

29 March 2018

Hon David Parker, Attorney-General

Consistency with the New Zealand Bill of Rights Act 1990: Accident Compensation Amendment Bill

Purpose

1. We have considered whether the Accident Compensation Amendment 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. We have not yet received a final version of the Bill. This advice has been prepared in relation to the latest version of the Bill (PCO 21230/1.2). We will provide you with further advice if the final version includes amendments that affect the conclusions in this advice.
3. We have concluded that the Bill appears to be consistent with the rights and freedoms affirmed in the Bill of Rights Act. In reaching that conclusion, we have considered the consistency of the Bill with s 19(1) (freedom from discrimination). Our analysis is set out below.

The Bill

4. The Bill amends the Accident Compensation Act 2001 ('the principal Act') to ensure that it is effective, efficient, and accords with best regulatory practice. It:
 - a. replaces the requirement for accident compensation claimants to choose between weekly compensation and New Zealand Superannuation after receiving a year of both, and provides instead that all claimants who are close to, or above, superannuation qualification age receive up to two years of weekly compensation;
 - b. extends ACC cover to the spouses or partners, and dependents, of New Zealand employees posted offshore;
 - c. allows surviving spouses to receive up to five years of weekly compensation, regardless of age;
 - d. moves from an annual review to a biennial review of the Accident Compensation (Liability to Pay or Contribute to the Cost of Treatment) Regulations 2003;
 - e. amends the regulation-making power in relation to levies, to allow regulations to specify the maximum amounts or deemed minimum amounts of earnings for levy purposes, or the methods for calculating those amounts; and
 - f. disestablishes the Accident Compensation Appeal Authority, which hears cases under the 1972 and 1982 Accident Compensation Acts.

Consistency of the Bill with the Bill of Rights Act

Section 19(1) – freedom from discrimination

5. Section 19(1) of the New Zealand Bill of Rights Act 1990 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 marital status, family status, and age.
6. The key questions determining whether legislation limits freedom from discrimination are:¹
 - a. does the legislation draw a distinction on one of the prohibited grounds of discrimination under the Human Rights Act?
 - b. if so, does the distinction involve material disadvantage to one or more classes of individuals?
7. Clause 10 of the Bill removes the requirement for claimants or dependants to choose between weekly compensation under the principal Act, and New Zealand Superannuation, when they reach the New Zealand Superannuation qualification age ('qualification age'), currently 65. Instead, claimants who first become entitled to weekly compensation for a personal injury:
 - a. at, or after reaching, qualification age will be able to receive up to two years of weekly compensation, together with any superannuation they may be eligible for;
 - b. more than 24 months prior to reaching qualification age, will cease to be entitled to compensation on reaching qualification age; and
 - c. within 24 months of reaching qualification age, are eligible for a maximum of two years of weekly compensation from the date of entitlement, together with any superannuation they may be eligible for upon reaching qualification age.
8. Clauses 13 and 14 of the Bill amend ss 65 and 104 of the Veterans' Support Act 2014 to mirror these changes.
9. These clauses appear to discriminate on the basis of age for claimants or dependants aged 63 or 64. This is because the closer a claimant or dependant is to their 65th birthday when they become eligible for weekly compensation, the longer the period they will receive both superannuation and weekly compensation, compared to persons who first become eligible for weekly compensation nearer their 63rd birthday.²
10. Superannuation is a universal entitlement that is not means tested, so superannuitants are able to continue working and receive superannuation at the same time. The stated aim of removing the election requirement between weekly compensation or superannuation is to provide for a fairer, more consistent relationship between weekly compensation and superannuation, so an injured person's or dependant's financial situation more closely reflects their income had they not been injured.

¹ See, for example, *Ministry of Health v Atkinson* [2012] NZCA 184, [2012] 3 NZLR 456; and *Child Poverty Action Group Inc v Attorney-General* [2013] NZCA 402, [2013] 3 NZLR 729.

² We note the extent of the disadvantage in individual cases will vary depending on a person's earnings prior to the injury.

11. Achieving a fair and efficient accident compensation scheme involves complex social policy questions, which can be addressed in a variety of ways. Some latitude is generally given to the legislature to achieve its objectives, and it is a matter of legitimate policy choice as to where thresholds are drawn. Moses J in *R (on the application of Hooper) v Secretary of State for Work & Pensioners* stated:³

In determining how to target resources to those in need, the legislature is entitled to impose 'bright line' rules which are easy to apply and which may not focus with precision on the merits of individual cases... such bright line rules in the context of social and economic policy do not lead to incompatibility [in that case, with the European Convention on Human Rights] even if individual hardship is occasioned...

12. While this policy may have a discriminatory effect on the basis of age for a small group of people, we consider it is justified. It is appropriate for a bright line to be drawn for eligibility for both weekly compensation and superannuation. Both forms of assistance are ways that the State compensates people who are no longer working. Accident compensation is intended to reflect the loss of wages that would have been earned but for the injury, while the superannuation scheme reflects societal expectations that there will come an age where people will no longer work. Accordingly, we are satisfied that this constitutes a justified limitation on the right to be free from discrimination.

Conclusion

13. We have concluded that the Bill appears to be consistent with the rights and freedoms affirmed in the Bill of Rights Act.

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³ *R (on the application of Hooper) v Secretary of State for Work & Pensions* [2002] EWHC 191 at [115] as referred to in *Howard v Attorney-General* (2008) 8 HRNZ 378 at [76] – [77].