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Report of the

# *ATTORNEY-GENERAL*

under the New Zealand Bill of Rights Act  
1990 on the Social Security Legislation  
Rewrite Bill

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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 Social Security Legislation Rewrite 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. I have concluded that in one respect the Bill limits the right to freedom from discrimination affirmed in s 19 of the Bill of Rights Act and that the limit cannot be justified under s 5 of that Act.
3. 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**

4. The Bill rewrites the Social Security Act 1964 ('the Act'). The Act established New Zealanders' fundamental legal entitlements to social assistance, delivered through the benefit system. The Act was written in 1964 and has been amended many times since then, resulting in provisions being fragmented and difficult to read.
5. The aim of the rewrite is to improve the accessibility of the legislation by clearly setting out:
  - 5.1 the existing requirements for eligibility for assistance
  - 5.2 the obligations applying to the Ministry of Social Development ('MSD') and beneficiaries
  - 5.3 sanctions for non-compliance with obligations
  - 5.4 rights to review and appeal decisions made by MSD, and
  - 5.5 the framework for the delivery of assistance.
6. The Bill also shifts the residential care provisions into a stand-alone act, so they are easier to access by or for people requiring residential care.
7. The Act aims to provide financial support and other services for people while they are out of work. This support is balanced by obligations on beneficiaries to find and stay in employment when it is possible and appropriate for them to do so. Obligations vary depending on a person's situation and what type of assistance they receive.

### **Inconsistency with s 19 — Right to freedom from discrimination**

8. Section 19 of the Bill of Rights Act 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 disability.
9. A legislative provision will limit the right to freedom from discrimination if:

- 9.1 the legislation draws a distinction based on one of the prohibited grounds of discrimination, and
- 9.2 the distinction involves material disadvantage to one or more classes of individuals<sup>1</sup>.

*Social security legislation and discrimination*

10. 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 inherently discriminatory as they are based on drawing distinctions on a number of prohibited grounds of discrimination including marital status, ethnic or national origins, disability, age, employment status, and family status.
11. In my view, all but one of the distinctions made in the Bill are justifiable. Paid employment is considered the best opportunity for people to achieve social and economic well-being. Where it is appropriate, people should be supported into work, and those unable to work should be provided with suitable support. I agree that achieving the best possible outcome for people at risk of long-term welfare dependency means appropriate assistance, support, and services under this Bill should be provided.
12. However, I consider the provisions of the Bill that relate to advantageous treatment of the totally blind compared to people with other disabilities, are not justifiable.

*Provisions for the totally blind*

13. Clause 33 provides that a person is entitled to the Supported Living Payment ('SLP') if the person 'has restricted work capacity or is totally blind'. People with disabilities other than total blindness must prove both their disability and the impact it has on their capacity to work. Restricted work capacity is defined in clause 34 as a permanent (expected to continue for more than six months) and severe (incapable of working at least 15 hours a week) restriction in capacity for work because of a health condition, injury or disability.
14. People who are totally blind must prove only that they are totally blind in order to be entitled to the SLP and can receive the SLP even if they are able to work full time. All other disabled people must prove they are unable to work more than 15 hours a week.
15. New schedule 4, part 3, clause 1 provides that MSD must disregard all of the income of a totally blind beneficiary earned by the beneficiary's own efforts. Other SLP recipients can have only \$20 of their earnings disregarded. Therefore an SLP recipient who is totally blind can work full time and receive the full SLP amount.

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<sup>1</sup> 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.

16. MSD advises that there are 1,049 totally blind people currently receiving the SLP under the Act's current equivalent provisions. MSD estimates that around 60 of these people could have their benefit reduced or cancelled if the separate provisions for the totally blind did not exist.
17. New schedule 4, part 3, clause 3 provides that a person receiving the SLP on the ground of total blindness, and who is employed, is entitled to an additional allowance equal to 25% of the person's average earnings for the year (up to a certain amount). Other SLP recipients are not entitled to this additional allowance (known as the blind subsidy). MSD advises that no one is currently receiving the blind subsidy under the Act's current equivalent provisions.
18. The Bill therefore distinguishes between different subgroups of persons who are protected from discrimination on the ground of disability. Individuals who are totally blind are eligible for certain entitlements that people with other disabilities are not entitled to. In my view, this distinction materially disadvantages people with disabilities other than total blindness.
19. In my view, these provisions create a *prima facie* limitation on the right to freedom from discrimination on the ground of disability.

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

20. Where a provision appears 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 demonstrably justified in a free and democratic society under s 5 of the Bill of Rights 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?

