

Report of the

ATTORNEY-GENERAL

under the New Zealand Bill of Rights Act 1990
on the Income Tax Bill 2002

*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 Income Tax Bill 2002 (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 married persons, opposite-sex couples, and same-sex couples differently from each other is inconsistent with section 19(1) of the Bill of Rights Act. Further, these inconsistencies do 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 (as varied by the House on 5 September 2002) I draw this to the attention of the House of Representatives.

The Bill

The Bill is the third stage of a long-term project to rewrite New Zealand’s income tax legislation. The Bill proposes to completely replace the current Income Tax Act 1994 (the “current Act”) by rewriting Parts A to E, and reproducing Parts F to O and the Schedules of the current Act. The Bill does not propose substantive changes to the policy content of the current Act.

Bill of Rights Act issue

The Bill gives rise to discrimination on the grounds of marital status and sexual orientation because the tax regime treats married persons, opposite-sex couples and same-sex couples differently for the purposes of determining tax liability. A list of the specific provisions giving rise to discrimination can be found on page 4.

The discrimination arises where rules and exceptions in the Bill draw a distinction between:

- married persons (a taxpayer with a husband or wife), and de facto partners (a taxpayer with either a same-sex or opposite-sex partner) giving rise to issues of discrimination on the ground of marital status and indirectly on the ground of sexual orientation; or
- married persons or opposite-sex partners (where opposite-sex partners are included in the definition of “spouse”), and same-sex partners (a taxpayer with a same-sex partner) giving rise to issues of direct discrimination on the ground of sexual orientation.

These distinctions chiefly arise from the application of the definition of “spouse” in the Bill. In most parts of the Bill the term “spouse” is defined to mean only the husband or wife of the taxpayer, in other instances the term “spouse” is defined to include the opposite-sex partner of the taxpayer. The term “spouse” in the Bill never includes the same-sex partner of a taxpayer. The term “relative” also raises similar issues as it is defined to recognise a taxpayer’s “spouse” but not a taxpayer’s de facto partner (whether of the same or opposite sex) as that taxpayer’s “relative”.

Depending on where the distinctions arise the resulting disadvantage usually falls into one of the following three categories:

- A taxpayer may not be eligible for a tax exemption;
- A taxpayer may be restricted in how he or she structures his or her finances; or
- A taxpayer may not be eligible for a tax advantage.

The party who is disadvantaged, (i.e. a taxpayer with a spouse, opposite-sex partner, or same-sex partner), varies according to the particular effect of a provision and the definition that applies to that provision.

There is a financial disadvantage created by these provisions where a taxpayer is unable to use a rule or exception to decrease his or her taxable income due to the type of relationship the taxpayer is in. However, these provisions may also be seen as socially disadvantaging taxpayers with a de facto partner as the distinction can be seen as perpetuating the historical and ongoing stigmatisation of de facto relationships by failing to recognise the status and value of such relationships. This stigmatisation is arguably stronger for people in same-sex relationships because they are not able to marry in the first instance, and because, in at least some instances, opposite-sex de facto relationships are recognised, whereas same-sex relationships are not.

I have, therefore, concluded that the Bill appears to be inconsistent with the right to be free from discrimination affirmed by section 19(1) of the Bill of Rights Act.

Is the discrimination justified under section 5?

The objectives behind treating taxpayers in a marital relationship differently from other taxpayers are:

- (i) to recognise the financial interdependence of married persons due to the nature of their relationship, (where a couple has entered into certain transactions jointly and have structured their finances in an interdependent manner, such as jointly owning property or a business); and
- (ii) to prevent married persons from using their relationship to gain a tax advantage in specific types of transactions.

These objectives are important and significant as they attempt to create a fairer and more equitable tax regime.

Nevertheless, in general, a taxpayer with a de facto partner (whether of the same or opposite-sex) is in an analogous position to a taxpayer with a spouse, and is likely to have a similar degree of financial interdependence. If it is necessary or desirable to treat people in marital or marital-type relationships differently from single people, due to the assumed nature of their finances, then all people in relationships of that nature should be treated the same unless there is a clear justification for not doing so.


