Report of the

ATTORNEY-GENERAL

under the New Zealand Bill of Rights Act 1990 on the Taxation (Annual Rates, GST, Trans-Tasman Imputation and Miscellaneous Provisions) Bill 2003

Presented to the House of Representatives pursuant to Section 7 of the New Zealand Bill of Rights Act 1990 and Standing Order 260 (as varied by the House of Representatives on 5 September 2002) of the Standing Orders of the House of Representatives

I have considered the Taxation (Annual Rates, GST, Trans-Tasman Imputation and Miscellaneous Provisions) Bill 2003 (the "Bill") for consistency with the New Zealand Bill of Rights Act 1990 (the "Bill of Rights Act"). I have concluded that the Bill contains provisions that appear to be inconsistent with the right to freedom from discrimination contained in section 19(1) of the Bill of Rights Act. As required by section 7 of the Bill of Rights Act and Standing Order 260 (as varied by the House on 5 September 2002) I draw this to the attention of the House of Representatives.

The Bill

The Bill seeks to introduce a number of significant changes to current taxation laws, including a number of amendments to the Income Tax Act 1994. One of the proposed amendments to the Income Tax Act appears to give rise to an issue of *prima facie* discrimination on the grounds of marital status and sexual orientation.

In the report on the Income Tax Bill 2002, the attention of the House was drawn to a number of clauses that gave rise to discrimination on the grounds of marital status and sexual orientation. That report recognised that, in general, the income tax regime in New Zealand treats married couples, opposite-sex de facto couples and same-sex couples differently from one another for the purposes of determining tax liability. This Bill again raises these discrimination issues.

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

Clause 14 of the Bill

Clause 14 seeks to insert into the Income Tax Act a new subpart ES that provides for the deferral of tax deductions in respect of certain financial arrangements. The proposed new subpart ES distinguishes between married persons and de facto partners, and appears to place both opposite-sex and same-sex de facto partners at a financial advantage because they may be eligible for tax deductions in respect of financial arrangements. Married persons investing in similar financial arrangements may not be eligible for such deductions and will, therefore, be at a financial disadvantage. The new subpart may also be seen as socially disadvantaging de facto partners as their relationships are not given the same degree of recognition as married relationships.

On this basis, I consider that the proposed new subpart ES gives rise to issues of direct discrimination on the ground of marital status, and indirect discrimination on the ground of sexual orientation.

I understand that the proposed new subpart ES treats taxpayers in a marital relationship differently from other taxpayers in order to recognise the financial interdependence between married persons due to the nature of their relationship and prevent married persons from using their relationship to gain an inequitable tax advantage. The underlying assumption of this differential treatment is that taxpayers

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who have a close relationship with each other are more likely to enter into transactions on a non-arm's length basis and thereby avoid tax liabilities.

In my view, the above objectives are important and significant. Accordingly, the proposed new subpart ES meets the first limb in the inquiry under section 5 of the Bill of Rights Act.

However, the interdependence (including financial) of de facto relationships is clearly recognised for the purposes of many other areas of social policy, for example social security and ACC. People involved in de facto relationships are, in general, likely to have a similar degree of financial interdependence as married persons. It appears anomalous that taxpayers in de facto relationships are able to gain a tax advantage where a married person is unable to do so when both groups of taxpayers are in substantially the same position.

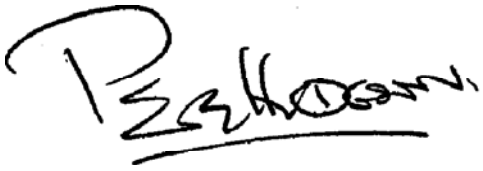
I have therefore concluded that the differential treatment of married persons and de facto partners in the proposed new subpart ES is not rationally and proportionately connected to the objectives identified and cannot be justified in terms of section 5 of the Bill of Rights Act.

Further work on the treatment of opposite-sex and same-sex couples in the taxation context

I understand that the different treatment of same-sex and opposite-sex de facto couples is a significant and outstanding issue across all legislation and is currently the subject of substantial policy work by the Government. The changes in the income tax regime to recognise de facto relationships would in some instances confer rights and in others impose obligations or restrictions. I understand that the Government recognises that it is important to implement reform in a comprehensive manner so that all possible implications of any changes are taken into account. However, proposals for future reform cannot justify the particular inconsistencies of this Bill.

Conclusion

I have concluded that clause 14 of the Bill appears to be inconsistent with the right to freedom from discrimination as affirmed by section 19(1) of the Bill of Rights Act. Furthermore, I do not consider that this clause can be considered a justified limitation in terms of section 5 of the Bill of Rights Act.



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