

5 December 2017

Hon David Parker, Attorney-General

## **Consistency with the New Zealand Bill of Rights Act 1990: Families Package (Income Tax and Benefits) Bill**

### **Purpose**

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1. We have considered whether the Families Package (Income Tax and Benefits) 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').
2. We have not yet received a final version of the Bill. This advice has been prepared with the latest version of the Bill (IRD 20772/6.11). We will provide you with further advice if the final version of the Bill includes amendments that affect the conclusions in this advice.
3. 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 s 19(1) (freedom from discrimination). Our analysis is set out below.

### **The Bill**

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4. The Bill implements a suite of amendments to the Income Tax Act 2007 and the Social Security Act 1964 which provide targeted financial assistance to low and middle income families with children, and those receiving main benefits, superannuation, or veteran's pensions.
5. The Bill repeals the personal tax changes enacted by the Taxation (Budget Measures: Family Incomes Package) Act 2017 (the Taxation Act). As a result, the personal income tax thresholds from 1 April 2018 for the 2018-19 income tax year will be those applying for the 2017-18 year. The Independent Earner Tax Credit, which was also repealed by the Taxation Act starting from 1 April 2018, will be reinstated.
6. The Bill also amends the Working for Families tax credits package under the Income Tax Act. Subpart 1 of the Bill adds 'BestStart' tax credits to the Working for Families regime, replacing parental tax credits. 'BestStart' tax credits, amounting to \$60 per week, are available to all families with new-borns for the first year of their life, and to lower income families, including beneficiaries, until the child turns three (with abatement at 21 cents for every dollar earned over \$79,000).
7. The Bill also increases the family tax credit and raises the abatement threshold to \$42,700. The orphan's benefit and the unsupported child's benefit rates are correspondingly increased as recipients of these benefits are not eligible for the family tax credit. Additionally, the Bill increases the minimum family tax credit, which is intended to ensure that all beneficiaries are better off in work by topping up the after-tax income

to a set threshold. The increased threshold aligns with the targeted social assistance increases in this Bill, such as winter energy payments.

8. Winter energy payments provide targeted assistance to those on main benefits, superannuation and veteran's pensions to help meet their household heating costs during the winter period. Winter energy payments are set at \$450 a year for single people with no dependents and at \$700 a year for people married, in a civil union or in a de facto relationship, and/or with one or more dependent children. The Bill also includes transitional provisions relating to the winter energy payment during its first year.
9. The winter energy payment is not available to recipients of a main benefit where they are subject to a non-entitlement period, a stand down under s 80BA, or suspension of 100 percent of the benefit or cancellation of the benefit under ss 116, 173 or 174.
10. The winter energy payment is also not available to otherwise eligible people who are receiving long-term residential care in hospital or a rest home, or residential support services which are funded in whole or part under the New Zealand Public Health and Disability Act 2000. People can choose to opt-out of receiving a winter energy payment.
11. The Bill inserts a new definition for accommodation supplement purposes of the terms Area 1, Area 2, Area 3, and Area 4. The new definition will be set out in regulations.
12. Finally, the Bill consequentially amends several other Acts, Regulations, and Orders relating to the Income Tax Act and the Social Security Act.

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

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### **Section 19(1) – Freedom from discrimination**

13. Section 19(1) of the New Zealand Bill of Rights Act 1990 affirms that everyone has the right to freedom from discrimination on the prohibited grounds in s 21 of the Human Rights Act 1993. The grounds of discrimination under the Human Rights Act include marital status, family status, and employment status which means being unemployed or being a recipient of a benefit under the Social Security Act or an entitlement under the Accident Compensation Act 2001.
14. The key questions determining whether legislation limits freedom from discrimination are:<sup>1</sup>
  - a. does the legislation draw a distinction on one of the prohibited grounds of discrimination under the Human Rights Act?
  - b. if so, does the distinction involve material disadvantage to one or more classes of individuals?

### *Social security legislation, tax legislation, and discrimination*

15. Social security legislation necessarily targets limited government assistance to those most in need. Assistance, and obligations on those receiving it, is then tailored to suit individual circumstances. Eligibility for benefits, and obligations on beneficiaries, are

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

inherently discriminatory as they are based on drawing distinctions on many prohibited grounds including marital status, ethnic or national origins, disability, age, employment status, and family status.

