



Youth Parliament 2010

Adult Rights and Responsibilities (Age Majority) Bill 2010

**Background paper by the Human Rights Team,
Ministry of Justice**

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Background paper on the Youth Parliament Adult Rights and Responsibilities (Age of Majority) Bill 2010

Introduction

1. The Ministry of Justice would like to submit a background paper about the amendments proposed in the Adult and Responsibilities Bill (Age of Majority) Bill 2010 for the Youth Parliament. The Bill would amend the Age Majority Act 1970 to decrease the age at which, in the absence of specific legislation, a person attains his/her legal majority, from 20 to 18. The Bill would also amend the Human Rights Act 1993 to remove the age specificity of 16 years of age or older attached to the prohibition against age-based discrimination.
2. The Ministry would like to comment on three points:
 - how discrimination law operates in New Zealand;
 - age as a prohibited ground for discrimination and;
 - the age limit in the Age Majority Act 1970.

Discrimination law in New Zealand

What is discrimination?

3. Discrimination arises where individuals or groups of individuals are subject to different forms of treatment than others in comparable circumstances based on irrelevant distinctions and this treatment results in a disadvantage to the person or the group. On the other hand, when a distinction is based on an individual's merits and capabilities, the different treatment is unlikely to be discriminatory.

What are the prohibited grounds for discrimination?

4. Section 19(1) of the New Zealand Bill of Rights Act 1990 ('Bill of Rights Act') provides that "everyone has the right to freedom from discrimination on the grounds of discrimination in the Human Rights Act 1993". Section 21(1) of Human Rights Act 1993 ('HRA') prohibits discrimination based on: sex, marital status, religious belief, colour, race, ethnic/national origin, disability, age, political opinion, employment status, family status or sexual orientation.

Who is subject to the Bill of Rights Act and HRA?

5. The Bill of Rights Act is designed to protect individuals and legal bodies (such as corporations) from the actions of the state. Section 3 states that the Bill of Rights Act applies to:
 - (a) any acts done by the legislative, executive and judicial branches of government or;
 - (b) a person or body performing a public function, power or duty conferred or imposed by or pursuant to law.

6. What is important is the nature of the public function performed by the agency not the form of the agency, for example the Gambling Commission is a statutory body that might be considered to be an agency subject to the Bill of Rights Act.
7. The HRA is complementary to the Bill of Rights Act and addresses discrimination in areas that may not be covered by the Bill of Rights Act. These areas include, but are not limited to, discrimination:
 - (a) in employment matters;
 - (b) by industrial and professional associations, qualifying bodies, and vocational training bodies;
 - (c) in relation to public access to places, vehicles, and facilities; or access to educational establishments; and
 - (d) in the provision of good and services and the provision of land, housing and other accommodation.

The test for discrimination

8. In order to know whether a particular policy infringes the right to freedom from discrimination, two questions need to be asked:
 - (a) Does the policy distinguish between persons or groups based on one or more of the prohibited grounds of discrimination?
 - (b) Does the distinction result in disadvantage to the person or the group? Section 19 requires a comparison between groups or individuals who benefit from the policy or practice and those who do not benefit. These groups must be in a comparable or similar position to each other.
9. If the policy does actually create a disadvantageous distinction to a comparable group it may still be consistent with the Bill of Rights if it can be justified in accordance with section 5.

Justified limitations to the right to freedom from discrimination

10. Section 5 states that the rights and freedoms contained in the Bill of Rights Act can only be subject to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society. Whether a limit is reasonable depends on a number of factors including: the significance of the proposal's objective, the interests addressed by the particular right and the proposal's effectiveness in achieving its objective. In essence the two fundamental questions are:
 - (a) Does the provision or proposal serve an important and significant objective? (if so what is it and why is it significant); and
 - (b) Is there a rational and proportionate connection between that objective and the provision?
11. An example of this is in the Civil Union Act 2004. The Civil Union Act provides that persons aged 16 or 17 years must obtain their guardian's consent before they may enter a civil union. Where consent has been refused, an application may be made to a Family Court Judge to obtain consent. This requirement would appear to be initially inconsistent with the freedom from discrimination because it distinguishes comparable groups based on a prohibited ground for discrimination (age) and creates a disadvantage for one group. However, it can be justified in

terms of section 5 of the Bill of Rights Act since providing certain limits on persons under 18 years from entering into a relationship as significant as a civil union is considered an important and significant objective. The consent requirement protects those 16 or 17 year olds who may not have sufficient maturity and capacity to understand the significance of entering into a civil union and the effects of that arrangement; this requirement is rationally linked with the objective. Further, the Civil Union Act provides a process whereby 16 or 17 year olds denied consent by their guardian can apply to a Family Court Judge to determine whether they have sufficient maturity to enter into a civil union. Accordingly, the consent requirement for those aged 16 or 17 years is considered to be a reasonable balance between the rights of those persons to be free from age discrimination and protecting them from the various effects of entering into a legal arrangement that is similar to marriage.

