



REPORT OF THE

ATTORNEY-GENERAL

under the New Zealand Bill of Rights Act
1990 on the Taxation (Income-sharing Tax
Credit) Bill

***Presented to the House of Representatives
pursuant to Section 7 of the New Zealand Bill of
Rights Act 1990 and Standing Order 261 of the
Standing Orders of the House of Representatives***

1. I have considered whether the Taxation (Income-sharing Tax Credit) 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 that the Bill appears to limit the right to be free from discrimination as affirmed by s 19(1) of the Bill of Rights Act. The limitation cannot be justified under s 5 of that Act. As required by s 7 of the Bill of Rights Act and Standing Order 261, I draw this to the attention of the House of Representatives.

The Bill

2. The Bill amends the Income Tax Act 2007 and Tax Administration Act 1994 to create an Income-sharing Tax Credit (ISTC). The ISTC would create a financial benefit through an annual tax credit available to couples with dependent children. However, the ISTC excludes sole parents from eligibility.
3. The stated intention of the Bill is to give couples greater freedom to work fewer hours or more flexible hours in order to care for dependent children. Under new section MG 2, a person qualifies for the ISTC if:
 - (a) the person is in a relationship with another person (the “family partner”) as spouses, civil union partners, or de facto partners; and
 - (b) both the person and their family partner are, for the whole of the tax year, resident in New Zealand; and
 - (c) during the tax year, the person or their family partner is the principal caregiver for a dependent child.¹
4. A parent who is separated, has an eligible shared care arrangement with the former partner and has a new family partner would also be eligible for the ISTC. A sole parent is not eligible for the ISTC because the sole parent has no eligible person with which to notionally split their income. The caring arrangements a sole parent may have with former partners, family members or friends will not meet the eligibility requirements of the ISTC.
5. The amount of the ISTC that can be claimed is the difference between the total tax payable by the couple and the tax they would pay if each partner notionally received half of the couple’s combined income. This is known as “income splitting”. Generally, no taxpayer can escape the assessment of income tax on income resulting from their personal activities.² However, the Bill explicitly allows income splitting for couples with dependent children. To maximise the ISTC, there must be a significant disparity in the couple’s respective incomes. The amount of the ISTC increases as the disparity between income increases.

¹ A child ceases to be a dependent child when they reach the age of 18, or before that age if they marry, enter a de facto or civil union relationship, or become financially independent. In the year in which a child turns 18, they continue to be treated as a dependent child if they are attending school or a tertiary educational establishment and remain financially dependent.

² *Spratt v CIR* [1964] NZLR 272, 277 per Henry J; approved *Hadlee v CIR* [1991] 3 NZLR 517; (1991) 13 NZTC 8,116; (1991) 15 TRNZ 721; affirmed *Hadlee v CIR* [1993] 2 NZLR 385; [1993] AC 524; 25 ATR 206 (NZPCC).

6. For example, where one family partner makes \$140,000 a year and the other has no taxable income the couple's total tax liability will be \$37,120.³ Under the ISTC, the income from that family's sole income earner would be notionally split between the couple and their total tax liability would be \$28,040, with a savings of \$9,080. The savings results because the second \$70,000 of the earner's income escapes taxation at 33 cents on the dollar and is instead taxed at lower marginal rates. For a couple where one person earns \$110,000 and the other \$30,000, the ISTC will be \$3,450. A couple with both parents working full-time and making \$70,000 each will not receive the ISTC. Assuming that the relative disparity in a couple's respective incomes remains the same, the amount of the ISTC also diminishes as a family's income falls.

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

7. Section 19(1) of the Bill of Rights Act affirms that everyone has the right to be free from discrimination on the grounds of discrimination in the Human Rights Act 1993, which include sex and marital status.⁴

Does the ISTC discriminate on the basis of marital status?

8. The ISTC takes a narrow view of family, parenting, and family care arrangements for children because there must be a "couple" with dependent children. The ISTC gives rise to a distinction on the ground of marital status because it explicitly distinguishes between couples with children and sole parents. For the purposes of this report, sole parents include caregivers without a partner, widows and widowers with children but without a partner, separated parents who have not repartnered and sole parents who share childcare responsibilities with another person.
9. The ISTC results in a comparative financial disadvantage for sole parents of up to \$9,080. In effect, the ISTC also stigmatises sole parents as less worthy of tax relief than couples and perpetuates the stereotype that to be a "real" family there must be two parents in a relationship to raise children.
10. Limiting the ISTC to couples means that there are many other types of families that would suffer a disadvantage. For example:

Family #1: A couple has two children. They receive the ISTC. The father is then widowed and the family's taxes rise by the amount of the ISTC they were receiving but are no longer eligible to receive as the father is now a sole parent. The children's grandmother quits her job to live with them and help look after the children but the father cannot split his income with the grandmother because she is not a family partner under the Bill.

Family #2: A couple is in a civil union with children. They separate and agree to a shared care arrangement and are raising the children together. The mother works

³ The example of \$140,000 family income is used because the Explanatory Note cites \$9,080 as the maximum amount available under the ISTC. This amount of ISTC is only available for high income earners. The figures are based on the personal tax rates as of 1 October 2010.

⁴ Human Rights Act 1993 ss 21(1)(a) and (b). Marital status is defined as being: (i) single; or (ii) married, in a civil union, or in a de facto relationship; or (iii) the surviving spouse of a marriage or the surviving partner of a civil union or de facto relationship; or (iv) separated from a spouse or civil union partner; or (v) a party to a marriage or civil union that is now dissolved, or to a de facto relationship that is now ended.

fewer hours to care for the children and is fully supported by the father. They are no longer eligible for the ISTC because the parents must be together caring for the child.

