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Report of the

# ***ATTORNEY-GENERAL***

under the New Zealand Bill of Rights Act  
1990 on the New Zealand Superannuation  
and Retirement Income (Pro Rata  
Entitlement) Amendment Bill

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Presented to the House of Representatives pursuant to  
Section 7 of the New Zealand Bill of Rights Act 1990  
and Standing Order 262 of the Standing Orders of the  
House of Representatives

1. I have considered whether the New Zealand Superannuation and Retirement Income (Pro Rata Entitlement) Amendment Bill ('the Bill') is consistent with the rights and freedoms affirmed in the New Zealand Bill of Rights Act 1990 ('the Bill of Rights Act'). I have concluded the Bill limits the right to be free from discrimination and the right to freedom of movement affirmed in ss 19(1) and 18 of the Bill of Rights Act respectively, and that the limits cannot be justified under s 5 of the Bill of Rights Act.
2. As required by s 7 of the Bill of Rights Act and Standing Order 262, I draw this to the attention of the House of Representatives.

### **The Bill**

3. The purpose of the Bill is to confront the impact on New Zealand superannuation of an increasingly ageing and mobile population. The Bill seeks to achieve this by establishing a pro rata entitlement to New Zealand superannuation based on residence and presence in New Zealand between the ages of 20 and 65 (a total of 540 months) as a proxy for contribution to the New Zealand economy.
4. Clause 5 amends the residential qualification for New Zealand superannuation to establish that a person must be resident and present in New Zealand for a period not less than 10 years between the ages of 20 and 65.
5. Clause 8 inserts new s 12A into the New Zealand Superannuation and Retirement Income Act 2001 ('the principal Act') which exempts the following periods of time from being deducted from a person's pro rata entitlement:
  - 5.1 "short-absence months" of up to 2 months' overseas travel per calendar year, and
  - 5.2 an aggregate period of 5 years' (60 months) absence for New Zealand residents born in New Zealand.
6. As a consequence of pro rata entitlement the Bill repeals s 70 of the Social Security Act 1964 which provides for the amount of a person's overseas pension to be deducted from their New Zealand superannuation entitlement. It also makes consequential amendments to remove reference to overseas pensions and overseas pensioners.

### **Section 19(1) of the Bill of Rights Act (freedom from discrimination)**

7. Section 19 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.

8. The key questions in assessing whether there is a limit on the right to freedom from discrimination are:<sup>1</sup>
- 8.1 does the legislation draw a distinction on one of the prohibited grounds of discrimination under s 21 of the Human Rights Act and, if so,
  - 8.2 does the distinction involve disadvantage to one or more classes of individuals?
9. 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>2</sup> The distinction analysis takes a purposive and untechnical approach to avoid artificially ruling out discrimination.<sup>3</sup> Once a distinction on prohibited grounds is identified, the question of whether disadvantage arises is a factual determination.<sup>4</sup>

*Does the Bill discriminate on the basis of national origin?*

10. Nationality is easily and objectively determined,<sup>5</sup> and can be defined as the bond between an individual and a state of which they are a member.<sup>6</sup>
11. Clause 8 of the Bill exempts an aggregate period of 5 years' absence for New Zealand residents born in New Zealand.<sup>7</sup> This provision confers a greater entitlement to New Zealand superannuation upon people purely by virtue of their birth in New Zealand. I consider this is a prima facie case of discrimination on the basis of national origins which creates a material disadvantage to people of different national origins.

*Does the Bill discriminate on the basis of age?*

12. At present a person becomes eligible for New Zealand superannuation from the age of 65 years, provided they also meet the residence threshold. Clause 5 of the Bill, however, provides that a person must fulfil their residency requirements prior to attaining the age of 65. The Bill therefore effectively establishes an upper age limit for eligibility. Put another way; once a person has reached 65 years of age without

<sup>1</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.

<sup>2</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>3</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>4</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.

<sup>5</sup> Paul Rishworth, Grant Huscroft, Scott Optican and Richard Mahoney, *The New Zealand Bill of Rights* (Melbourne, Australia: Oxford University Press, 2003) pg. 370

<sup>6</sup> K Kitching (ed) *Non-discrimination in International Law: A Handbook for Practitioners* (Interights, January 2005) pg. 183

<sup>7</sup> This will not include any people born within the Realm of New Zealand – refer the Interpretation Act 1999, s 9. Thus, people from the Cook Islands, Niue, Tokelau and the Ross Dependency would not qualify for these additional exempt months.

attaining their eligibility for New Zealand superannuation they will be unable to ever achieve eligibility.

