



Report of the

ATTORNEY-GENERAL

under the New Zealand Bill of Rights Act 1990
on the Affordable Healthcare Bill

Presented to the House of Representatives pursuant to
Section 7 of the New Zealand Bill of Rights Act 1990 and
Standing Order 265 of the Standing Orders of the House of
Representatives

1. I have considered whether the Affordable Healthcare Bill ('the Bill'), a members' Bill in the name of Barbara Stewart MP, 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 that the Bill limits the right to be free from discrimination affirmed in s 19(1) of the Bill of Rights Act and that the limit cannot be justified under s 5 of that Act.
2. As required by s 7 of the Bill of Rights Act and Standing Order 265, I draw this to the attention of the House of Representatives.

The Bill

3. The stated purpose of the Bill is to 'encourage people to contribute to their own healthcare costs in a way that is consistent with supporting the public health system'. The Bill proposes three ways to help sustain and balance New Zealand's health system when increasing healthcare costs are overstressing public resources.
4. Parents of adult New Zealand citizens and residents may apply for New Zealand residency under certain circumstances ('Parent Category' migrants).¹ Clause 4 of the Bill amends s 22 of the Immigration Act 2009 to require Parent Category migrants, other than those from Pacific countries, to obtain private health insurance at the time their residency visa is granted ('health insurance requirement'). Health insurance must be maintained for at least 10 years of residency in New Zealand and cover elective surgery.

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

5. Section 19(1) of the Bill of Rights Act affirms that everyone has the right to freedom from discrimination on the prohibited grounds of discrimination in the Human Rights Act 1993. Family status and national origin, which includes nationality or citizenship, are prohibited grounds of discrimination.
6. Discrimination under s 19 of the Bill of Rights Act arises where:²
 - 6.1 legislation draws a distinction on one of the prohibited grounds of discrimination under s 21 of the Human Rights Act; and
 - 6.2 the distinction involves material disadvantage to one or more classes of individuals;³ and

¹ Eligibility criteria for New Zealand residency under the Parent Category include: being sponsored by their New Zealand adult child who is eligible to sponsor their parent(s), being in good health, being of good character, having no dependent children, meeting English language criteria, and meeting minimum financial capacity requirements. Parents of adult New Zealand citizens and residents applying for residency under the Parent Retirement Category must not have dependent children and have sufficient and acceptable investment and settlement funds and/or assets, which must be maintained for 4 years.

² 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.

6.3 the distinction cannot be justified under s 5 of the Bill of Rights Act as a ‘reasonable limit’ on the right that is ‘demonstrably justified in a free and democratic society’.

7. 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.⁴ The distinction analysis takes a purposive and untechnical approach to avoid artificially ruling out discrimination.⁵ Once a distinction on prohibited grounds is identified, the question of whether disadvantage arises is a factual determination.⁶

Does the Bill discriminate on the basis of family status?

8. Family status among other things, means ‘being a relative to a particular person’.⁷ I consider that the Bill *prima facie* discriminates on the basis of family status, and more particularly parenthood, because it imposes the health insurance requirement on Parent Category migrants, but not other ‘Family Category’ migrants (Partners of New Zealand citizens or residents, and Dependent Children of New Zealand citizens or residents).⁸ I consider this a material disadvantage as the health insurance requirement is financially onerous.

Does the Bill discriminate on the basis of national origin?

9. Nationality is easily and objectively determined,⁹ and can be defined as the bond between an individual and a state of which they are a member.¹⁰

³ *Ministry of Health v Atkinson* [2012] 3 NZLR 456 at [101].

⁴ *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]; *Ministry of Health v Atkinson* [2012] 3 NZLR 456 at [143]; *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].

⁵ *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].

⁶ 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.

⁷ ‘Relative’ is defined in s 2 of the Human Rights Act as ‘[i]n relation to any person, ... any other person who – a) is related to the person by blood, marriage, civil union, de facto relationship, affinity or adoption; or b) is wholly or mainly dependent on the person; or c) is a member of the person’s household’.

⁸ A comparator group may be another group within the prohibited ground, see *Mathieson v Secretary of State for Work and Pensions* [2015] UKSC 47 at [23]. Other Family Category migrants are an appropriate comparator group because, while there are varying English language and financial requirements across the different family categories, they all require an eligible New Zealand citizen or resident to sponsor and/or support the applicant, who must also meet good health and character requirements.

⁹ Paul Rishworth, Grant Huscroft, Scott Optican and Richard Mahoney, *The New Zealand Bill of Rights* (Melbourne, Australia: Oxford University Press, 2003) pg. 370.

10. Parent Category migrants from ‘Pacific countries’ are exempt from the health insurance requirement. Consequently, I consider that the Bill *prima facie* discriminates on the basis of national origin because it only imposes the health insurance requirement on those Parent Category migrants from non-Pacific countries.