Family #3: A couple is married with children. The mother is the primary income earner and she receives the ISTC. The couple separate, the father cannot care for the children and the mother has sole custody of the children. On separation, the mother's taxes rise in proportion to the ISTC that she is no longer eligible for because she is now a sole parent.

11. I consider that the ISTC places a limit on the right to freedom from discrimination on the ground of marital status because sole parents are not able to avail themselves of the ISTC.

Does the ISTC discriminate on the basis of sex?

12. Unlike marital status, the ISTC does not expressly discriminate on the basis of sex. A person is not automatically excluded from the ISTC because of their sex. The ISTC does, however, reinforce the inequalities that women face in the context of being sole parents.
13. Indirect discrimination may be established where a significant proportion of women experience a negative effect from the ISTC. While some individual women may receive a benefit from the ISTC, it is the effect on the group to which the individual belongs that is relevant and not the effect on the individual personally. The effect must create a significant disparity.
14. The 2009 Social Report states that compared to other OECD countries, New Zealand has a relatively high proportion of families with children under 18 years headed by sole parents (28 per cent).⁵ Of these one-parent families, 83 per cent are mother only families.⁶
15. I consider that the ISTC will have the effect of discriminating against a significant proportion of women who are sole parents.

Are the limits on the right to freedom from discrimination justified in a free and democratic society?

16. Where a provision is found 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 justifiable in terms of s 5 of that Act. Following the guidance of the New Zealand Supreme Court decision of *Hansen v R*, the s 5 inquiry may be summarised as:⁷
 - (a) does the objective serve a purpose sufficiently important to justify some limitation of the right or freedom?

⁵ Ministry of Social Development *The Social Report 2009* at 16.

⁶ Ibid.

⁷ The proportionality test under s 5 of the Bill of Rights Act, as applied in *Hansen v R* [2007] NZSC 7 [123], draws on the test articulated by the Canadian Supreme Court in *R v Oakes* [1986] 1 SCR 103, *R v Edwards Books and Art Ltd* [1986] 2 SCR 713 and *R v Chaulk* [1990] 3 SCR 1303. See for example, *Hansen*, at [42] per Elias CJ; [64] and [79] per Blanchard J; [103], [104] and [120]-[138] per Tipping J; [185] and [217] per McGrath J; and [272] per Anderson J.

(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 the objective?
- iii. is the limit in due proportion to the importance of the objective?

Is the objective sufficiently important?

17. The stated intention of the ISTC is to give couples greater freedom to work fewer hours or more flexible hours in order to care for children. The intention of ISTC is not to give this assistance to parents generally, but to couples specifically. In doing so, the ISTC excludes 28 per cent of New Zealand families with children because those families have a sole parent. The effect of the ISTC is that couples would have greater freedom *than sole parents* to work fewer hours or more flexible hours in order to care for children.
18. If the Bill gave all parents greater freedom to work fewer hours or more flexible hours in order to care for children, this would unquestionably be an important objective.
19. The first limb of the s 5 inquiry requires that an objective must be sufficiently important to limit the right to freedom from sex and marital status discrimination. Objectives that are discordant with the principles integral to a free and democratic society should not gain s 5 protection.⁸ It is unclear why couples are in need of greater freedom than sole parents to work fewer hours or more flexible hours in order to care for dependent children. Accordingly, I consider that the objective, which limits preferential tax treatment to couples with dependent children, does not serve a purpose sufficiently important to justify limiting the right to freedom from discrimination.

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

20. Even if the objective of the ISTC was sufficiently important, the payment of ISTC is not rationally connected to that objective.
21. Income and marital status determine the amount of and eligibility for the ISTC. However, the need to work fewer hours or more flexible hours in order to care for dependent children flows from the age of the children (infant versus school-age), the individual needs of the children, the number of dependent children and the availability of support and assistance from other people. However, the actual needs of parents do not change the amount of the ISTC available to couples.
22. The only factor that changes the amount of the ISTC is income disparities. This is demonstrated in comparing two eligible couples equal in all respects including receiving the same combined income. The couple that has no disparity in income will not receive the ISTC whereas the other couple with a significant disparity in income will receive the ISTC in an amount reflecting the disparity.

⁸ *R v Oakes* [1986] 1 SCR 103, 138-9; *R v Big M Drug Mart Ltd.* [1985] 1 SCR 295 at [140]-[141].

Is the impairment on the right greater than reasonably necessary?

23. Parliament is entitled to appropriate latitude to achieve its objectives.⁹ The issue here is, in practical terms, whether the objective might be achieved by another method involving less cost to the right to be free from discrimination on the basis of marital status and sex. I note that there are other government measures that make fact-based determinations into whether a family is in need of support from the State based on number of dependents and family income without discriminating on the basis of marital status or sex. If the freedom to work fewer hours or more flexible hours in order to care for children was available equally to all similarly situated parents, a limit on the right to freedom from discrimination may be justifiable.
24. In light of the availability of alternatives, I consider that the ISTC limits sole parents' and women's rights more than is reasonably necessary.

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

25. Finally, the limit is not in due proportion to the importance of the objective because sole parents are also in need of greater freedom to work fewer hours or more flexible hours in order to care for dependent children. Similarly, women are more economically vulnerable than men and are more likely to have a greater need for tax relief to care for children. Accordingly, those most in need of greater freedom to work fewer hours or more flexible hours in order to care for dependent children will not be eligible for the ISTC.

Conclusion

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



Hon Christopher Finlayson
Attorney-General

⁹ Hansen, above n 7, at [126] per Tipping J.