

16 JULY 2010

ATTORNEY-GENERAL

**LEGAL ADVICE**  
**CONSISTENCY WITH THE NEW ZEALAND BILL OF RIGHTS ACT 1990:**  
**TAXATION (INCOME-SHARING TAX CREDIT) BILL**

1. We have considered whether the Taxation (Income-sharing Tax Credit) Bill ("the Bill") (IRD 14584/2.1) is consistent with the New Zealand Bill of Rights Act 1990 ("Bill of Rights Act"). We understand that the Bill is to be considered by the Cabinet Legislation Committee on 22 July 2010.
2. The Bill amends the Income Tax Act 2007 and Tax Administration Act 1994 to create an Income-sharing Tax Credit (ISTC). The ISTC would create a financial benefit through an annual tax credit available to couples with dependent children. However, the ISTC excludes sole parents from eligibility.
3. We 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. We have consulted with the Crown Law Office and it agrees with that conclusion. Accordingly, we recommend that you bring the Bill to the attention of the House of Representatives pursuant to s 7 of the Bill of Rights Act and Standing Order 261. We have attached a draft report under s 7 for your consideration.

**THE INCOME-SHARING TAX CREDIT PROPOSED BY THE BILL**

4. The stated intention of the Bill, as set out in the Explanatory Note, is to give couples greater freedom to work fewer hours or more flexible hours in order to care for dependent children. Under new section MG 2, a person qualifies for the ISTC if:
  - (a) the person is in a relationship with another person (the "family partner") as spouses, civil union partners, or de facto partners; and
  - (b) both the person and their family partner are, for the whole of the tax year, resident in New Zealand; and
  - (c) during the tax year, the person or their family partner is the principal caregiver for a dependent child.<sup>1</sup>
5. A parent who is separated, has an eligible shared care arrangement with the former partner and has a new family partner would also be eligible for the ISTC.

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<sup>1</sup> A child ceases to be a dependent child when they reach the age of 18, or before that age if they marry, enter a de facto or civil union relationship, or become financially independent. In the year in which a child turns 18, they continue to be treated as a dependent child if they are attending school or a tertiary educational establishment and remain financially dependent.

A sole parent is not eligible for the ISTC because the sole parent has no eligible person with which to notionally split their income. The caring arrangements a sole parent may have with former partners, family members or friends will not meet the eligibility requirements of the ISTC.

6. The amount of the ISTC that can be claimed is the difference between the total tax payable by the couple and the tax they would pay if each partner notionally received half of the couple's combined income. This is known as "income splitting". Generally, no taxpayer can escape the assessment of income tax on income resulting from their personal activities.<sup>2</sup> The ISTC would explicitly allow income splitting for couples with children. To maximise the ISTC, there must be a significant disparity in the couple's respective incomes. The amount of the ISTC increases as the disparity between income increases.
7. For example, where one family partner makes \$140,000 a year and the other has no taxable income the couple's total tax liability will be \$37,120.<sup>3</sup> Under the ISTC, the income from that family's sole income earner would be notionally split between the couple and their total tax liability would be \$28,040, with a savings of \$9,080. The savings results because the second \$70,000 of the earner's income escapes taxation at 33 cents on the dollar and is instead taxed at lower marginal rates. For a couple where one person earns \$110,000 and the other \$30,000 the ISTC will be \$3,450. On the other hand, a couple with both parents working full-time and making \$70,000 each will not receive the ISTC. Assuming that the relative disparity in a couple's respective incomes remains the same, the amount of the ISTC also diminishes as a family's income falls.
8. This is "notional" income splitting because the lesser earning parent has no entitlement to the income for which they are taxed. The attribution of income to the lesser earning parent is solely for the purpose of the ISTC.

### **CONSISTENCY WITH SECTION 19(1) OF THE BILL OF RIGHTS ACT**

9. Section 19(1) of the Bill of Rights Act affirms that everyone has the right to freedom from discrimination on the grounds of discrimination in the Human Rights Act 1993. The grounds of discrimination under the Human Rights Act include sex and the marital status of being single.<sup>4</sup>
10. Drawing on the New Zealand case law on discrimination, we consider that the key questions in assessing whether there is a limit on the right to freedom from discrimination are:<sup>5</sup>

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<sup>2</sup> *Spratt v CIR* [1964] NZLR 272, 277 per Henry J; approved *Hadlee v CIR* [1991] 3 NZLR 517; (1991) 13 NZTC 8,116; (1991) 15 TRNZ 721; affirmed *Hadlee v CIR* [1993] 2 NZLR 385; [1993] AC 524; 25 ATR 206 (NZPCC).

