

Annexure 3: Examples of legislation where the Bill of Rights advice failed to identify potential inconsistency

Firearms Prohibition Orders Legislation Act 2022

In the whole, the Law Society disagreed with the assumptions and conclusions reached in the Bill of Rights report issued by the Attorney General. In particular, the Act imposes severe limitations on rights protected by the Bill of Rights, without any connection to the policy objectives of the Act, and without demonstrable justification.

The Attorney-General's report failed to consider the likelihood of a disproportionate impact on Māori. To take one particularly concerning example, the prohibition on "residing" at any premises where firearms are stored has the capacity to materially affect the ability of Māori to visit whānau, attend events at marae, or to attend tangi without risking (potentially unknowingly) a breach of an FPO. Māori are also more likely to live rurally and rely on firearms for the provision of food.

This potentially disproportionate impact was only acknowledged in passing in the Departmental Disclosure Statement to the Bill, and there was no information on the outcomes of engagement with Māori. The actual effects do not appear to have been outlined or assessed, and are likely to be significant. The Bill of Rights consistency advice did not consider section 19(1) of the Bill of Rights, freedom from discrimination.

Terrorism Suppression Control Orders Act 2019

Crown Law's advice to the Attorney-General confirming the Bill's compliance with the Bill of Rights can be described as cursory at best. It concluded that control orders are primarily civil in nature, as they are applied to individuals without a conviction, sentence, or even proof that certain conduct has occurred. Given this, the advice expressed no concern that criminal process rights will not apply. That is – the advice relied on human rights breaches (the application of control orders irrespective of proven conduct), to establish that the control orders are civil, so as to avoid criminal procedure and due process rights – with minimal substantive consideration of the implications and justification for this. The advice did not address the adequacy of protections against reliance on non-disclosable information, applications made without notice, and the implications of not including the orders within the criminal justice system (including accessibility of legal advice).

Corrections Amendment Bill (not yet enacted)

This Bill contains a provision that limits the use of non-lethal weapons against prisoners who passively resist a lawful order to situations where there are reasonable grounds for believing there is an imminent threat of injury or harm to the prisoner or another person. It contains no requirement that non-lethal weapons only be used when other potential responses that do not involve the use of weapons would be insufficient.

The courts and Government have recognised that, in some circumstances, the use of nonlethal weapons can raise issues of inconsistency with the right for people who have been detained to be treated with humanity and dignity, as protected by s 23(5) of the Bill of Rights. This was not addressed in the Ministry of Justice's advice to the Attorney-General on the Bill's consistency with the Bill of Rights.

Electoral (Lowering Voting Age for Local Elections and Polls) Legislation Bill (not yet enacted)

This Bill was introduced by the Government in response to the Supreme Court’s declaration of inconsistency, arising from *Make it 16 Inc v Attorney-General*.¹ It will amend the Local Electoral Act (and others) to reduce the voting age in local elections and polls from 18 to 16 years of age. It disqualifies youth offenders serving sentences of imprisonment of three years or more from registering to vote in those elections or polls.

The Bill of Rights consistency advice in respect of this disqualification is inadequate. Somewhat conveniently, the Bill of Rights protects electoral rights only for general elections. The disqualification of voters in local elections therefore does not engage section 12 of the Bill of Rights. However, the advice does not consider the particular characteristics of youth, and what this means for the disqualification’s impact on other rights, such as the right not to be subjected to disproportionately severe punishment.

A proportionate punishment on an adult offender might not be proportionate when applied to youth. The assumption underpinning the current prisoner voting ban is that a three-year or more sentence of imprisonment is a reasonable balance to strike between loss of rights for (serious) crime and the importance of the right to vote. That logic is justified, implicitly, on the fairness of the punishment as imposed on adult offenders. Further, decisions about young people must reflect their sense of time — three years is much longer proportionately for a youth offender than for an adult offender. It is also their first election they will be prohibited from voting in, which has a much greater “milestone effect” than for adult offenders.

No analysis of this nature is evident in the advice. While it might still have concluded there was no inconsistency with a protected right, more robust consideration is needed.

¹ [2022] NZSC 134.