

22 November 2006

ATTORNEY-GENERAL

LEGAL ADVICE

CONSISTENCY WITH THE NEW ZEALAND BILL OF RIGHTS ACT 1990: Social Security Amendment Bill

- 1 We have considered whether the Social Security Amendment Bill (PCO 7459/9) is consistent with the New Zealand Bill of Rights Act 1990 ('the Bill of Rights Act'). We understand that this Bill will be considered by the Cabinet Legislation Committee at its meeting on 23 November 2006.
- 2 We have concluded that the Bill is consistent with the Bill of Rights Act. In reaching this conclusion, we have considered potential issues of inconsistency with the right to freedom of expression (section 14) and the right to freedom from discrimination (section 19(1)). Our analysis of these issues is set out below.
- 3 We understand that a subsequent version of the Bill with largely minor amendments will go to the Cabinet Legislation Committee on Thursday, 23 November 2006. Further, we understand from officials that any changes to the Bill are unlikely to give rise to Bill of Rights Act issues. If any of the amendments do give rise to a Bill of Rights Act issue, we will advise you immediately.

PURPOSE OF THE BILL

- 4 The Bill amends the Social Security Act 1964. It represents the first phase of the Working New Zealand: Work-Focused Support package of proposals to reform the social support system. This package of reforms is intended to encourage beneficiaries to participate in the labour market, where work is an appropriate outcome, and continue to provide social and financial support for people with temporary or long-term barriers to work.
- 5 The main objectives of the Bill are:
 - to place greater expectations on benefit recipients, which align with new developments in service delivery and support; and
 - to align and update a number of provisions in the Social Security Act.
- 6 The Bill seeks to achieve these objectives by:
 - introducing a new pre-benefit activity requirement on applicants for unemployment benefit, and enhancing the current expectations of people who are work-tested;
 - introducing planning and activity requirements for sickness and invalid's beneficiaries, and other people who are not work-tested (in particular, the

- spouses and partners of beneficiaries whose youngest dependent child is aged under 6);
- introducing an activity requirement (education, training or employment) instead of the work test for young people in receipt of an independent youth benefit;
- providing that some people with ill health or a significant disability be exempt from any work, planning or activity requirement;
- aligning and updating provisions relating to:
 - the application process:
 - residence criteria:
 - the maximum stand down period (reducing the stand-down period to two weeks for all primary benefits):
 - periods for which main benefits are paid:
- broadening a reference to hospital care (for the domestic purposes benefit for care of sick or infirm persons) so other forms of full-time, disability related care are included.

SUMMARY OF BILL OF RIGHTS ACT ISSUES

- 7 Below is a summary of how the issues of inconsistency with sections 19(1) and 14 of the Bill of Rights Act arise. A more detailed analysis of these issues follows this summary.
- 8 We have considered whether issues with the right to be free from discrimination as affirmed by section 19(1) of the Bill of Rights Act arise in the Bill on the grounds of age, marital status, family status and sex because of limits placed on eligibility for certain benefits, the lesser or greater benefit requirements that certain people have to meet and the lighter penalties imposed on certain people.
- 9 A number of clauses in the Bill compel applicants and beneficiaries to disclose information in a range of situations in order to be eligible or continue to be eligible for a benefit. These clauses give rise to an issue under section 14 of the Bill of Rights Act (the right to freedom of expression).
- 10 We have reached the conclusion that, upon consideration of these issues under section 5 of the Bill of Rights Act, the Bill appears to be consistent with the rights and freedoms contained in the Bill of Rights Act.

ISSUES OF INCONSISTENCY WITH THE BILL OF RIGHTS ACT

Section 19: Freedom from Discrimination

- 11 Under section 19(1) of the Bill of Rights Act everyone has the right to freedom from discrimination on the grounds of discrimination set out in section 21 of the Human Rights Act 1993. The grounds of discrimination include age, marital status, family status and sex.
- 12 Not all policies or practices that draw a distinction between individuals give rise to an issue of discrimination under section 19(1) of the Bill of Rights Act. This is because different treatment does not necessarily result in disadvantage. In our view, taking into account the various domestic and

overseas judicial pronouncements as to the meaning of discrimination, the key questions in assessing whether discrimination under section 19(1) exists are:

- Does the legislation draw a distinction based on one of the prohibited grounds of discrimination?
 - Does the distinction involve disadvantage to one or more classes of individuals?
- 13 If these questions are answered in the affirmative, we consider that the legislation gives rise to a *prima facie* issue under section 19(1) of the Bill of Rights Act.
- 14 Where a provision is found to be *prima facie* inconsistent with 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 section 5 of that Act. The section 5 inquiry is essentially two-fold: whether the provision serves an important and significant objective; and whether there is a rational and proportionate connection between the provision and the objective.¹

Discrimination on the grounds of age, marital status, family status and sex

- 15 Several clauses in the Bill draw distinctions between applicants, beneficiaries and spouses or partners of beneficiaries on the grounds of age, marital status, family status and sex for the purpose of determining benefit entitlements.