Age as a prohibited ground for discrimination in New Zealand law

Legislative age-based distinctions

12. Legislative age-based distinctions are used to empower and protect young people. An age threshold is required to capture the transition in law where a person is considered most likely to be able to properly make decisions on specific situations and rights.

Age as a prohibited ground of discrimination

13. According to Section 21(1)(i) of the HRA age is defined as any age 16 years and over. This means that it is not discrimination for the purposes of the Bill of Rights Act and HRA to make a distinction between persons 16 year olds and older and those under 16 years of age. Additionally, it is not discrimination to make distinctions between different age groups of young persons under 16 years old.

14. The purpose of the age cut-off of 16 years old is to recognise that for the vast majority of young people, 16 is the age that they are presumed to have a level of maturity to make important decisions for themselves. Age is an indicator, a proxy, for maturity. It would be unworkable¹ to make individualised maturity assessments for every young person approaching the age of 16 (and in many cases over the age of 16) to determine if any distinctions based on an age under the age of 16 is justified.

15. Maturity is relevant to the idea of discrimination. When the government makes a distinction between young people solely on their age; the government is essentially saying it considers that persons below the specified age lack the maturity to access a particular benefit or participate in a particular activity.

16. Age discrimination is less offensive than other forms of discrimination. Age is a dynamic process. While there are certain characteristics such as sex, race, religion that people cannot easily change, the characteristics of age is something that people transition through.² Unlike race, religion, or gender, age is not strongly associated with discrimination and arbitrary denial of privilege. No one would ever suggest that people of a certain religion should not drive. It is generally agreed, however, young people of a certain age should not drive on the motorway. It is unlikely that the distinction between young people over and under 16 would be considered an affront to human dignity.

17. Young people under the age of 16 possess all other civil and political rights and freedoms provided for in the Bill of Rights Act and common law. They can not be discriminated against on

¹ *A.C. et al v Director of Child and Family Services* 2009 SCC 30.

² Andrew Butler and Petra Butler *The New Zealand Bill of Rights Act- a commentary* (Lexis Nexis, Wellington, 2005) 488.

the basis of other prohibited grounds of discrimination. For example, a 14 year old can not be denied access to public education or any other public service because of his/her religion or ethnic origin. Young people of any age are free to express themselves and exercise their right to peaceful assembly. Likewise, they are recognised as a person at law and before the courts.

18. While all age-based legislative distinctions have an element of arbitrariness, this does not invalidate the distinctions provided that the age chosen is reasonably related to the legislative goal. In addition, the purpose of the different treatment of young people under 16 years old is ameliorative. That is, the different treatment of people under 16 is to protect the interests of young people as a vulnerable group. For example the Children, Young Persons, and Their Families Act 1989 requires children to be held accountable for certain criminal acts but in the case of a child over ten years and under fourteen years or a young offender between 14 and 16 years of age the welfare and interests of the child or young person shall be the first and paramount consideration during the criminal proceedings.³ Such treatment is not discriminatory within the meaning of the Bill of Rights Act and HRA.

16 as a proxy for maturity

19. The HRA uses the age of 16 as a proxy for a young person's maturity as well as being an indicator of the relationship with his or her guardian(s). The developing nature of a young person's intellectual and emotional capabilities is consistent with the notion that the role of a guardian also changes as the child approaches an age where he or she may be capable of making important decisions, such as medical and residence decisions, for himself or herself.⁴ It is a general proposition that a young person over the age of 16 years is to be presumed, in the absence of evidence to the contrary, to have acquired a sufficient level of maturity to make his or her decisions. Conversely, young people under 16 years old will be presumed to lack this capacity, unless shown otherwise.⁵
20. Below the age of 16, young people are physically and financially dependent on parents or guardians who, in turn, are subject to specific obligations. Parents and guardians have the duty to support them financially contributing to their intellectual, emotional, physical, social and cultural development. Parents and guardians also have the duty to determine for or with them questions about important matters affecting them.⁶ Likewise, young people below 16 years old are required to be enrolled at a registered school at all times during the period beginning on their sixth birthday.⁷

Age of consent to medical treatment

21. The issue of age as a proxy for maturity is particularly difficult for medical decisions. In a very general sense, a young person under the age of 16 may consent to medical treatment where the young person is capable of understanding what is proposed and expressing his or her own wishes.⁸ Young people who meet this test are often referred to as 'mature minors'. It is recognised that mature minors are entitled to a degree of decision-making autonomy that is reflective of their evolving intelligence and understanding.⁹ The decisions of a mature minor

³ Children, Young Persons, and Their Families Act 1989 s 14 (e).

