is targeted toward a determination of an individual's capacity to carry out specific functions with respect to her or his personal and property interests. Such orders are more likely to affect individuals who lack capacity by reason of their disability. The question is whether an order under the PPPRA is sufficiently related to an individual's ability to perform the functions of a trustee that it serves as an appropriate proxy.
19. Orders under PPPRA are based on the objective of least restrictive intervention. For this reason, orders will typically be issued only where an individual has been determined to lack capacity, wholly or partly, to manage her or his affairs and will be tailored to the specific matters over which the individual lacks competency. Most PPPRA orders are issued after notice and a hearing and if practicable, the views of the individual to be subject to the order are ascertained.
20. However, the PPPRA also permits interim or temporary orders on an urgent basis pending the outcome of an application for a long term order. An individual may be unaware of the application or the hearing and has no right to be heard or call or cross-examine witnesses. The test to be applied is also a lower threshold and requires only reasonable grounds to believe the individual may be incompetent. Further, interim or temporary orders are only in place pending the outcome of an application for long term order. If the application for a long term order is denied, the individual will no longer be subject to any order under the PPPRA.
21. Clause 20.9(e) (and, by reference, cl 20.8(d)) of the trust deed disqualifies an individual from serving as a trustee if she or he is subject to *any* order under the PPPRA. These clauses do not distinguish between temporary and long term orders or provide for the temporary disqualification of a trustee pending the outcome of an application for a long term order.
22. There is a sufficient link between competence to act as a trustee and the ability to communicate choices, understand relevant information, appreciate a situation and rationally manipulate information. As such, the use of long term personal and property orders under the PPPRA as a proxy for capacity may be a justified limitation on the right to be free from discrimination.
23. However, I consider the use of interim or temporary orders as a proxy for competence is not sufficiently related to competence to justify the limitation on the right. A temporary or interim order is not subject to the same procedural safeguards as a long term order and does not require a determination that an individual lacks capacity over her or his affairs. Rather, these orders are provisional measures put in place pending a hearing and determination of capacity. An interim or temporary order is no guarantee that a long term order may follow.

24. Clause 20.9(e) (and, by reference, cl 20.8(d)) is too broad and it may disqualify individuals who are nonetheless competent. As such, I have concluded that cl 20.9(e) (and, by reference, cl 20.8(d)) cannot be justified under s 5 of the Bill of Rights Act.

United Nations Convention on the Rights of Persons with Disabilities

25. The Disability (United Nations Convention on the Rights of Persons with Disabilities) Act 2008 (the “Disability Act”) has amended a number of Acts to remove an individual’s status as “mentally disordered” under MH(CAT) as a proxy for capacity. It has inserted a test which relies on the issuance of one or more orders under the PPPRA. The Disability Act does not, however, use the issuance of *any* order under the PPPRA as a permanent disqualification. Where an individual is removed from a position on the basis of a temporary order, the removal is temporary pending the outcome of an application for a long term order. One of the primary purposes of the Disability Act is to ensure that New Zealand legislation is consistent with its international obligations under the United Nations Convention on the Rights of Persons with Disabilities and to enable ratification of that Convention.

Conclusion

26. For these reasons I have concluded that the Bill appears to be inconsistent with s 19(1) of the Bill of Rights Act and the inconsistency cannot be justified under s 5 of that Act.



Hon Christopher Finlayson
Attorney-General