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Report of the

# ***ATTORNEY-GENERAL***

under the New Zealand Bill of Rights Act  
1990 on the Financial Assistance for Live  
Organ Donors 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 Financial Assistance for Live Organ Donors 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 freedom from discrimination affirmed in section 19(1) of the Bill of Rights Act. The limitation cannot be justified under section 5 of that Act. As required by section 7 of the Bill of Rights Act and Standing Order 265, I draw this to the attention of the House of Representatives.

### ***The Bill***

2. The purpose of the Bill is to provide financial assistance to people who, for altruistic reasons, donate kidney or liver tissue for transplants. It entitles qualifying donors to the greater of a weekly benefit payment or 80 percent of their ordinary income for up to 12 weeks following the donation ('the convalescence period').
3. Beneficiaries are excluded from obtaining the financial assistance outlined in the previous paragraph. Instead, they will continue to receive their benefit or, if they are unable to meet the criteria for their income-tested benefit during the convalescence period, the Chief Executive of the Department of Social Development may provide financial assistance by continuing their benefit during that period as if they meet the criteria.
4. While the Bill makes provision for workers to receive financial assistance and for beneficiaries to retain their benefit in circumstances where it may be affected by their donation, the Bill does not adequately deal with the individuals who work while being on a benefit. It is this scenario in which the limit on the right to freedom from discrimination arises.
5. I note that, as currently drafted, the Bill refers to legislative provisions and benefit categories repealed in 2013. A straight substitution for the purposes of analysis is not possible because the benefit categories in existence now do not neatly align with those specified in the Bill. In particular, more benefits are income-tested now than under the previous system. I have taken a purposive approach where possible and have assumed those references will be updated to refer to the corresponding existing provisions and entitlements.

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

6. Section 19(1) of the Bill of Rights Act affirms the right to be free from discrimination on the prohibited grounds of discrimination in the Human Rights Act 1993. Employment status, which includes being a recipient of a benefit under the Social Security Act, is one of those grounds.
7. Beneficiaries excluded from eligibility for income assistance of 80 percent of their ordinary income under the Bill include recipients of income-tested benefits (jobseeker support, sole parent support, a supported living payment, a youth payment, a young parent payment, or an emergency benefit) and recipients of New Zealand Superannuation and veteran's pensions.

*Income-tested beneficiaries*

8. Many income-tested beneficiaries under the Social Security Act work and earn income as well as receiving a benefit. For each type of income-tested benefit and beneficiary, there is a maximum amount of income from employment the beneficiary can earn before the benefit is fully abated by virtue of the relevant income test. In each case that maximum amount is appreciably more than the full rate of that benefit (to which they would be entitled if they had no or minimal income).
9. Income-tested beneficiaries earning over 25 percent more than the full rate of their benefit (while still not earning enough for the benefit to fully abate) will be disadvantaged by the inability to receive 80 percent of their income during the convalescence period.<sup>1</sup> This disadvantage is prima facie discriminatory on the basis of receipt of a benefit.
10. Limitations on rights protected by the Bill of Rights Act may be justified under section 5 of that Act if it can be demonstrated that:<sup>2</sup>
  - a. the objective of the Bill is sufficiently important to justify some limit on the right;
  - b. the limit is rationally connected to the objective;
  - c. the limit impairs the right no more than reasonably necessary to achieve the objective; and
  - d. the limit is proportionate to the importance of the objective.
11. I consider providing financial assistance to donors and removing disincentives for organ donation are sufficiently important objectives to justify some limitation on the right to freedom from discrimination. However I do not consider that differential treatment of recipients of income-tested benefits who also work from other people who work is rationally connected to those objectives. Indeed, it seems inconsistent with the Bill's general objective of limiting the financial impact of organ donation. Given that conclusion, the limit cannot be either minimally impairing or proportionate.
12. I therefore consider the exclusion of income-tested beneficiaries who work from eligibility for income assistance under the Bill also appears to be inconsistent with section 19(1) of the Bill of Rights Act.
13. I note that if the updated Bill protects the entitlements of recipients of only certain income-tested benefits, those income-tested beneficiaries not covered will be disadvantaged further because they will not be eligible for any form of income assistance. This discrimination would only arise in circumstances where the

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<sup>1</sup> Where 80 percent of a beneficiary's income is greater than the relevant full benefit rate, the beneficiary will be disadvantaged by the Bill. For each class of benefit and beneficiary, there is an income range (the lower limit being 25 percent over the maximum benefit rate and the upper limit being the maximum income before the entitlement entirely abates) in which beneficiaries are disadvantaged.

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

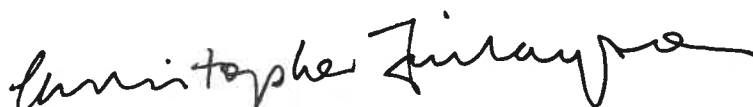
beneficiaries' eligibility for their benefit is affected. The Bill does not provide any justification for excluding some income-tested benefits from its ambit. For the same reasons discussed above I cannot see that any justification is available. I therefore consider the exclusion of certain income-tested beneficiaries who work from the Bill's eligibility for income assistance also appears to be inconsistent with section 19(1).

*Recipients of New Zealand Superannuation and veteran's pensions*

14. The Bill does not cause any issue of discrimination if the recipient of New Zealand superannuation or a veteran's pension does not work as they should receive their benefit unaffected. However, a recipient of superannuation or a veteran's pension who works and earns income will be adversely impacted (even more so than those on income-tested benefits because superannuation and veteran's pensions do not abate with other income). Because they receive a benefit they will be ineligible to receive income assistance of 80 percent of their income. They are therefore disadvantaged vis a vis people who work and are not also beneficiaries. This again constitutes prima facie discrimination on the basis of receipt of a benefit.
15. As I stated above I consider the main objectives of the Bill are sufficiently important to justify some limitation on the right to freedom from discrimination. However, again, I do not consider excluding recipients of New Zealand Superannuation and veteran's pensions who work from eligibility for income assistance at 80 percent of their income is rationally connected to those objectives, or minimally impairing or proportionate.
16. I therefore consider that the differential treatment of working recipients of New Zealand Superannuation and veteran's pensions under the Bill appears to be inconsistent with section 19(1) of the Bill of Rights Act.

***Conclusion***

17. The Bill's current drafting renders organ donors who both work and receive a benefit ineligible for income assistance to which they would be entitled if they were not 'beneficiaries'. Depending on how the Bill is updated it may also exclude certain income-tested beneficiaries from eligibility for any assistance or protection of their benefit during the convalescence period. No justification or purpose is apparent for excluding these classes of individuals from the scheme or benefits of the Bill.
18. For the above reasons, I have concluded that the Bill appears to limit section 19(1) of the Bill of Rights Act. The limitation cannot be justified under section 5 of that Act.



Hon Christopher Finlayson

**Attorney-General**

18 July 2015

WELLINGTON, NEW ZEALAND