



Report of the

ATTORNEY-GENERAL

under the New Zealand Bill of Rights Act 1990
on the Social Security (Long-term Residential
Care) Amendment 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 Sessional Order of
September 2002, of the Standing Orders of the House of
Representatives*

I have considered the Social Security (Long-term Residential Care) Amendment Bill (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 (the "principal Act") by making a number of significant changes to the income and asset testing regime that applies to older people in long-term residential care and who have been assessed as requiring that care indefinitely.

The aim of the bill is to minimise the extent to which persons in long-term care are required to use their assets to pay for their care. The policy has significant costs and is being implemented progressively.

The changes will be implemented in two stages. There will be a brief transitional stage between the time the Bill comes into force and 30 June 2005. Within this period a slightly modified version of the current arrangements will apply. The new regime, which will take effect from 1 July 2005, will provide immediate relief for the group of persons assessed as needing long-term residential care who are unmarried, aged between 50 and 64 years, and who have no dependent children. This group, which is currently subject to asset testing rules, will not be means tested as to assets after 1 July 2005. The other affected group comprises persons assessed as needing long-term residential care who are 65 years and over. Approximately 97% of persons receiving long-term residential care are over 65. From 1 July 2005, the asset thresholds (the sum of assets that are exempt from asset testing rules) increase significantly, and are progressively increased by a further \$10,000 each succeeding year.

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 Bill does not recognise the status of same-sex relationships. Persons living in such relationships are therefore treated under the Bill as being single or unmarried. This is because section 63 of the principal Act 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 a marriage.

By treating persons in same-sex relationships as single, the Bill therefore draws distinctions in the way that persons who are married or living in an opposite-sex de facto relationship are treated compared to those living in same-sex relationships.

This is relevant because the assets and income of a person's spouse are taken into account in means testing the person receiving residential care. Similarly, the relevant asset thresholds during the transitional period and following 1 July 2005 differ in part depending on whether the person is single or in an opposite-sex relationship.

During the transitional phase, the Bill disadvantages persons living in same-sex relationships because the thresholds, contained in Schedule 27 Part 1(1), for single persons (which include persons in same-sex relationships) are less than those for opposite-sex couples. The person in a same-sex relationship will therefore be asset tested in circumstances where the person in an opposite-sex relationship would not.

On the other hand, a number of the provisions (in particular, proposed new sections 146, 147, and parts 2 and 3 of new Schedule 27) may financially advantage persons living in same-sex relationships because their partner's assets will not be taken into consideration when conducting the means test as to assets and income.

In summary, in some instances, the bill results in disadvantage to persons in opposite-sex relationships. In other cases, persons in same-sex relationships are disadvantaged.

I consider that the failure of the Bill to recognise the status of same-sex relationships and the arbitrary manner in which it treats persons in same-sex relationships appears to be *prima facie* inconsistent with section 19(1) of the Bill of Rights Act on the ground of sexual orientation.

I have therefore gone on to consider whether the *prima facie* inconsistency with section 19(1) can be justified.

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

I understand that the government is currently considering rationalisation of the treatment of same-sex couples in social security legislation and has agreed that generally same-sex couples should be treated in the same way as opposite-sex couples. It is proposed to implement the reforms in a comprehensive manner. In the meantime, same-sex relationships are not being recognised in the Bill in order to preserve consistency with the current treatment of same-sex relationships in the principal Act. However, as I have previously advised this House, I do not consider that the different treatment of same-sex couples can be justified on the basis of proposals for reform that have yet to be realised.

Therefore, 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. I also note that the sexual orientation discrimination contained in the Bill could be remedied by a straightforward drafting amendment.

Conclusion

I conclude that the Social Security (Long-term Residential Care) Amendment Bill 2003, in discriminating on the ground of sexual orientation, appears to be inconsistent with section 19(1) of the 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 the general issues relating to the legal rights and entitlements of same-sex couples are under review, but, as I have previously advised this House in relation to similar discrimination in other bills, proposals for possible future reform do not justify the inconsistencies in this Bill.

Hon Margaret Wilson

Attorney-General