



NEW ZEALAND
LAW SOCIETY

NZLS EST 1869

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

30/09/2016

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

1 Introduction

- 1.1 The New Zealand Law Society (Law Society) welcomes the opportunity to comment on the Social Security (Stopping Benefit Payments for Offenders Who Repeatedly Fail to Comply with Community Sentences) Amendment Bill (Bill).
- 1.2 The Bill raises questions of compliance with New Zealand's obligations under domestic and international human rights instruments, in particular the right not to be discriminated against on the ground of receipt of a benefit and the right to an adequate standard of living, including for dependent children.

2 Executive summary

- 2.1 The Law Society recommends:
 - a. the addition of review and appeal rights to the Bill which attach to the directions of the Department of Corrections to the Ministry of Social Development;
 - b. clarification of the meaning of "instruction" in proposed section 184(1)(b)(ii);
 - c. substitution, in proposed section 183(2), of the word "may" with "must", so that the Department of Corrections has an obligation to instruct the Ministry of Social Development to restore the benefit as soon as it is satisfied that the person is complying with their sentence;
 - d. removal of the provision for verbal notification, so that a notification must be given in writing; and
 - e. consideration of the definition of "benefit" in proposed section 182(2); and the appropriateness of the exclusion from that definition of entitlements under the New Zealand Superannuation and Retirement Income Act 2001. The Law Society is concerned that otherwise there could be unjustified discrimination on the ground of age.

3 The Bill

- 3.1 The Bill would allow the Department of Corrections (Department) to instruct the Ministry of Social Development (Ministry) to withhold payment of all or part of a person's benefit if that person has not complied with a community-based sentence or related instruction.¹
- 3.2 The Department can only issue such an instruction after it has issued two written warnings to the person receiving the benefit, each giving that person 14 days to comply.² The Department can only issue a warning if it reasonably believes that it has exhausted all options other than prosecution in attempting to get the person to comply with the relevant community-based sentence or instruction.³
- 3.3 Where the person receiving the benefit is responsible for the care of a dependent child, the Department may not instruct the Ministry to reduce that person's benefit by more than 50 per cent.⁴

¹ Proposed section 183.

² Proposed sections 183 and 184.

³ Proposed section 184(1)(a).

⁴ Proposed section 183(3).

4 The right to freedom from discrimination

- 4.1 Section 19 of the New Zealand Bill of Rights Act 1990 (Bill of Rights) prohibits discrimination on the ground of a person being in receipt of a benefit.⁵ A law or policy will breach the right to freedom from discrimination where:
- a. it treats a person or group differently by reason of the prohibited ground of being in receipt of a benefit;
 - b. the differential treatment results in material disadvantage; and
 - c. the differential treatment is not demonstrably justified.
- 4.2 The Law Society's submission is directed at the question of justification.
- 4.3 Section 5 of the Bill of Rights provides that the rights contained in it may be subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society. New Zealand courts approach this question as follows:⁶
- a. Does the limiting measure serve a purpose sufficiently important to justify curtailment of the right or freedom?
 - b. If so,
 - i. Is the limiting measure rationally connected with its purpose?
 - ii. Does the limiting measure impair the right or freedom no more than is reasonably necessary for sufficient achievement of its purpose?
 - iii. Is the limit in due proportion to the importance of the objective?
- 4.4 The Ministry of Justice's advice follows this framework to determine that the objective of the Bill is sufficiently important to justify some limitation on the freedom from discrimination, and that that limitation is justified.⁷
- 4.5 The Law Society notes, however, that it is difficult to properly assess the justification for the Bill in the absence of the regulatory impact statement that would accompany a government bill, or any equivalent analysis of the justification of the Bill, including for example:
- a. the number of people likely to be affected;
 - b. the reasons for the distinctions drawn among persons receiving benefits (specifically, the exclusion of those receiving New Zealand superannuation or a living alone benefit under the New Zealand Superannuation Act and Retirement Income Act 2001, or a living alone benefit under the War Pensions Act 1954);⁸
 - c. analysis of the likely impact of the Bill in encouraging compliance and therefore its effectiveness in meeting its stated objectives; and

⁵ New Zealand Bill of Rights Act 1990, section 19; Human Rights Act 1993, section 21(1)(k)(ii).

⁶ *R v Hansen* [2007] NZSC 7, [2007] 3 NZLR 1 at [104] per Tipping J.

⁷ Ministry of Justice, *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*, 25 November 2015.

⁸ Proposed section 182(2).

d. analysis of the adequacy of a 50 per cent reduction in a person's benefit where that person is responsible for the care of a dependent child.

4.6 In the absence of this information it is not possible to analyse whether the limitation on freedom from discrimination imposed by the Bill is reasonably justified.

5 New Zealand's obligations under ICESCR and UNCROC

5.1 The Bill also engages New Zealand's obligations under the International Covenant on Economic, Social and Cultural Rights (ICESCR) and the UN Convention on the Rights of the Child (UNCROC), ratified by New Zealand in 1978 and 1993 respectively. Article 26 of the Vienna Convention on the Law of Treaties requires that New Zealand performs its obligations under ICESCR and UNCROC in good faith.

5.2 New Zealand (as a party to ICESCR) has recognised "the right of everyone to social security" (article 9) and the "right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing" (article 11). New Zealand has also recognised that "[t]he widest possible protection and assistance should be accorded to the family" (article 10).

