



Report of the
ATTORNEY-GENERAL
under the New Zealand Bill of Rights Act
1990 on the Relationships (Statutory
References) Bill

*Presented to the House of Representatives pursuant to
Section 7 of the New Zealand Bill of Rights Act 1990
and Standing Order 264 of the Standing Orders of the
House of Representatives*

1. I have undertaken an examination of the Recognition of Relationships Bill (PCO 5620/13) (“the Bill”) for consistency with the New Zealand Bill of Rights Act 1990 (“the Bill of Rights Act”). I conclude that amendments to ss 21, 27C and 27D of the Social Security Act 1964 in Schedules 8 and 9 of the Bill in respect of the Widows and Woman Alone Benefits appear to be inconsistent with the freedom from discrimination on the grounds of sex affirmed by s 19(1) of the Bill of Rights Act and s 21(1)(a) of the Human Rights Act 1993, and do not appear to be justifiable in terms of s 5 of the Bill of Rights Act.
2. Further, the amendment to s 35(2) of the Immigration Act 1987 in Schedule 14 of the Bill, which provides that the Minister may decline the permit application of a person under 17 years of age if there is no parental consent, appears to be inconsistent with the freedom from discrimination on the grounds of age affirmed by s 19(1) of the Bill of Rights Act and s 21(1)(i) of the Human Rights Act and does not appear to be justifiable in terms of s 5 of the Bill of Rights Act.
3. As required by section 7 of the Bill of Rights Act and Standing Order 264, I draw these apparent inconsistencies to the attention of the House.

The Bill

4. The Bill amends legislation (that is not already part of a statute/section specific review or for which no suitable vehicle already exists) to ensure laws are relationship-neutral, in that they apply equally to married, civil union and de facto relationships of different and same sex couples.

The Bill of Rights issues

Sex discrimination

5. Amendments to the widow’s and woman alone benefits in the Social Security Act appear to discriminate on grounds of sex. These are the amendments to ss 21, 27C and 27D of the Social Security Act in Schedules 8 and 9 of the Bill. These provisions extend the widow’s and woman alone benefits so as to apply to women who were in a civil union (Schedule 8) or in de facto relationships as defined in s3B of the principal Act (Schedule 9). The provisions in this Bill re-enact provisions which permit payment of the widow’s benefit and woman alone benefit to women only. This apparent discrimination has existed since the time the payments were first instituted.
6. These provisions all treat men and women differently as only women are eligible for these benefits. While men may be eligible for other benefits, such as unemployment benefit, men suffer real disadvantage as those alternative benefits provide less money per week, are subject to a harder income test and carry a particular stigma within our society that the widow’s benefit, in particular, does not.
7. In my view this differential treatment of men is not justified under s 5 of the Bill of Rights Act.
8. The continued existence of these gender-based benefits reflects that historically many married women did not work outside the home and were economically dependent on their spouses and that many women alone who had to care for dependants did not work outside the home. The fact of having to care for dependants

and/or the lack of labour market attachment during either the period of the marriage or period of caring for dependants meant that the widow or woman alone would have difficulties in entering the labour market. This explanation is supported anecdotally.

9. It may be difficult to understand why a widower or man alone is necessarily in a significantly different position than a widow or woman alone with the same responsibilities. The need to care for dependants may make working difficult. It may be doubtful that the lack of labour market attachment is sufficiently prevalent to warrant the continued existence of these benefits.
10. Because I have no evidence of any demonstrable need for women only to receive these benefits, I am unable to say that for certain that the widow's benefit and the woman alone benefit are demonstrably justified in a free and democratic society in terms of section 5 of the Bill of Rights Act. If reliable and statistically significant differences between men and women could be established on the evidence available to the Ministry of Social Development, I could possibly have reached a different decision.
11. The United Kingdom experience may be illustrative. The UK until recently did make separate provision for widows. This was changed in 1999 to take effect in 2001. The regime applying prior to that change, which disqualified widowers from the same entitlements as widows, was challenged under the UK Human Rights Act 1998 in *Hooper and Others v Secretary of State for Work and Pensions* [2003] EWCA Civ 813. In the Court of Appeal, the Secretary of State conceded that the legislation had been changed because the gendered entitlements could no longer be justified. However, the Secretary of State argued that up until the time at which the law was changed the provision was capable of objective justification (para. 18). The government relied on the comparative statistics of women and men's economic activity in the labour market to support that position. Not surprisingly, these statistics did show a disparity between women and men. Nonetheless, the Court held that the government had not discharged its burden of showing the disparity to be objectively justified. Clearly the Court considered that there was sufficient concordance to make the existence of payments to widows only unsustainable (para. 64). I would expect our labour market statistics not to be dissimilar to those in the UK.
12. I therefore conclude, in the absence of evidence to the contrary, that these provisions are inconsistent with the right to freedom from discrimination on the ground of sex under the Bill of Rights Act.

Section 35(2) Immigration Act 1987

13. The amendment to s 35(2) of the Immigration Act 1987 in Schedule 14 results in that section providing that where an application for a permit is made by a person under 17 years of age who is not married or in a civil union or a de facto relationship the Minister may decline the application if the Minister believes on reasonable grounds that any parent or guardian of the person does not consent to the making of the application.
14. This provision applies to every 16 year old who is not married, in a civil union or in a de facto relationship, and not only to those who are dependent on a parent or guardian. The provision is clearly directed at securing parental control and disadvantages 16 year olds by presuming them to be under such control. This is a legitimate exercise of the state's prerogative in respect of immigration, and in

particular makes a decision about the age below which young immigrants may not be on their own in this country. This reason, and also the fact that the Minister has a discretion in this matter, might alter my view that the provision is not justified, if it were not for the fact that the New Zealand Immigration Service has been unable to provide evidence of a rationale for the reliance upon age and has indicated that there appear to be no compelling reasons relating to these particular clauses in the Immigration Act as to why the age is set at 17 and not 16.

15. In these circumstances this differential treatment of 16 year olds is not justified under s 5 of the Bill of Rights Act on any argument or evidence that I have in front of me.
16. I am advised that there is a proposal for the Ministry of Social Development to co-ordinate a project in the near future to eliminate examples of unjustified discrimination on the grounds of age across government. I also note that there is a review of the Immigration Act currently being undertaken at the request of the Minister. As I have noted in section 7 reports before, while issues may well be under review, proposals for future reform alone do not justify the particular inconsistencies in this Act.

A handwritten signature in black ink, appearing to read "Margaret Wilson".

Hon Margaret Wilson
Attorney-General