<sup>3</sup> The example of \$140,000 family income is used because the explanatory note cites \$9,080 as the maximum amount available under the ISTC. This amount of ISTC is only available for high income earners. The figures are based on the personal tax rates as of 1 October 2010.

<sup>4</sup> *Human Rights Act 1993* ss 21(1)(a) and (b). Marital status is defined as being: (i) single; or (ii) married, in a civil union, or in a de facto relationship; or (iii) the surviving spouse of a marriage or the surviving partner of a civil union or de facto relationship; or (iv) separated from a spouse or civil union partner; or (v) a party to a marriage or civil union that is now dissolved, or to a de facto relationship that is now ended.

<sup>5</sup> See, for example, *Atkinson v Minister of Health and others* [2010] NZHRRT 1; *McAlister v Air New Zealand* [2009] NZSC 78; and *Child Poverty Action Group v Attorney-General* [2008] NZHRRT 31.

- (a) does the legislation draw a distinction based on one of the prohibited grounds of discrimination; and if so
  - (b) does the distinction involve disadvantage to one or more classes of individuals?
11. In determining if a distinction arises, consideration is given to whether the legislation proposes that two comparable groups of people be treated differently on one or more of the prohibited grounds of discrimination.<sup>6</sup> The distinction analysis takes a purposive and untechnical approach to avoid artificially ruling out discrimination.<sup>7</sup> Once a distinction on prohibited grounds is identified, the question of whether disadvantage arises is a factual determination.<sup>8</sup>

### **Does the ISTC discriminate on the basis of marital status?**

12. The ISTC takes a narrow view of family, parenting, and family care arrangements for children because there must be a “couple” with dependent children. The ISTC gives rise to a distinction on the ground of marital status because it explicitly distinguishes between couples with children and sole parents. For the purposes of this report, sole parents include caregivers without a partner, widows and widowers with children but without a partner, separated parents who have not repartnered and sole parents who share childcare responsibilities with another person.
13. The ISTC results in a comparative financial disadvantage for sole parents of up to \$9,080. In effect, the ISTC also stigmatises sole parents as less worthy of tax relief than couples and perpetuates the stereotype that to be a “real” family there must be two parents in a relationship to raise children.
14. Limiting the ISTC to couples means that there are many types of families that would suffer a disadvantage. For example:

Family #1: A couple has two children. They receive the ISTC. The father is then widowed and the family’s taxes rise by the amount of the ISTC they were receiving but are no longer eligible to receive as the father is now a sole parent. The children’s grandmother quits her job to live with them and help look after the children but the father cannot split his income with the grandmother because she is not a family partner under the Bill.

Family #2: A couple is in a civil union with children. They separate and agree to a shared care arrangement and are raising the children together. The mother works fewer hours to care for the children and is fully supported by the father.

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<sup>6</sup> *Quilter v Attorney-General* [1998] 1 NZLR 523 (CA) at [573] per Tipping J (dissenting) relied on in *Atkinson v Minister of Health and others* [2010] NZHRRT 1 at [199]; *McAlister v Air New Zealand* [2009] NZSC 78 at [34] per Elias CJ, Blanchard and Wilson JJ and at [51] per Tipping J; and *Child Poverty Action Group v Attorney-General* [2008] NZHRRT 31 at [137].

<sup>7</sup> *Atkinson v Minister of Health and others* [2010] NZHRRT 1 at [211]-[212]; *McAlister v Air New Zealand* [2009] NZSC 78 at [51] per Tipping J; and *Child Poverty Action Group v Attorney-General* [2008] NZHRRT 31 at [137].

<sup>8</sup> See for example *Child Poverty Action Group v Attorney-General* [2008] NZHRRT 31 at [179]; and *McAlister v Air New Zealand* [2009] NZSC 78 at [40] per Elias CJ, Blanchard and Wilson JJ.

They are no longer eligible for the ISTC because the parents must be together caring for the child.

Family #3: A couple is married with children. The mother is the primary income earner and she receives the ISTC. The couple separate, the father cannot care for the children and the mother has sole custody of the children. On separation, the mother's taxes rise in proportion to the ISTC that she is no longer eligible for because she is now a sole parent.

15. We consider that the ISTC places a limit on the right to freedom from discrimination on the ground of marital status because sole parents are not able to avail themselves of the ISTC.
16. We also note the ISTC distinguishes between families with and without children. We do not consider that this second distinction amounts to discrimination within the meaning of s 19(1) as the two groups are not comparable.<sup>9</sup> The ISTC seeks to financially assist parents raising children, financial assistance that childless people do not need.