Clause 5: Widows' benefits

- 16 Clause 5 of the Bill provides that for the purposes of determining eligibility for a widow's benefit, the Chief Executive may regard any dependent child as being a child of an applicant for a widow's benefit if the child is being maintained by the applicant and was at any time maintained by the applicant's husband.
- 17 This clause draws a distinction between persons on the grounds of sex and marital status for the purposes of determining eligibility for a widow's benefit because a dependent child will only be regarded as being the child of an applicant if the applicant is a married female. However, this distinction does not disadvantage males with a dependent child whose spouse or partner has died, or females with a dependent child whose partner has died, because they are eligible for the domestic purposes benefit (DPB) to assist them to care for their child. The Ministry of Social Development (MSD) has advised that the DPB rate is equivalent to the widow's benefit.

¹ In applying section 5, we have had regard to the guidelines set out by the Court of Appeal in *Ministry of Transport (MOT) v Noort* [1993] 3 NZLR 260 *Moonen v Film and Literature Board of Review* [2000] 2 NZLR 9; and *Moonen v Film and Literature Board of Review* [2002] 2 NZLR 754 and Supreme Court of Canada's decision in *R v Oakes* (1986) 26 DLR (4th).

Clause 7: Domestic purposes benefits for care at home of the sick or infirm (DPB: CSI)

Ineligibility of 16 and 17 year olds caring for spouse or partner for DPB: CSI

- 18 Clause 7 of the Bill provides that an applicant who has attained the age of 16 years and meets the residential requirement is entitled to receive a domestic purposes benefit for care at home of the sick or infirm (DPB: CSI), if the Chief Executive is satisfied that the applicant is required to give full time care and attention at home to some other person (other than the applicant's spouse or partner).
- 19 This clause draws a distinction on the grounds of marital status between 16 and 17 year olds who are required to give full time care and attention at home to their spouse or partner who would otherwise require hospital, rest home or residential disability care, or care of an equivalent kind, and those who are required to care for any other person in the same situation. In our view, this clause is prima facie inconsistent with section 19(1) of the Bill of Rights Act as it disadvantages 16 and 17 year olds who are caring for their spouse or partner because they are not eligible to receive any financial support.
- 20 We consider that the clause serves a significant and important objective. This is because it helps protect vulnerable young people and ensures that they do not sacrifice their own well-being and future prospects, and have the opportunity to be engaged in full-time education, training or employment. It is particularly important that there is no financial incentive for young persons to leave school to care for a spouse or partner, as educational attainment is important for improved long-term socio-economic outcomes.
- 21 Young persons are able to care for persons other than their spouse or partner because there may be cultural practices involved which oblige young people to care for older family members. Even so, young people caring for family members will only be able to receive a benefit where there is no other available carer, all the family circumstances and alternative care arrangements have been considered, and the young person's parents or guardians do not have capacity to provide adequate financial support. It is our view that the provision is rationally and proportionately connected to this objective and is therefore justified in terms of section 5 of the Bill of Rights Act.

Indirect distinction on grounds of family status

- 22 Clause 7 draws an indirect distinction on the grounds of family status between a person receiving a sickness or invalid's benefit who is married, in a civil union or a de facto relationship with a 16 or 17 year old person, and a person receiving the same type of benefit who has a spouse or partner aged 18 years or over. This is because they receive their benefit at the 'married rate' and not the 'single rate', even though their 16 or 17 year old spouse or partner is not eligible to receive a benefit.

- 23 We consider that any disadvantage that arises from this situation is justified. One of the principles underlying the social security regime in place in New Zealand is that young persons under 18 years will benefit long-term from being in full-time education, training or employment. Therefore to ensure that there is no financial incentive for young persons to leave school or training early, such persons are ineligible, in normal circumstances, to receive a benefit. This principle applies equally in the present case, as the couple will benefit long-term if the younger of the two partners remains in full-time education, training or employment. We note, however, that if the couple suffers financial hardship as a result of the younger partner or spouse not receiving a benefit, then that person may apply for an emergency benefit under section 61 of the Social Security Act.

