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Report of the

# ATTORNEY-GENERAL

under the New Zealand Bill of Rights Act  
1990 on the Social Security (Residence of  
Spouses) Amendment Bill 2001

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*Presented to the House of Representatives pursuant  
to Section 7 of the New Zealand Bill of Rights Act  
1990 and Standing Order 260 (2) of the Standing  
Orders of the House of Representatives*

I have considered the Social Security (Residence of Spouses) Amendment Bill 2001 (the "Bill") for consistency with the New Zealand Bill of Rights Act 1990 (the "Bill of Rights Act"). I have concluded that the effect of the Bill in treating same-sex couples differently from opposite-sex couples appears to be inconsistent with section 19(1) of the Bill of Rights Act, and does not appear to be justified in terms of section 5 of the Bill of Rights Act. As required by section 7 of the Bill of Rights Act (and Standing Order 260), I draw this to the attention of the House of Representatives.

### **The Bill**

The Bill amends the Social Security Act 1964 to alter the benefits payable to a New Zealand citizen or permanent resident who is married to, or in a relationship in the nature of marriage with, a person resident in New Zealand on the basis of certain kinds of temporary permits. The effect of the amendment is that permanent residents in such relationships will not be entitled to receive benefits at the married rate but instead will be paid at the unmarried rate. The Bill also re-enacts similar provisions already in place in respect of permanent residents or citizens married to or living with persons who are unlawfully in New Zealand. The Bill provides for certain exemptions so that if, for example, the temporarily resident partner of the permanent resident is awaiting the outcome of his or her application for refugee status, the permanent resident may be paid at the married rate.

The Bill's objectives include that of discouraging unlawful immigration and overstaying of temporary permits, as well as that of minimising state resources being used to support people temporarily in New Zealand who should be supporting themselves. The Bill also reflects the objective of ensuring that people in a relationship do not obtain state assistance when, together, they have enough to support themselves.

### **The Bill of Rights Act issue**

The Bill gives rise to discrimination on the ground of sexual orientation. The discrimination on the ground of sexual orientation arises because the provisions set out in the Bill apply only to couples treated as "married" under the Social Security Act 1964. Section 63 of the Social Security Act 1964 defines "married" in terms of a person who is legally married or who is living with an opposite-sex partner in a relationship in the nature of marriage.

The exclusion of same-sex couples leads to two areas of different treatment as between same-sex and opposite-sex couples. First, assessment of the permanent resident's eligibility for a benefit, and the rate of benefit to be paid, is carried out on the basis of both partners' income and assets. As a permanent resident living in a same-sex relationship is not "married", income and assets owned by his or her partner are not taken into account in assessing eligibility for benefit purposes. This may in some circumstances financially benefit the permanent resident in a same-sex relationship in comparison to opposite-sex couples in the same circumstances.

Second, the exceptions from the rules in the Bill relating to people in specified circumstances (for example, people applying for refugee status) will not result in the permanent resident in a same-sex relationship being paid at the "married rate". Permanent residents in such situations will continue to be paid at the single rate. From this perspective, same-sex couples would appear to be disadvantaged in comparison with opposite-sex couples.

The overall effect of the Bill is that it confers both a financial advantage and a financial disadvantage on same-sex couples, depending on the circumstances. In addition, the Bill's lack of recognition of same-sex relationships constitutes a form of disadvantage for persons in such relationships. In considering this issue I have been influenced by recent international

movements in the law relating to sexual orientation discrimination, such as the decision of the Supreme Court of Canada in *M v H* [1999] 2 SCR 3. I have concluded that the Bill gives rise to a *prima facie* issue of discrimination on the ground of sexual orientation by not recognising same-sex relationships.

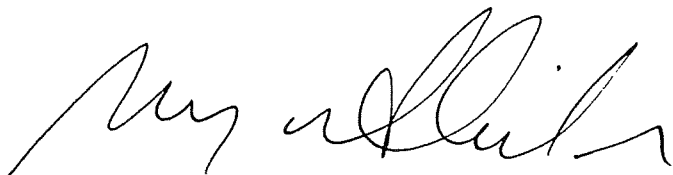
The differences which result from the Bill's treatment of same-sex couples are not relevant to the objectives of the Bill and are not rationally or proportionately connected to them. There is, therefore, no basis for justifying the Bill's treatment of same-sex couples under section 5 of the Bill of Rights Act.

#### **Further work on the treatment of same-sex couples in the social assistance context**

The Government recognises that, in the delivery of social assistance, the different treatment of same-sex and opposite sex couples is a significant and outstanding issue. The Government has therefore decided to examine how to address the existing inconsistencies in a comprehensive manner so that all possible implications of any changes are taken into account. Cabinet is expected to consider options for reform in this area in the near future with a view to rationalising the treatment of same-sex couples across a range of statutes and policy.

#### **Conclusion**

I conclude that the Social Security (Residence of Spouses) Amendment Bill 2001, in discriminating on the grounds of sexual orientation, appears to be inconsistent with section 19(1) of the New Zealand Bill of Rights Act 1990, and does not appear to be justified in terms of section 5 of the Bill of Rights Act. I note that general issues relating to the legal rights and entitlements of same-sex couples are under review, but that proposals for possible future reform do not justify the inconsistencies in this Bill.



Hon Margaret Wilson

Attorney-General