

14 August 2023

Hon David Parker, Attorney-General

## **Consistency with the New Zealand Bill of Rights Act 1990: Pae Ora (Healthy Futures) (Provision of Breast Cancer Screening Services) Amendment Bill**

### **Purpose**

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1. We have considered whether the Pae Ora (Healthy Futures) (Provision of Breast Cancer Screening Services) Amendment Bill (the Bill), a Member's Bill in the name of Dr Shane Reti MP, is consistent with the rights and freedoms affirmed in the New Zealand Bill of Rights Act 1990 (the Bill of Rights Act).
2. We have concluded that the Bill appears to be consistent with the rights and freedoms affirmed in the Bill of Rights Act. In reaching that conclusion, we have considered the consistency of the Bill with section 19 (freedom from discrimination). Our analysis is set out below.

### **The Bill**

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3. The Bill amends the Pae Ora (Healthy Futures) Act 2022 (the principal Act).
4. The Bill introduces breast cancer screening into primary legislation. Specifically, it inserts new provisions into the principal Act to provide women aged between 45 and 74 years with access to regular breast cancer screening. The current scope of free breast cancer screening in New Zealand for women is between 45 and 69. The Bill notes that Australia, the United States and Canada provide screening to age 74.
5. The Bill also requires the Minister of Health to enter into a funding agreement with Health New Zealand or other providers to ensure that sufficient breast cancer screening facilities are available in each locality to enable each eligible woman to receive publicly funded breast cancer screening.

### **Consistency of the Bill with the Bill of Rights Act**

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#### **Section 19 – Freedom from discrimination**

6. Section 19(1) of the Bill of Rights Act affirms the right to freedom from discrimination on the grounds set out in the Human Rights Act 1993 (Human Rights Act). It is generally unlawful to treat people in comparable circumstances differently on the basis of a prohibited ground unless the differential treatment is justified.
7. Discrimination under section 19 of the Bill of Rights Act arises where:<sup>1</sup>

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<sup>1</sup> *Ministry of Health v Atkinson* [2012] NZCA 184, [2012] 3 NZLR 456 at [55]; *Child Poverty Action Group Inc v Attorney-General* [2013] NZCA 402, [2013] 3 NZLR 729.

- a. there is differential treatment or effects as between persons or groups in analogous or comparable situations based on a prohibited ground of discrimination; and
- b. that treatment has a discriminatory impact (it imposes a material disadvantage on the person or group differentiated against).

*Freedom from discrimination on the basis of age*

8. Age is a prohibited ground of discrimination under section 21 of the Human Rights Act, under which it is defined as any age commencing with the age of 16 years.<sup>2</sup>
9. The Bill states that every eligible woman is entitled to publicly funded breast cancer screening every two years. The Bill defines an eligible woman as a woman aged between 45 and 74 years who belongs to a class of eligible people specified in regulations made under section 102 of the principal Act. Limiting eligibility for publicly funded screening to women within a specified age bracket draws a distinction on the basis of age which is prima facie discriminatory.
10. Any limit on the right to be free from discrimination may be considered a reasonable limit if it can be demonstrably justified in terms of section 5 of the Bill of Rights Act. The section 5 inquiry may be approached as follows:<sup>3</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?
11. We understand that the objective of providing entitlement to regular breast cancer screening for 45–74-year-olds, which in practice means extending the current screening programme to 70–74-year-olds, is to increase the detection of breast cancer and hence reduce morbidity and mortality associated with breast cancer. We consider this a sufficiently important objective to justify a limitation on the right to freedom from discrimination. The proposal also appears rationally connected to this objective, given that evidence supports screening as a way of detecting breast cancer. Research has found that BreastScreen Aotearoa’s existing screening programme for 45–69-year-olds has resulted in approximately a 30 percent reduction in breast cancer mortality for

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<sup>2</sup> Human Rights Act 1993, s 21(1)(i).

<sup>3</sup> *Hansen v R* [2007] NZSC 7, [2007] 3 NZLR 1.

women.<sup>4</sup> There is also evidence of a potential benefit to providing regular screening for women aged 70-74 years.<sup>5</sup>

12. We also consider that the proposal limits the right to be free from discrimination no more than reasonably necessary and is overall proportionate. It is reasonable to target screening at this age group, as research indicates that screening is less effective in younger women,<sup>6</sup> and the chances of getting breast cancer increase with age:<sup>7</sup> about 70-75 per cent of women who are diagnosed with breast cancer and about 80 per cent of women who die from it are aged 50 years or older.<sup>8</sup> While using age as a basis for determining eligibility for services involves a degree of arbitrariness, governments have some latitude in determining how to prioritise and allocate limited public funding to health and social services. In addition, the Bill does not limit or affect any requirement to provide breast cancer screening services more widely or frequently, based on medical need.
13. We therefore consider that any discrimination on the basis of age is justified.

#### *Freedom from discrimination on the basis of sex*

14. Sex, including pregnancy and childbirth, is a prohibited ground of discrimination under section 21 of the Human Rights Act.<sup>9</sup>
15. The Bill does not provide for publicly funded breast screening for men. The prevalence of breast cancer is much higher in women than men: approximately 25 men are diagnosed with breast cancer each year, while approximately 3300 women are diagnosed.<sup>10</sup> While the Bill makes a distinction on the basis of sex, we do not consider that it gives rise to discrimination because it does not impose a material disadvantage on a comparable group.
16. It is not clear how this policy would be applied in practice for transgender, intersex and non-binary people aged 45-74 who may be at similar risk of developing breast cancer as cisgender women within the same age bracket. However, by taking an interpretation that is consistent with the Bill of Rights Act, we consider that the wording of the Bill is sufficiently broad to include individuals facing the same risk of breast cancer as cisgender women within the same age bracket.

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<sup>4</sup> Ministry of Health *New Zealand Cancer Action Plan 2019 – 2029* (3 February 2020) at 51.

<sup>5</sup> Above n 4 at 51.

<sup>6</sup> Ministry of Health “Information for Women under 45 Years of Age – English version” <[Information for Women under 45 Years of Age – English version – HealthEd](#)>.

<sup>7</sup> Te Aho o Te Kahu Cancer Control Agency “Cancer Types - Breast Cancer” <[www.teaho.govt.nz/cancer/types](http://www.teaho.govt.nz/cancer/types)>.

<sup>8</sup> Breast Cancer Foundation “Breast Cancer in New Zealand” <[www.breastcancerfoundation.org.nz](http://www.breastcancerfoundation.org.nz)>.

<sup>9</sup> Human Rights Act 1993, s 21(1)(a).

<sup>10</sup> Southern Cross Health Insurance “Southern Cross Medical Library – Cancers – Breast cancer” <<https://www.southerncross.co.nz/medical-library/cancers/breast-cancer-symptoms-diagnosis-and-treatment>>.

17. We therefore consider that the proposal in the Bill which entitles eligible women to publicly funded breast screening does not give rise to discrimination on the basis of sex.

## **Conclusion**

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18. We have concluded that the Bill appears to be consistent with the rights and freedoms affirmed in the Bill of Rights Act.



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