13. The Bill effectively assumes no person over the age of 65 years can make a contribution to New Zealand which would warrant them being able to attain eligibility for New Zealand superannuation if they have not done so already. I consider this is a blanket distinction based on age that requires consideration of whether it is justified under s 5 of the Bill of Rights Act.

*Is the limitation justified and proportionate under s 5 of the Bill of Rights Act?*

14. Where a provision appears 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 demonstrably justified in a free and democratic society under s 5 of the Bill of Rights Act. The s 5 inquiry may be approached as follows:<sup>8</sup>
- a) does the provision serve an objective 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 of the objective?
    - iii. is the limit in due proportion to the importance of the objective?

*Is the objective sufficiently important?*

15. The stated objective of the Bill is to establish a fair superannuation policy which confronts the impact on New Zealand superannuation of an increasingly ageing and mobile New Zealand population. It seeks to do this by aligning entitlement to New Zealand superannuation to a person's contribution to the New Zealand economy. I consider the focus on intra and intergenerational equity to be an important objective.

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

16. Achieving a fair distribution of superannuation is a complex social policy matter. There can be 'many ways to approach a particular problem, and no certainty as to which will be the most effective.'<sup>9</sup>
17. In my view, however, there is no rational connection between conferring additional entitlement to New Zealand superannuation to those born in New Zealand with the stated objective of the Bill. Where a person is born does not, of itself, affect their ability to contribute to the economy. Indeed, favouring people purely based on

<sup>8</sup> *Hansen v R* [2007] NZSC 7 at [123].

<sup>9</sup> *Canada (A-G) v JTI-McDonald Corp* [2007] 2 SCR 610 at [43].

where they were born seems to contradict the logic of a pro rata entitlement to superannuation based on residence and presence in New Zealand.<sup>10</sup>

18. I also consider the age restriction on attaining eligibility is not rationally connected to the objective. Between 2006 and 2013 the number of people aged 65 and over in paid employment increased from 16.8 percent to 22.1 percent.<sup>11</sup> This suggests an increasing amount of over 65 year olds are continuing to contribute to the New Zealand economy beyond the age at which they become entitled to New Zealand superannuation.

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

19. Parliament is entitled to appropriate latitude to achieve its objectives.<sup>12</sup> I note the observations of Moses J in *R (on the application of Hooper) v Secretary of State for Work & Pensions*<sup>13</sup> that:

“In determining how to target resources to those in need, the legislature is entitled to impose ‘bright line’ rules which are easy to apply and which may not focus with precision on the merits of individual cases... such bright line rules in the context of social and economic policy do not lead to incompatibility [in that case, the European Convention on Human Rights] even if individual hardship is occasioned...”

20. Such “bright line” rules should, however, draw a distinction which can be seen to ‘reflect a difference between the substantial majority of the people on either side of the line.’<sup>14</sup> The question then arises whether a blanket policy of exempting an aggregate period of 5 years’ absence only for those born in New Zealand is necessary to achieve the stated objectives.
21. I consider the impairment on the right to be free from discrimination on the basis of national origin contained in Clause 8 of the Bill is greater than reasonably necessary. In my view, limiting the benefit of a 5 year exemption from reductions in qualifying months to people born in New Zealand alone is not necessary for the purposes of the Bill.
22. There are also reasonable alternatives available that would recognise the contribution of those not born in New Zealand. For example, the Bill could provide for a minimum period of residence and presence in New Zealand at which up to an additional 60 exempt months could be added to a person’s pro rata entitlement. Alternatively, the Bill could provide an additional 60 exempt months for people who are considered “ordinarily resident” in New Zealand rather than by virtue of

<sup>10</sup> See Statistics New Zealand, ‘People aged 65+ living in New Zealand’ ([www.stats.govt.nz/census](http://www.stats.govt.nz/census)) (Accessed on 6 July 2015). According to this Census data, 27.5 percent of people aged over 65 years were born outside of New Zealand. The same data shows 24.8 percent of people under 65 years were born outside New Zealand

<sup>11</sup> Statistics New Zealand, ‘People aged 65+ living in New Zealand’ ([www.stats.govt.nz/census](http://www.stats.govt.nz/census)) (Accessed on 6 July 2015)

<sup>12</sup> *Hansen* at [126] per Tipping J.

<sup>13</sup> [2002] EWHC 191 at [115] – noted in *Howard v Attorney-General* [2008] 8 HRNZ 378 at [76 – 77].