Limited eligibility of 16 and 17 year olds for DPB: CSI

- 24 Under clause 7, a 16 or 17 year old applicant is ineligible to receive a DPB: CSI, unless the Chief Executive is satisfied, having regard to the circumstances of the person, the person he or she is giving care and attention to, and their families, that no other caregiver is reasonably available to care for the other person. This clause draws a distinction between 16 and 17 year olds and those who are aged 18 years or older for the purpose of determining eligibility for a DPB:CSI. Persons who are 18 years or older do not have to meet the test outlined above. This clause appears to raise an issue of inconsistency with section 19(1) of the Bill of Rights Act on the grounds of age.
- 25 We consider that the clause is justified in terms of section 5 of the Bill of Rights Act for the reasons given in paragraph 23 above.

Clause 24: Interpretation - definition of 'part-time work-tested beneficiary'

- 26 Clause 24 defines the term "part-time work tested beneficiary" as a person who is a work-tested spouse or partner and whose youngest dependent child is aged 6 years or older, but under 18 years. This definition draws a distinction on the grounds of family status between work-tested spouses or partners whose youngest dependent child is aged under 6 years and:
- those who have no dependent children; and
 - those whose youngest dependent child is aged 6 years or older, but under 18 years.
- 27 The consequences of this distinction is that spouses or partners whose youngest dependent child is aged 6 years or more will be disadvantaged because they are required to be part-time work-tested (required to take up suitable employment), whereas spouses or partners whose youngest dependent child is under 6 years are not required to be work-tested. It also disadvantages spouses or partners who have no dependent children as they are required to be full-time work-tested. Therefore, the definition of 'part-time work-tested beneficiary' appears to raise a prima facie issue of inconsistency with section 19 of the Bill of Rights Act.
- 28 In our view, the definition of part-time work-tested beneficiaries is justified in terms of section 5 of the Bill of Rights Act. The Bill recognises that people with dependent children under 6 years of age are best placed to provide full-time

care for their children, but once the children are school aged, they will be able to work part-time, while caring for their children outside of school hours. In this context, MSD has advised that the provision is consistent with the Government's objective of facilitating greater choices for primary carers around work and parenting.

Clause 31(2): Personal development and employment plans

- 29 Clause 31(2) provides that spouses or partners of recipients of emergency, invalid's, sickness or unemployment benefits who have a dependent child aged under 6 years must develop a personal development and employment plan (PDEP) and comply with the PDEP requirements. But such spouses or partners are not subject to a work-test.
- 30 This clause distinguishes between spouses or partners of recipients of emergency, invalid's, sickness or unemployment benefits who have a dependent child under 6 years of age and:
- those who do not have dependent children; and
 - those whose youngest dependent child is aged 6 years or over.
- 31 This distinction disadvantages spouses or partners of beneficiaries who do not have dependent children as they are subject to a full-time work-test as well as the PDEP requirements. It also disadvantages spouses or partners whose youngest dependent child is aged 6 years or more because they are subject to a part-time work-test as well as the PDEP requirements. Therefore, the clause raises a prima facie issue of discrimination on the grounds of family status.
- 32 In our opinion, clause 31(2) is consistent with the Bill of Rights Act because it assists certain beneficiaries and their spouses or partners to care for young children, who require greater parental attention, by not subjecting them to a work-test. They are instead required to develop a PDEP and are obliged to comply with the requirements set out in this plan. This will enable such persons to plan for a return to work as their family circumstances allow.

Clause 29: Independent youth benefit: obligations

- 33 Clause 29 provides that a person granted an independent youth benefit is required to:
- participate for at least 30 hours a week and not more than 40 hours a week, in any approved activities the person has previously agreed in writing to undertake, unless the person has a limited capacity to work because of sickness, injury, disability, pregnancy or the need to care for dependent children, in which case he or she must participate in at least one approved activity (being educational, training or developmental activity) for at least 3 hours a week; or
 - be available for, and take reasonable steps to obtain, full-time employment.
- 34 These requirements do not form part of the obligations that are imposed on persons aged 18 or over who are receiving a work-tested benefit. Clause 29, therefore, creates a disadvantageous distinction that gives rise to a

prima facie issue of inconsistency with section 19(1) of the Bill of Rights Act on the grounds of age.

