



Report of the

ATTORNEY-GENERAL

under the New Zealand Bill of Rights Act 1990
on the Marriage (Gender Clarification)
Amendment Bill 2005

*Presented to the House of Representatives pursuant to
Section 7 of the New Zealand Bill of Rights Act 1990 and
Standing Order 264 of the Standing Orders of the House
of Representatives*

I have considered the Marriage (Gender Clarification) Amendment Bill (the "Bill") for consistency with the New Zealand Bill of Rights Act 1990 (the "Bill of Rights Act"). I have concluded that clause 7 of the Bill authorises measures that, in terms of section 5 of the Bill of Rights Act, unjustifiably limit the rights affirmed in section 19 of that Act.

As required by section 7 of the Bill of Rights Act and Standing Order 264, I draw this to the attention of the House of Representatives.

The Bill

The Bill seeks to add a provision to the Marriage Act 1955, clarifying that marriage means a union between a man and a woman, not between two persons of the same sex. A provision is also inserted into the Bill of Rights Act specifying that measures taken in good faith for the purposes of assisting or advancing marriage do not constitute discrimination.

The Bill of Rights Act issue

Clause 7 of the Bill seeks to amend section 19 of the Bill of Rights Act by inserting a new subsection (3), which provides that "measures taken in good faith for the purpose of assisting or advancing marriage do not constitute discrimination." The provision distinguishes between persons who are married and those in other types of committed, stable and exclusive relationships (such as those in a civil union or de facto relationship). This distinction is disadvantageous on the grounds of marital status and sexual orientation (as same sex couples are unable to get married) as it affords protection to future legislation, policy or practice that may be discriminatory vis-à-vis these groups.

I have considered whether clause 7 could be interpreted consistently with the Bill of Rights Act pursuant to section 6 of that Act.

It may be possible to read clause 7 as only permitting "reasonable limits" on the right to be free from discrimination, in the sense that the limits would be justifiable in terms of section 5 of the Bill of Rights Act. However, I note the judgment of Thomas J in the case of *Quilter v Attorney General* [1998] 1 NZLR 523 at 542 where he stated that:

"even if a meaning is theoretically possible it must be rejected if it is clearly contrary to what Parliament intended."

It is my view that the courts would be obliged to read clause 7 as allowing measures that provide "unreasonable limits" on the right to be free from discrimination."

I have come to this view because any other interpretation would mean that clause 7 served no purpose. The Courts are very likely to recognise that Parliament would not enact a provision that had no purpose. Thus they would likely interpret clause 7 as allowing the placement of "additional limits" on the

right to be free from discrimination as protected by section 19 of the Bill of Rights Act.

Conclusion

I conclude that clause 7 of the Bill authorises measures that, in terms of section 5 of the Bill of Rights Act, unjustifiably limit the rights affirmed in section 19 of that Act. Thus, clause 7 of the Marriage (Gender Clarification) Amendment Bill appears to be inconsistent with section 19(1) of the Bill of Rights Act.

A handwritten signature in black ink, appearing to read 'M. Cullen', with a long horizontal stroke extending to the right.

Hon Dr Michael Cullen

Attorney-General