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

11. Limitations on rights protected by the Bill of Rights Act may nevertheless be justified under s 5 of that Act if it can be demonstrated that:¹¹
- a) the provision serves an objective sufficiently important to justify some limitation of the right or freedom;
 - b) the limit is rationally connected with the objective;
 - c) the limit impairs the right no more than reasonably necessary to achieve the objective; and
 - d) the limit is proportionate to the importance of the objective.

Is the objective sufficiently important?

12. The general purpose of the Bill is to encourage people to contribute to their own healthcare costs in a way that is consistent with supporting the public health system and to help sustain and balance New Zealand’s health system. In furtherance of this purpose, the objective of the health insurance requirement is to make private health insurance a 10 year requirement for Parent Category visa applicants from non-Pacific countries.
13. I consider that the general purpose of the Bill and the objective of the health insurance requirement are sufficiently important to justify some limitation on the right to freedom from discrimination on the basis of family status and national origin. It is important that New Zealand’s public healthcare system continues to be sustainable. To this end, it is important to minimise the stress of new migrants on already scarce public healthcare resources.

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

Family status

14. The explanatory note does not provide a rationale for applying the health insurance requirement only to migrants in the Parent Category, nor is one immediately obvious. Indeed, it would seem contrary to the general purpose of the Bill to require only this particular category of migrants to obtain health insurance.

¹⁰ The International Centre for the Legal Protection of Human Rights, (2011 ed) *Non-Discrimination in International Law: A Handbook for Practitioners* (Interights, 2011) pg. 168.

¹¹ *Hansen v R* [2007] NZSC 7 at [123].

15. Consequently, I cannot conclude that there is a rational connection between the Bill's objective and the limitation on the right to freedom from discrimination on the basis of family status.
16. The intention may be to use the Parent Category as a proxy for age (specifically those of or close to retirement age) as the Bill refers to health insurance being a requirement for 'retirement visas' in other jurisdictions. The rationale for requiring these 'older' migrants to have health insurance would be that they are less likely to contribute to the tax base and more likely to have healthcare needs.
17. The Parent Category is not a good proxy for age because applicants could be as young as 35 and migrants of or close to retirement age could be granted residency under other categories. Consequently, even if it could be said that there was a rational connection between the Bill's objective and the limitation on the right to freedom from discrimination on the basis of family status (as a proxy for age), use of the Parent Category would clearly impair the right greater than reasonably necessary to attain that objective.

Nationality

18. Similarly, the explanatory note to the Bill does not provide a rationale for why applicants from Pacific countries are exempt from the health insurance requirement, nor is one immediately obvious. Again, it seems counter intuitive to the general purpose of the Bill to exclude particular migrants from the scheme. Consequently, I do not consider that there is a rational connection between the Bill's objective and the limitation on the right to freedom from discrimination on the basis of national origin.
19. It may be that the Bill intended to recognise certain arrangements between the New Zealand Government and certain Pacific countries. For example, citizens of the Cook Islands, Niue and Tokelau are eligible for publicly funded health services in New Zealand in the same way as other New Zealand citizens.¹² However, the Bill uses the term 'Pacific country' without further elaboration which, given its ordinary and plain meaning, could include any country in or bordering the Pacific Ocean.
20. Alternatively, the exception may have been intended as a good faith measure to acknowledge a general economic disadvantage of Pacific migrants in accordance with s 19(2) of the Bill of Rights Act.¹³ However, s 19(2) would not apply in this case as general economic advantage does not constitute discrimination for the purposes of the Human Rights Act.

¹² See Ministry of Health, *Eligibility Questions and Answers for Consumers*, <http://www.health.govt.nz/new-zealand-health-system/eligibility-publicly-funded-health-services/eligibility-questions-and-answers-consumers#Pacific> people. See also *Health and Disability Services Eligibility Direction 2011*.

¹³ Section 19(2) of the Bill of Rights Act provides that '[m]easures taken in good faith for the purpose of assisting or advancing persons or groups of persons disadvantaged because of discrimination that is unlawful by virtue of Part 2 of the Human Rights Act 1993 do not constitute discrimination'.

21. Without knowing what was intended by the 'Pacific country' reference, or how the Bill might be redrafted to achieve that, it would be futile to speculate on the other aspects of the section 5 inquiry outlined above.
22. Given the lack of rational connection and minimal impairment of the right to be free from discrimination on the basis of family status and national origin, I do not consider the limits to be in due proportion to the importance of the objective.
23. I therefore conclude the limits on s 19(1) of the Bill of Rights Act cannot be justified.

Conclusion

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

A handwritten signature in black ink, reading "Christopher Finlayson". The signature is written in a cursive style with a long horizontal flourish at the end.

Hon Christopher Finlayson QC
Attorney-General