

25 February 2019

Hon David Parker, Attorney-General

Consistency with the New Zealand Bill of Rights Act 1990: Social Security (Winter Energy Payment) Amendment Bill

Purpose

1. We have considered whether the Social Security (Winter Energy Payment) 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 21859/1.8). 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 Social Security Act 1964 in respect of winter energy payments (WEP) for the 2018 calendar year and the Social Security Act 2018 in respect of WEPs in and after the 2019 calendar year. The WEP regime provides an additional government subsidy to recipients over the "winter period," as set out in the Acts, to help with the higher costs of heating incurred over this period.
5. The Bill ensures that social security legislation authorises a WEP or purported WEP, to a person who is receiving long-term residential care in a hospital or rest home, or residential care services, unless the person is a specified recipient of higher levels of assistance.
6. The Bill also ensures that social security legislation authorises a WEP, or purported WEP, to a person for up to a maximum of 28 days of any 1 or more absences of that person from New Zealand during the winter period if:
 - a. the payment would be payable to that person were it not for those days of absence; and
 - b. those days of absences do not affect that person's eligibility, under the general eligibility requirements, for the payment.
7. The Bill makes these entitlements retroactive to account for the fact that these entitlements were within the original policy intent of the principal Acts and have consequently been paid for the 2018 calendar year.

Consistency of the Bill with the Bill of Rights Act

Section 19(1) – Freedom from discrimination

8. 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 set out in s 21 of the Human Rights Act 1993. The grounds of discrimination under the Human Rights Act include employment status, which includes being unemployed or in receipt of a benefit.
9. A legislative provision will limit the right to freedom from discrimination if:
 - a. the legislation draws a distinction based on one of the prohibited grounds of discrimination, and
 - b. the distinction involves material disadvantage to one or more classes of individuals.¹
10. The payment of a WEP to classes of persons on the basis of their receipt of other government benefits *prima facie* limits the right to freedom from discrimination on the grounds of employment status. Those on government benefits are receiving a financial advantage over those not in receipt of government benefits through the provision of the WEP. This Bill continues the practice of the principal Acts in providing for the WEP to be paid to some groups, and not to others.

Social security legislation and discrimination

11. Social security legislation necessarily targets limited government assistance to those most in need of it. 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 many prohibited grounds.
12. However, limitations on rights and freedoms may still be consistent with the Bill of Rights Act if they can be considered a reasonable limit that is justifiable in terms of s 5 of that Act. The s 5 inquiry may be approached as follows:
 - 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?
13. Instituting a WEP serves the important objective of alleviating the harm to low income earners and the elderly caused by cold, damp homes during winter. This acknowledges these groups' particular vulnerability to winter cold, based on their typically greater health

¹ See, for example *Atkinson v Ministry of Health and others* [2010] NZHRRT 1; *McAlister vs Air New Zealand*. [2009] NZSC 78; and *Child Poverty Action Group v Attorney General* [2008] NZHRRT 31.

needs and lower standards of housing. The form of assistance provided is rationally connected to the objective, proportionate, and does not go further than reasonably necessary.

14. The proposed amendments contained within the Bill do not create further discrimination. In fact, their effect is to withdraw the discrimination against certain classes of persons that was present within the principal Acts.
15. The principal Acts did not entitle those living in residential care or rest homes to the WEP. This was due to heating costs being included within the greater costs of residential care, and the eligibility of those in residential care to government subsidies to cover all or part of the costs of their care.
16. However, this resulted in a material disadvantage towards those who were ineligible for full government subsidies for their residential care, which are means tested. This was not the policy intent. The Bill mitigates some of the discrimination contained within the principal Acts by extending eligibility for the WEP to persons living in residential care or rest homes who are ineligible for full government subsidies.
17. For these reasons, we conclude that any limits to the right to be free from discrimination imposed by the Bill are justified under s 5 of the Bill of Rights Act.

Conclusion

18. 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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