⁴ Under the Care of Children Act 2004 guardianship ends at the age of 18. However s 50 states that a parenting order determining the person or persons who have the role of providing day-to-day care for a child of or over the age of 16 years must not be made unless there are special circumstances. Likewise, s 36 states that consent, or refusal to consent, to any medical treatment (including blood transfusion) given by a child of or over the age of 16 years, has effect as if the child were of full age.

⁵ *Hawthorne v Cox* [2008] 1 NZLR 409.

⁶ Care of Childre Act 2004 s 16(1)(a)(b).

⁷ Education Act 1989 s 2(1).

⁸ *Gillick v West Norfolk and Wisbech Area Health Authority* [1986] AC 112; [1985] 3 All ER 402 (HL).

⁹ *A.C. et al v Director of Child and Family Services* 2009 SCC 30.

can, however, be overridden by the courts where the minor's decision is to refuse life-saving or life-prolonging treatment.¹⁰

Other age-limits in specific legislation

22. Where the age of 16 is not appropriate for the regulated conduct or treatment of young people, another age is used. An example of this is the Criminal Justice Act 1985 which provides that no person under the age of 15 years may be remanded to a prison pending the hearing or trial of any charge or pending sentence. The Trade Unions Act 1908 allows young people over 14 years of age to be a member of a trade union. Young people of any age can, with approval of the Family Court, make a will. If a minor applies to the Family Court, then the Presiding Judge must be satisfied that the minor understands the effect of making, changing, revoking, or reviving a will. Also, it is not discrimination on the basis of sex where 12 year olds and older are prevented from participating in an organised sport for a different sex where strength and stamina are relevant.¹¹

Age Majority Act 1970

23. The Age of Majority Act 1970 specifies the default age for assuming adult rights and responsibilities, where not otherwise specified in legislation, at the age of 20. The age limit of 20 assumes that once a young person has reached that age they are fully mature and may make decisions for themselves and others.

24. Once a young person has reached the age of 20, the young person is trusted with additional rights and responsibilities. There are numerous examples where a person must be of 'full age' to do certain things. A person must be 20 years of age to hold an on-licence to sell and supply liquor at licensed premises.¹² Unless there are special factors that would justify otherwise, a person under 20 years old may not be a private investigator or security guard.¹³ No one under the age of 20 years old may be a welfare guardian for a person who lacks the capacity to make or to communicate decisions relating to particular aspects of the personal care and welfare of the person lacking capacity.¹⁴ A welfare guardian may make decisions (with some important limitations) for another person who lacks the capacity to make those decisions themselves.

25. The age of 20 is an appropriate back-stop for concerns about maturity. Where the young person may be required to make decisions that may seriously affect others, it is appropriate to require an adult level of maturity. The justification set out above for the age of 16 for discrimination applies equally here. The age of 20 is a proxy for adulthood. To offer an individualised test for each young person for each instance of an age limit would be administratively unworkable and exceedingly expensive. Instead, as Parliament develops laws that require an age limit, consideration is given to what an appropriate age limit would be.

26. In some cases, such as for private investigators and security guards, the under 20 year old may have the opportunity to prove that they have the maturity to undertake the licenced activity. In other cases, such as being a welfare guardian, the responsibility of making decisions, such as medical care, for a person who is not your child or spouse is so important that there is an absolute requirement to be fully mature.

27. Age limits do, however, change over time. Some go up, some go down. As stated above, young people 16 to 19 years old who are treated as minors may claim that they are unjustifiably discriminated against due to their age. Nineteen year-olds may challenge the age limits imposed on them. Our Parliamentary process also gives young people an opportunity to

¹⁰ *Minister for Health v A.S.* [2004] WASC 286, 33 Fam. L.R. 223.

¹¹ Human Rights Act 1993 s 49.

¹² Sale of Liquor Act 1989 s 8(1)(a).

¹³ Private Investigators and Security Guards Act 1974 s 17(1)(a).

¹⁴ Protection of Personal and Property Rights Act 1988 s 12(4).

influence age limits through being able to contact parliamentarians, petition Parliament and participate in the Select Committee process.