- 35 We consider that Clause 29 is justified in terms of section 5 of the Bill of Rights Act. The provision actively engages eligible young people in education, training, employment or developmental activities that will lead to their long-term economic independence and wellbeing. It is also important that a broad range of intensive interventions be available for 16 and 17 year olds as employment may not be the best outcome, especially where young people lack or have low qualifications or skills and where, due to their circumstances, they are not work or life-ready.
- 36 16 and 17 year olds are transitioning from being at school full-time to having greater choice over activities. They are, therefore, at greater risk of becoming disengaged from education, training or employment and becoming inactive. Young people who are inactive for prolonged periods of time have a heightened risk of poor outcomes, including lower earnings, greater reliance on social assistance, higher rates of unemployment, criminal offending, substance abuse, teenage pregnancy, suicide, homelessness and mental or physical ill-health. ² Requiring young people to engage in these activities is intended to reduce the risk of these negative outcomes.

Clause 43: Effect of sanctions on rate of benefit for people married or in civil union or de facto relationship

- 37 Clause 43 provides that if the suspension or cancellation of a benefit payable at a work-test married rate results from the failure of both work-tested spouses or partners in respect of whom the benefit is paid to comply with work-test obligations and they have one or more dependent children, the suspension or cancellation of the benefit applies to only half the applicable rate of the benefit before any abatement on account of income. The spouses or partners are entitled to receive half that rate (and the appropriate income test applies to that rate).
- 38 This clause draws distinctions on the grounds of marital status and family status between beneficiaries who are married, in a civil union or a de facto relationship with dependent children and those who are married, in a civil union or a de facto relationship without dependent children. The distinction arises where a childless couple can be liable to have their total benefit suspended or cancelled where both members of the couple fail to meet their obligations, whereas if the couple have dependent children, the suspension or cancellation affects only half of the benefit.
- 39 We consider that this distinction is justifiable because it costs more to support a family than it does to support a couple. Suspending the total benefit for a family on welfare would cause considerable hardship, and the limited financial assistance the beneficiaries would receive during a suspension or cancellation period will enable such persons to continue to support their children.

² McLaren (2003) *Reconnecting Young People*, Ministry of Social Development, & Maloney, (2003) *The Determinants, Patterns and Outcomes of School-to-Work Transitions Among Youth in the Christchurch Health and Development Study*, Department of Labour.

Section 14 Freedom of expression

40 Section 14 of the Bill of Rights Act provides:

"Everyone has the right to freedom of expression, including the freedom to seek, receive, and impart information and opinion of any kind and in any form."

41 The right to freedom of expression extends to all forms of communication that attempt to express an idea or meaning,³ and has been given a very broad meaning to encompass conduct that has an expressive component.⁴ The right has been interpreted as including the right not to be compelled to say certain things or to provide certain information.⁵ Part of the reasoning behind this position is that individuals should not be portrayed as being aligned with particular opinions that they do not believe in or forced to express deeply held personal beliefs. The right not to say certain things appears to extend to written⁶ as well as verbal⁷ forms of communication.

42 A number of clauses in the Bill compel applicants and beneficiaries to disclose information in a range of situations in order to be eligible or continue to be eligible for benefit. For instance, clause 31(1) of the Bill enables the Chief Executive to require beneficiaries to attend and participate in interviews to identify, *inter alia*, any features of the person's individual circumstances or parenting responsibilities that may affect the ability of the person to obtain employment, and the person's skills and experience that are relevant to obtaining employment.

43 We consider the provisions that raise issues of inconsistency with section 14 of the Bill of Rights Act appear to be justified in terms of section 5 of that Act. The aim of these provisions is to require beneficiaries and applicants for the unemployment benefit, who are able to work, to be available for suitable employment and plan for returning to work in the future. The purpose of these provisions is to ensure eligibility for benefits and to identify the appropriate training for clients to take up to assist them to move into work.

44 Additionally, MSD has advised that keeping active and connected is a key way of achieving the objective of assisting people into employment. Provisions that require persons to disclose information to Work and Income, for instance, about their skills and experience provide that agency with more opportunities to identify the appropriate level of support required and allow the agency to get to know a client as a person not just a beneficiary. The PDEP planning requirements and enhanced case management system enable Work and Income to work more proactively with people and allow people to take advantage of services or programmes on offer.

³ *R v Keegstra* [1990] 3 SCR 697, 729-826.

⁴ *Irwin Toy Ltd v Attorney-General (Quebec)* [1989] 1 SCR 927, 968.

⁵ *Slaight Communications v Davidson* 59 DLR (4th) 416; *Wooley v Maynard* 430 US 705 (1977).

⁶ *Slaight Communications v Davidson* 59 DLR (4th) 416; *Wooley v Maynard* 430 US 705 (1977).

⁷ *West Virginia State Board of Education v Barnette* 319 US 624 (1943).

Conclusion

7. We have concluded that the Bill appears to be consistent with the Bill of Rights Act.

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