

Social Security (Stopping Benefit Payments for Offenders who Repeatedly Fail to Comply with Community Sentences) Amendment Bill

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Hon Christopher Finlayson QC, Attorney-General

Consistency with the New Zealand Bill of Rights Act 1990: Social Security (Stopping Benefit Payments for Offenders who Repeatedly Fail to Comply with Community Sentences) Amendment Bill

Purpose

1. We have considered whether the Social Security (Stopping Benefit Payments for Offenders who Repeatedly Fail to Comply with Community Sentences) Amendment Bill ('the Bill') is consistent with the rights and freedoms affirmed in the New Zealand Bill of Rights Act 1990 ('Bill of Rights Act').

2. We have concluded that the Bill appears to be consistent with the rights and freedoms affirmed in the Bill of Rights Act. In doing so, we have considered a possible inconsistency with section 19 (right to freedom from discrimination).

The Bill

3. The Bill seeks to amend the Social Security Act 1964 to provide the Department of Corrections ('the Department') with the ability to instruct the Ministry of Social Development ('the Ministry') to withhold all or part of a person's benefit if they have not complied with their community-based sentence or related instructions.

4. The Department can only issue such instructions to the Ministry after the beneficiary has received two written warning notices and the person fails to comply with the second notice within 14 days of receipt of the notice. The reasoning for this measure is to ensure beneficiaries comply with community-based sentences or related instructions.

5. The proposed amendment is similar to an amendment made in 2012 to the Social Security Act which enabled the Chief Executive of the Ministry to suspend a person's benefit for failure to comply with a court warrant. Whilst that amendment possibly raised a prima facie issue of discrimination, it was considered that it was not discriminatory, or alternatively that the discrimination was justified.

Consistency of the Bill with the Bill of Rights Act

Section 19 – right to freedom from discrimination

6. Section 19 of the Bill of Rights Act affirms that everyone has the right to freedom from discrimination on the prohibited grounds in section 21 of the Human Rights Act 1993. The

grounds of discrimination under the Human Rights Act include employment status, which includes being on a benefit.

7. 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.

8. Clause 5 proposes to insert sections 183 and 185 into the principal Act and may be seen to limit section 19 of the Bill of Rights Act. New section 183 authorises the Department to instruct the Ministry to withhold payment of all or part of any benefit payment if, following two warning notices issued under new section 184, the person fails to comply with the instructions contained within the notice within 14 days.

9. New section 184 authorises the Department to issue a written warning notice to a person currently serving a community-based sentence [1] who receives a benefit under the Act, if:

- a. the Department reasonably believes that it has exhausted all options other than prosecution in attempting to get that person to comply with that community-based sentence or instruction; and
- b. that person breaches or fails to comply with any term of a community-based sentence; or fails to comply with an instruction from the Department that relates to their community-based sentence.

10. The Bill further authorises the Department to issue a second written warning if 14 days have passed since service of the first written warning notice and that person continues to fail to comply with the instruction contained within that notice.

11. Where payment of a benefit has been withheld and subsequently reinstated, new section 185 authorises the Department to recommence the procedure defined in new part 6 as if the preceding warnings had not been issued.

12. New sections 183 and 185 could be said to engage section 19 of the Bill of Rights Act because:

- a. they draw a distinction based on the prohibited ground of discrimination of employment status. The distinction is between people subject to a community-based sentence who are in receipt of a benefit and people subject to a community-based sentence who are not in receipt of a benefit, and
- b. that distinction involves a material disadvantage (the withholding of a benefit) to a class of individuals, namely persons with community-based sentences who are beneficiaries.

13. Legislative provisions limiting a particular right or freedom may nevertheless be consistent with the Bill of Rights Act if the limit can be considered reasonable and demonstrably justified in terms of section 5 of that Act. The section 5 inquiry may be approached as follows: [2]

- 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?

14. We consider the limitation of the right to freedom from discrimination made by new sections 183 and 185 is justified under section 5 of the Bill of Rights Act.

15. The Bill's objective, to ensure compliance with community-based sentences, is sufficiently important to justify some limitation on the right to freedom from discrimination.

16. New sections 183 and 185, which limit the right to freedom from discrimination, are rationally connected to the objective of incentivising compliance with community-based sentences or related instructions issued by the Department. This is because removing entitlements creates an incentive for compliance. Further, the limit operates under the rationale that taxpayers should not be financially assisting persons not complying with community-based sentences or related instructions;

17. New sections 183 and 185 impair the right to freedom from discrimination no more than is reasonably necessary because:

- a. compliance with a community-based sentence is a court imposed penalty and any individual subject to the sentence has an obligation to comply with its terms;
- b. the benefit withholding measure is imposed only once an individual has not complied with both the community sentence or related instruction, and two written warning notices have been issued;
- c. where payment of a person's benefit is withheld and the Department is thereafter satisfied that that person is complying with the sentence or instruction, the Department may instruct the Ministry to restore that benefit; and
- d. the Bill prevents the Department from issuing instructions to reduce a person's benefit by any more than 50 per cent of the gross benefit where that person is responsible for the care of any dependent child.

18. The limitation is proportionate to the importance of the Bill's objective because of several safeguards:

- a. new section 184 requires the Department to issue written warning notices only when it reasonably believes it has exhausted all options other than prosecution in attempting to get a person to comply with a community-based sentence or instruction, and when that person has in fact breached or failed to comply with that sentence or instruction.
- b. Although there is no right to appeal, the Department must issue two written warning notices before they can instruct the Ministry to withhold the benefit and an affected

beneficiary may bring judicial review proceedings in respect of the Department's decisions.

19. We therefore consider that, to the extent that new sections 183 and 185 do engage the right to freedom from discrimination, the limitation is justified under section 5 of the Bill of Rights Act.

Conclusion

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

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Footnotes

[1] The Bill refers to section 44 of the Sentencing Act 2002, which defines a community-based sentence as a sentence of community work, supervision, intensive supervision, or community detention.

[2] Hansen v R [2007] NZSC 7 [123].