### **Does the ISTC discriminate on the basis of sex?**

17. Unlike marital status, the ISTC does not expressly discriminate on the basis of sex. A person is not automatically excluded from the ISTC because of their sex. The ISTC does, however, reinforce the inequalities that women face in the context of being sole parents.
18. Indirect discrimination may be established where a significant proportion of women experience a negative effect from the ISTC. While some individual women may receive a benefit from the ISTC, it is the effect on the group to which the individual belongs that is relevant and not the effect on the individual personally. The effect must create a significant disparity.
19. The 2009 Social Report states that compared to other OECD countries, New Zealand has a relatively high proportion of families with children under 18 years headed by sole parents (28 per cent).<sup>10</sup> Of these one-parent families, 83 per cent are mother only families.<sup>11</sup>
20. We consider that the ISTC indirectly limits a woman's right to freedom from discrimination if she is a sole parent.
21. For completeness, we also note that there may be an indirect discrimination issue for women who are part of a couple receiving the ISTC.
22. The 2009 Social Report recognises that women spend more time on childcare and other unpaid household work than men. In addition, in 2008 there was a difference between the sexes in median hourly earnings for wage and salary earners at all ages over 25 years. The gap was greatest at ages 40–44 years, where the ratio of female to male median earnings for employees was 76 per

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<sup>9</sup> *McAlister v Air New Zealand* [2009] NZSC 78 [51].

<sup>10</sup> Ministry of Social Development *The Social Report 2009* at 16.

<sup>11</sup> *Ibid.*

cent.<sup>12</sup> The greatest income disparity was for married women who recorded less than half the median income of married men (47 per cent).<sup>13</sup> What these statistics do not say is, as a percentage, the proportion of men that make more than women where they are in a couple with a dependent child.

23. The distinction between men and women in couples that receive the ISTC is with how they may maximise the ISTC. As women generally have lower incomes than men,<sup>14</sup> it is more likely that women will be encouraged to forgo income and work experience to maximise the ISTC. This is because lowering the income of the lower earner in a couple will create an even greater disparity and thereby a greater ISTC. If only the high income earner works fewer hours in order to care for children the family will suffer the double disadvantage of having less income and a reduction of the ISTC as incomes equalise.
24. The ISTC appears to support the existing trend that lower-paid work by women may be sacrificed and compensated to a degree by the man working more hours but higher-paid men's work should not be foregone for childcare.<sup>15</sup> This creates the disadvantage of stereotyping women as being more suited to undertake unpaid work as caregivers than paid work.
25. We recognise, however, that there are significant societal benefits in parents choosing to forego paid work to care for their children. We also recognise that forgoing paid work to care for children can create a significant personal benefit to the caregivers themselves.
26. On balance, we do not consider that the ISTC appears to negatively affect a significant proportion of women who are in a couple receiving the ISTC.

**Are the limits on the right to freedom from discrimination justified in a free and democratic society?**

27. Where a provision is found to limit a particular right or freedom, it may nevertheless be consistent with the Bill of Rights Act if it can be considered a reasonable limit that is justifiable in terms of s 5 of that Act. For example, in the Supreme Court of New Zealand's decision in *Hansen v R (Hansen)* Tipping J states:<sup>16</sup>

Whether a limit on a right or freedom is justified under s 5 is essentially an inquiry into whether a justified end is achieved by proportionate means. The end must be justified and the means adopted to achieve that end must be proportionate to it. Several sub-issues inform that ultimate head issue. They

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<sup>12</sup> Ibid at 48-51.

<sup>13</sup> Statistics New Zealand *Focusing on Women 2005* at 95.

<sup>14</sup> Far higher proportions of men are found in the top two income quintiles. A total of 12 percent of women had incomes in the top 20 percent of incomes received by all New Zealanders in 2001, less than half of that of men (29 percent): Statistics New Zealand *Focusing on Women 2005* at 86.

<sup>15</sup> This conclusion is supported in part by the work the Families Commission that states: "fathers' long hours have considerable impact on mothers' opportunity to engage in paid work given that women typically are also responsible for running the household and organising arrangements for children" Families Commission *Finding Time: Parents' Long Working Hours and Time Impact on Family Life* (Research Report No 2/09 May 2009) at 64.

<sup>16</sup> *Hansen v R* [2007] NZSC 7 [123].

include whether the practical benefits to society of the limit under consideration outweigh the harm done to the individual right or freedom.

28. Following the guidance of *Hansen*, the s 5 inquiry may be summarised as:<sup>17</sup>
- (a) does the objective serve a purpose sufficiently important to justify some limitation of the right or freedom?
  - (b) If so, then:
    - (i) is the limit rationally connected with the objective?
    - (ii) does the limit impair the right or freedom no more than is reasonably necessary for sufficient achievement the objective?
    - (iii) is the limit in due proportion to the importance of the objective?