16. As with social security legislation, taxation legislation also makes distinctions based on prohibited grounds under s 21 of the Human Rights Act. Achieving a fair and efficient tax system involves complex social policy questions, which can be addressed in a variety of ways. Some latitude is generally given to the legislature to achieve its objectives, and it is a matter of legitimate policy choice as to where tax thresholds are drawn.
17. Limitations on rights and freedoms may still be consistent with the Bill of Rights Act if they can be considered a reasonable limit that is justifiable in terms of s 5 of that Act. The s 5 inquiry may be approached as follows:<sup>2</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?
18. The object of the Bill is to enact the Government's 'Families Package' which includes several measures to support children in New Zealand by reducing child poverty, and address income adequacy. In doing so, the Government provides targeted financial assistance to families with children (i.e. based on family status) and to certain vulnerable groups of people so they can heat their homes during winter. Eligibility for the winter energy payment depends on receiving a main benefit, superannuation, or a veteran's pension under the Social Security Act (i.e. based on employment status).
19. Achieving a fair distribution of financial and social assistance to those most in need is a complex social policy matter. Moses J in *R (on the application of Hooper) v Secretary of State for Work & Pensioners* stated:<sup>3</sup>

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, with the European Convention on Human Rights] even if individual hardship is occasioned...
20. As seniors are more susceptible to winter ills and beneficiaries are on low incomes and therefore have a higher likelihood of being impacted by poor quality housing stock, the winter energy payment also serves an important objective. The form of assistance provided is rationally connected to the Bill's objective, proportionate, and does not go further than reasonably necessary.

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<sup>2</sup> See *Hansen v R* [2007] NZSC 7, [2007] 3 NZLR 1 at [123].

<sup>3</sup> *R (on the application of Hooper) v Secretary of State for Work & Pensions* [2002] EWHC 191 at [115] as referred to in *Howard v Attorney-General* (2008) 8 HRNZ 378 at [76] – [77].

21. The 'BestStart' tax credit serves an important objective of ensuring all children get their best start in life by providing all families with extra support in the first year of a child's life, and longer-term support for those on low and middle incomes. Increases to the rates and abatement thresholds of family tax credits similarly assist families with children over families without children. Nevertheless, targeting assistance to families with children is objectively connected to the purpose of the Bill, proportionate, and does not go further than reasonably necessary.

*Differential payment based on employment status*

22. Proposed ss 61FG(2)(b) – (d) of the Social Security Act carve out exceptions from receiving a winter energy payment for those persons receiving a benefit who are living in long term residential care in a hospital or rest home, or otherwise in residential disability support services and that care is funded in whole or in part by the New Zealand Public Health and Disability Act 2000.
23. On its face, this discriminates against those people based on their employment status because they are unemployed or in receipt of a benefit under the Social Security Act and *cannot* access the winter energy payment. However, as residential care costs presumably already include heating costs, there is no need to pay persons receiving long term care any supplementary payment. This category of benefit recipients will therefore not suffer material disadvantage if they do not receive this support.
24. Maintaining the Independent Earner Tax Credit gives preferential treatment to low income earners in work, rather than those on benefits. Nevertheless, this is a justified intervention to promote income adequacy and incentivise work.

*Differential payment based on marital and/or family status*

25. The winter energy payment schedule has two payment categories based on an eligible person's marital or family status (whether they have dependent children).
26. While the payment schedule distinguishes between groups based on prohibited grounds, this does not result in material disadvantage because payments are broadly set in accordance with the energy needs of these groups.
27. Additionally, and carrying over an existing feature of the Working for Families scheme, caregivers who receive an Orphan's Benefit, Unsupported Child's Benefit or Foster Care Allowance are not able to apply for the family tax credit. Presumably, such caregivers are not eligible as they are already receiving a benefit or allowance to assist in caring for dependent children. To the extent such caregivers are excluded from the family tax credit scheme, however, the detriment suffered should be minimal given that the Bill also increases the rates of these benefits to reflect the increase in the eldest child family tax credit rate.

*Conclusion on freedom from discrimination*

28. Taken together, the Bill enacts a policy package to address complex social and economic issues. The Bill targets assistance based on an assessment of levels of poverty and relative disadvantage, which may differ over time depending on "overall political judgment".<sup>4</sup>

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<sup>4</sup> *Child Poverty Action Group Inc v Attorney-General* [2013] NZCA 402, [2013] 3 NZLR 729 at [149].

29. For the reasons outlined above, and having regard to the degree of deference that is appropriate when dealing with complex social policy issues,<sup>5</sup> we consider the Bill appears to be consistent with the right to be free from discrimination affirmed in s 19(1) of the Bill of Rights Act.

## **Conclusion**

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30. 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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<sup>5</sup> See, for example, *Canada (Attorney General) v JTI-MacDonald Corp* [2007] 2 SCR 610 at [41] – [43].