*Is the objective sufficiently important?*

21. The objective of these provisions appears to be to provide support to those who have severely restricted work capacity (because of total blindness) and to support and encourage blind people into employment where possible. I consider this to be a sufficiently important objective. It aligns with the overall objective of the Bill of

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<sup>2</sup> *Hansen v R* [2007] NZSC 7 at [123].

supporting people into paid employment, which is considered the best opportunity for people to achieve social and economic well-being.

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

22. Disregarding income earned by totally blind SLP recipients' own efforts appears to be rationally connected to the objective of encouraging blind people into employment.
23. However, there appears to be little rational connection between the entitlement to claim the SLP on proof of total blindness only and the objective of supporting those with severely restricted work capacity, as a totally blind person may in fact have the capacity to work full time.
24. I also consider there is little rational connection between payment of the blind subsidy and the objective of supporting and encouraging blind people into work. The blind subsidy is only available to people working minimal hours for low wages (MSD advises this is about 10 hours per week at minimum wage), and the maximum subsidy available is very low (about \$27.50 per week). The blind subsidy therefore does not provide much of an incentive to undertake employment and I note that no one is currently receiving it.

*Is the impairment of the right greater than reasonably necessary and in due proportion to the importance of the objective?*

25. The rights of people with disabilities other than total blindness are impaired as they are not entitled to the same additional support, or automatic entitlement to the SLP, as those with total blindness.
26. Historically, the provisions for the totally blind were considered necessary as there was a perception the totally blind were restricted in their capacity to work (both by lack of opportunity and by lack of technological support) and needed additional support into employment. However, research shows that people with physical and mental health impairments now have higher costs associated with access to education, employment, healthcare and community support services, than people who are blind.<sup>3</sup> Advances in technology have also removed some barriers to employment for the totally blind.
27. A range of other mechanisms are in place to meet the additional costs of disability in employment for all disabled people in paid work. These include:
  - 27.1 Support Funds, which are used to cover any additional costs that a jobseeker or student has as a direct consequence of their disability, when undertaking the same job or training as a person without a disability

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<sup>3</sup> The Cost of Disability Final Report - DRC (Disability Resource Centre, Auckland, Inc). This project was co-funded by MSD and the Health Research Council of New Zealand, and conducted by the Disability Resource Centre, in collaboration with the University of Auckland. Published in 2010.



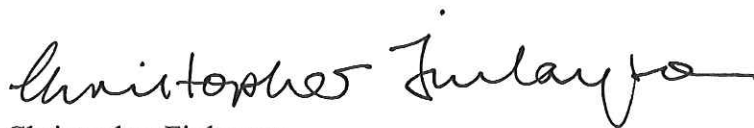
- 27.2 the Disability Allowance, provided for in part 2, subpart 12 of the Bill, which assists individuals who have ongoing additional costs because of a disability
- 27.3 Accident Compensation Corporation (ACC) vocational rehabilitation and managed rehabilitation equipment service, which provides support for people to stay at work or return to alternative employment following an injury
- 27.4 the Total Mobility Scheme, organised by the Ministry of Transport and participating Regional Councils, which provides subsidised taxi and mobility services to disabled people, and
- 27.5 the Ministry of Health equipment modification scheme which provides specialised equipment and vehicles that are not funded by ACC.
28. There now appears to be no needs-based justification for providing additional levels of support to the totally blind simply on the basis of total blindness. Accordingly, the impairment of the right of other disabled groups to be free from discrimination cannot be said to be no more than reasonably necessary or proportionate to the importance of the objectives.
29. As outlined above, 1,049 totally blind people currently receive the SLP (60 of whom could have their benefit reduced or cancelled if the separate provisions for the totally blind did not exist) and no one currently receives the blind subsidy. While these are small numbers in the overall social security context, any unjustifiable limits on Bill of Rights Act rights and freedoms, however small, must be drawn to the attention of the House.

### **Consideration of consistency with other sections of the Bill of Rights Act**

30. I also considered *prima facie* limitations in the Bill on the following rights and freedoms in the Bill of Rights Act:
- 30.1 section 11 – right to refuse medical treatment
- 30.2 section 14 – right to freedom of expression
- 30.3 section 17 – right to freedom of association, and
- 30.4 section 21 – right to be secure against unreasonable search and seizure.
31. I consider the overall objective of the Bill sufficiently important to justify some limits to the above rights and freedoms. In my view these limits are rationally connected to the objective, minimally impair the rights and freedoms, and are proportionate to the importance of the objective. Consequently, to the extent that the Bill limits those rights and freedoms, I consider them to be justified under s 5 of the Bill of Rights Act.

**Conclusion**

32. For the above reasons, I have concluded the Bill's provisions relating to the advantageous treatment of the totally blind appear to be inconsistent with s 19 of the Bill of Rights Act and the inconsistency cannot be justified under s 5 of that Act.



Hon Christopher Finlayson

**Attorney-General**

*CF* March 2016