*Is the objective sufficiently important?*

29. The stated intention of the ISTC is to give couples greater freedom to work fewer hours or more flexible hours in order to care for children. The intention of ISTC is not to give this assistance to parents generally, but to couples specifically. In doing so, the ISTC excludes 28 per cent of New Zealand families with children because those families have a sole parent. The effect of the ISTC is that couples would have greater freedom than sole parents to work fewer hours or more flexible hours in order to care for children.
30. If the Bill gave all parents greater freedom to work fewer hours or more flexible hours in order to care for children, this would unquestionably be an important objective.
31. The first limb of the s 5 inquiry requires that an objective must be sufficiently important to limit the right to freedom from sex and marital status discrimination. Objectives that are discordant with the principles integral to a free and democratic society should not gain s 5 protection.<sup>18</sup> It is unclear why couples are in need of greater freedom than sole parents to work fewer hours or more flexible hours in order to care for dependent children. Accordingly, we consider that the objective, which limits preferential tax treatment to couples with dependent children, does not serve a purpose sufficiently important to justify limiting the right to freedom from discrimination.

*Is there a rational connection between the limit and the objective?*

32. Even if the objective of the ISTC was sufficiently important, the payment of ISTC is not rationally connected to that objective.

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<sup>17</sup> The proportionality test under s 5 of the Bill of Rights Act, as applied in *Hansen*, draws on the test articulated by the Canadian Supreme Court in *R v Oakes* [1986] 1 SCR 103, *R v Edwards Books and Art Ltd* [1986] 2 SCR 713 and *R v Chaulk* [1990] 3 SCR 1303. See for example, *Hansen*, above n 16, at [42] per Elias CJ; [64] and [79] per Blanchard J; [103], [104] and [120]-[138] per Tipping J; [185] and [217] per McGrath J; and [272] per Anderson J.

<sup>18</sup> *R v Oakes* [1986] 1 SCR 103, 138-9; *R v Big M Drug Mart Ltd.* [1985] 1 SCR 295 at [140]-[141].

33. Income and marital status determine the amount of and eligibility for the ISTC. However, the need to work fewer hours or more flexible hours in order to care for dependent children flows from the age of the children (infant versus school-age), the individual needs of the children, the number of dependent children and the availability of support and assistance from other people. However, the actual needs of parents do not change the amount of the ISTC available to couples.
34. The only factor that changes the amount of the ISTC is income levels. This is demonstrated in comparing two eligible couples equal in all respects but for income. The couple that has no disparity in income will not receive the ISTC whereas the other couple with a significant disparity in income will receive the ISTC in an amount reflecting the disparity.

*Is the impairment on the right greater than reasonably necessary?*

35. Parliament is entitled to appropriate latitude to achieve its objectives.<sup>19</sup> The issue here is, in practical terms, whether the objective might be achieved by another method involving less cost to the right to be free from discrimination on the basis of marital status and sex. We note that there are other government measures that make fact-based determinations into whether a family is in need of support from the State based on number of dependents and family income without discriminating on the basis of marital status or sex. If the freedom to work fewer hours or more flexible hours in order to care for children was available equally to all similarly situated parents, a limit on the right to freedom from discrimination may be justifiable.
36. As stated above, there are ways to assist parents without unduly disadvantaging sole parents. Significant numbers of sole parent lack both a partner to assist with childcare and the freedom to work fewer hours or more flexible hours in order to care for dependent children. The ISTC is as a result of notional income splitting and it would be possible, in a similar manner, to notionally reduce a sole parent's income for the purposes of enabling a parent to work fewer hours or more flexible hours in order to care for children.
37. In light of the availability of alternatives, we consider that the ISTC limits sole parents' rights more than is reasonably necessary.

*Is the limit in due proportion to the importance of the objective?*

38. Finally, the limit is not in due proportion to the importance of the objective because sole parents are also in need of greater freedom to work fewer hours or more flexible hours in order to care for dependent children. Similarly, women are more economically vulnerable than men and are more likely to have a greater need for tax relief to care for children. Accordingly, those most in need of greater freedom to work fewer hours or more flexible hours in order to care for dependent children will not be eligible for the ISTC.

## **CONCLUSION**

39. Based on the analysis set out above, we have concluded that the Bill appears to be inconsistent with s 19(1) of the Bill of Rights Act and that the inconsistency

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<sup>19</sup> Hansen, above n 16, at [126] per Tipping J.

cannot be justified under s 5 of that Act. Accordingly, we recommend that you bring the Bill to the attention of the House of Representatives pursuant to s 7 of the Bill of Rights Act.

40. This advice has been prepared by the Public Law Group and the Office of Legal Counsel.

Jeff Orr  
**Chief Legal Counsel**  
**Office of Legal Counsel**