<sup>14</sup> *R (Carson) v Secretary of State for Work and Pensions* [2005] UKHL 37, [2006] 1 AC 173 at [41] per Lord Hoffman – noted in *Cameron Mathieson, a deceased child (by his father Craig Mathieson) (Appellant) v Secretary of State for Work and Pensions (Respondent)* [2015] UKSC 47 at [27].

birth alone. The principal Act currently uses this model for exempting periods of absence from New Zealand for missionary work where the entitled person resides overseas.<sup>15</sup>

23. I also consider the impairment on the right to be free from discrimination on the basis of age is greater than reasonably necessary. There is an appreciable risk that a number of people will reach the age of 65 without attaining their eligibility, no matter what their contribution may be after that time. The Bill, however, does not provide a mechanism for people over 65 years of age to accrue even the minimal proportional entitlement and therefore cannot be said to impair the right in a minimal way.

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

24. Given the lack of rational connection and minimal impairment of the right to be free from discrimination on the basis of national origin and age, I do not consider the limit to be in due proportion to the importance of the objective. I therefore conclude the limit on s 19(1) of the Bill of Rights Act cannot be justified.

### **Section 18(3) of the Bill of Rights Act 1990 (Freedom of movement)**

25. Section 18(3) of the Bill of Rights Act affirms that everyone has the right to leave New Zealand. Freedom of movement is an 'indispensable condition for the free development of a person',<sup>16</sup> and has a close relationship with other rights and freedoms affirmed by the Bill of Rights Act.
26. The provisions of the Bill have the potential to create a "chilling effect" on the exercise of freedom of movement. While the Bill does not directly prevent a person from exercising their right to leave the country, pro rata entitlement to New Zealand superannuation creates a potentially significant disincentive to exercising that right because leaving the country for aggregate periods of more than 2 months per calendar year risks reducing entitlement to superannuation.
27. The Bill therefore effectively financially penalises individuals for exercising freedom of movement. We consider the potential loss for superannuation limits s 18 of the Bill of Rights Act.<sup>17</sup>

*Is the limitation justified and proportionate under s 5 of the Bill of Rights Act?*

28. I consider, as noted above, the Bill attempts to achieve an important objective. Moreover, creating a fair superannuation policy is a complex social issue and using

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<sup>15</sup> New Zealand Superannuation and Retirement Income 2001, s 26A.

<sup>16</sup> Human Rights Committee, General Comment 21 (02/11/General Comment 27 99, CCPR/C/21/Rev.1/Add.9, CCPR) at [1].

<sup>17</sup> See, for example, *ANZ v Wellington International Airport Ltd* [2009] 3 NZLR 713 (CA) at [166] per J Baragwanath where it was noted that excessive airport charges would "tend to infringe the entitlement recognised by the Bill of Rights to freedom of movement".

a bright line rule of residence and presence in New Zealand as a proxy for economic contribution might be considered one rational way of achieving that goal.

29. However, I do not consider that the reduction in pro rata entitlement if a person spends an aggregate of more than 2 months overseas in a given year is a justified and proportionate limitation on freedom of movement.
30. First, it is questionable whether the 2 month limit is rationally connected to the Bill's objective. I am not aware of any evidence showing people spending an aggregate of more than 2 months overseas in a given year are, in general, less likely to remain in New Zealand or contribute less to the economy. Indeed, the two month restriction is likely to capture a significant number of New Zealand-based people going overseas on holiday or in the course of their work, as opposed to people who will be working (and paying tax) in another jurisdiction, which appears to be the intended target.
31. Second, the limit is greater than reasonably necessary to achieve the objective. The restriction provides a relatively limited allowance for travel compared to, for example, ss 26 and 26A of the principal Act, which provide for pro rata payment of New Zealand superannuation for eligible people travelling overseas for more than 6 months.<sup>18</sup> In addition, it takes no account of the purpose of any travel.
32. Finally, I consider the limit is not in due proportion to the objective. Addressing the demographic realities and impact on New Zealand superannuation of an increasingly aging and mobile population does not, in my view, outweigh the need to protect freedom of movement as an 'indispensible condition for the free development of a person'.<sup>19</sup>
33. I have therefore concluded the limitation on the freedom of movement cannot be justified under s 5 of the Bill of Rights Act.

### Conclusion

34. For the above reasons, I have concluded the Bill appears to limit sections 19(1) and 18(3) of the Bill of Rights Act and cannot be justified under s 5 of that Act.



Hon Christopher Finlayson  
Attorney-General

<sup>18</sup> New Zealand Superannuation and Retirement Income Act 2001, ss 26 – 26A.

<sup>19</sup> Human Rights Committee, General Comment 21 (02/11/General Comment 27 99, CCPR/C/21/Rev.1/Add.9, CCPR) at [1].