I therefore consider that the differential treatment of married persons, opposite-sex couples, and same-sex couples in the Bill is not rationally and proportionately connected to the objectives stated above and cannot for this reason, in my view, be justified in terms of section 5 of the Bill of Rights Act. I have not been made aware of any further contextual issues that justify the ongoing lack of recognition of these relationships.

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 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.

Conclusion

I conclude that the Income Tax Bill 2002, in discriminating on the grounds of marital status and 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. While issues relating to the legal rights and tax liability of opposite-sex and same-sex couples are currently under review, proposals for future reform do not justify the particular inconsistencies of the Bill.



Hon Margaret Wilson
Attorney-General

Table of Discriminatory Clauses

Practical Effect	Who is Disadvantaged?	Clause
Tax Exemption	De Facto Partners (Same or opposite-sex)	CB 19(1)(b) – Farmland exclusion: land division; CB 20(1) – Farmland exclusion: land affected by changes in permitted use; and CW 24(b) – Maintenance payments.
	Married Persons	CD 5(1)(a)(iii) – When is a transfer caused by a shareholding relationship.
Restriction	De Facto Partners (Same or opposite-sex)	CF 1(2) - Benefits, pensions, compensation and government grants (second part of definition of pension).
	Married Persons	CE 5(2) – Meaning of expenditure on account of an employee: life insurance policies; CF 1(2) - Benefits, pensions, compensation and government grants (first part of definition of pension); DB 34(1) - Making good loss from misappropriation by partners; GC 14B(2)(b) – Attribution rule for personal services; GD 3 – Payment of excessive salary or wages, e.t.c, to relative employed by or in partnership with taxpayer; GD 4 - Payments to taxpayer's spouse; GD 5 – Excessive remuneration by close company to shareholder, director, or relative; GD 9 – Land transferred between associated persons; GD 10(1) & (4) – Leases for inadequate rent; KC 4(2) – Rebate in certain cases for housekeeper (definition of housekeeper); and LD 1(2A)(a) – Tax deductions to be credited against tax assessed.
	Married Persons and Opposite-sex partners	KC 3(3) – Transitional tax allowance; KD 2(4), (5), (6) & (7) – Calculation of subpart KD credit; KD 2AA(4) and (5) – Rules for subpart KD credit; KD 2AB(1), (2) & (3) – Parental tax credit; KD 3(1), (2), (4) & (5) – Calculation of family tax credit; KD 3A(2) & (3) – Rules for family tax credit; KD 4(4) & (5) – Allowance of credit of tax in end of year assessment; KD 5(1), (2), (3A) & (9) – Credit of tax by instalments; KD 5B(4), (4A), (5), (5A) & (6) – Rates for interim instalments for period beginning on or after 1 July 1998; and KD 6(4) – Chief executive to deliver credit of tax.
Tax Advantage	De Facto Partners (Same or opposite-sex)	CD 14(9) – Returns of capital: off-market share cancellations (definition of counted associate); CD 34(15) – Available capital distribution amount; and KC 4(2) – Rebate in certain cases for housekeeper (definition of communal home).
	Same-sex Partners	KD 1A(1) – Family support and family plus; and KD 5(1), (2), (3A) & (9) – Credit of tax by instalments.
Affects Third Party	Married Persons and Opposite-sex partners	HH 3C(1) – Source of beneficiary income.
Definition	De Facto Partners (Same or opposite-sex)	OB 1 – Definition of relative; OB 3(3) – Meaning of qualifying company; OD 1(2) – Defining when company is under control of any persons; OD 7 – Defining when 2 person are associated persons; and OD 8 – Further definitions of associated persons.
	Same-sex Partners	OB 1 - Definition of fully employed person; OB 1 – Definition of full-time earner; and OB 1 – Definition of spouse.