5.3 Under ICESCR, once a certain level of realisation of a particular recognised right is obtained, measures which negatively impact on that level of realisation are only permissible in certain circumstances. In particular, article 4 of ICESCR provides:

The States Parties to the present Covenant recognize that, in the enjoyment of those rights provided by the State in conformity with the present Covenant, the State may subject such rights only to such limitations as are determined by law only in so far as this may be compatible with the nature of these rights and solely for the purpose of promoting the general welfare in a democratic society.

5.4 The UN Committee on Economic, Social and Cultural Rights (CESCR) comments that one of the elements of the right to social security is adequacy. In particular, benefits "must be adequate in amount and duration in order that everyone may realize his or her rights to family protection and assistance, an adequate standard of living and adequate access to healthcare".⁹ "Methods applied should ensure the adequacy of benefits. The adequacy criteria should be monitored regularly to ensure that beneficiaries are able to afford the goods and services they require to realize their Covenant rights."¹⁰

5.5 In CESCR's view, "[t]he withdrawal, reduction or suspension of benefits should be circumscribed, based on grounds that are reasonable, subject to due process, and provided for in national law."¹¹

5.6 New Zealand (as a party to UNCROC) has also recognised "the right of every child to a standard of living adequate for the child's physical, mental, spiritual, moral and social development" (article 27). The State "in accordance with national conditions and within their means, shall take appropriate measures to assist parents and others responsible for the child to implement this right and shall in case of need provide material assistance and support programmes, particularly with regard to nutrition, clothing and housing."

⁹ CESCR *General Comment No 19: The Right to Social Security* (art. 9) E/C.12/GC/19 (2008) at [22].

¹⁰ *Ibid.*

¹¹ *Ibid* at [24].

- 5.7 According to a 2009 report published by the Ministry of Social Development (cited in the High Court's decision in *Harlen v Ministry of Social Development*), "the majority of sole parent beneficiaries live in severely straitened circumstances and cannot provide an adequate standard of living for themselves and their dependent children."¹²
- 5.8 The above suggests that certain beneficiaries may have only a very limited ability to sustain removal or deductions to their benefits. This is an important consideration because if a deduction to a person's benefit results in that person being unable to realise an adequate standard of living then New Zealand may be in breach of its international obligations under ICESCR. It is difficult to see how New Zealand could justify (in terms of ICESCR) any deduction from a person's benefit or any other debt recovery measure which resulted in that person being unable to realise an adequate standard of living. As set out above, while ICESCR permits justifiable limitations on ICESCR rights, such limitations must be compatible with the nature of those rights.¹³
- 5.9 Against this context, the Law Society recommends that the Committee considers the following issues.

6 Absence of appeal rights

- 6.1 The Bill does not include a right to appeal a direction made by the Department. While a complaint may be made to an inspector of Corrections, any report may only make recommendations unless directions are made to avoid immediate danger and any direction may be overturned by the Chief Executive of the Department.¹⁴ Judicial review of a decision or direction is, in theory, possible, however the Law Society considers that the cost of judicial review is prohibitive and that it is a less effective means of review than standard appeal processes under the Social Security Act 1964.
- 6.2 A review by the Benefit Review Committee is a low cost mechanism by which a person can challenge a decision made by the Chief Executive of the Ministry in relation to their entitlements under the Social Security Act 1964. A person can be self-represented or represented in the Committee by a lawyer or a benefit-rights advocate. Decisions of the Benefit Review Committee can be challenged in the Social Security Appeal Authority where a person can be self-represented or represented by an advocate or lawyer. Legal aid may be available to those who cannot afford lawyers' fees.
- 6.3 Reviews conducted in the Benefit Review Committee and the Social Security Appeal Authority allow a beneficiary to air their grievances and for the Committee or Authority to consider the substantive facts. The Benefit Review Committee and the Social Security Appeal Authority are better placed to consider whether the amount of the benefit withheld results in a payment that is "adequate in amount and duration in order that everyone may realize his or her rights to family protection and assistance, an adequate standard of living and adequate access to healthcare".¹⁵
- 6.4 The Law Society respectfully submits that the Committee recommend the addition of review and appeal rights to the Bill that provide equivalent protections where a direction is made by the Department to the Ministry.

¹² *Harlen v Ministry of Social Development* [2012] NZHC 669, [2012] NZAR 491 at [50], citing Ministry of Social Development "Non-Income Measures of Material Wellbeing and Hardship: First Results from the 2008 New Zealand Living Standards Survey, with International Comparisons" (December 2009).

¹³ As provided in the *Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights* UN E/CN.4/1987/17 (*Limburg Principles*) at [56], "[t]he restriction 'compatible with the nature of these rights' requires that a limitation shall not be interpreted or applied so as to jeopardize the essence of the right concerned."

¹⁴ Subpart 6, Part 2 Corrections Act 2004.

¹⁵ CESCR *General Comment No 19: The Right to Social Security* (art. 9) E/C.12/GC/19 (2008) at [22].

7 Certainty required regarding relevant instructions

- 7.1 As presently worded, the term "instruction" in proposed section 184(1)(b)(ii) could refer to directions of any employee of the Department. It is unclear what instructions related to a community sentence must be complied with in order to avoid a reduction in benefit. The lack of clarity in proposed section 184(1)(b) potentially provides an overly broad discretion to the Department, and may inhibit effective challenge to a reduction of benefit.

8 Restoration of benefit following compliance

- 8.1 Proposed section 183(2) states that the Department "may" instruct the Ministry to restore that benefit if the Department is satisfied that the person is now complying with their community-based sentence or the instruction contained within the written warning" (emphasis added).
- 8.2 This provision raises two issues:
- a. First, on a plain reading, with particular regard to the word "may", the Bill would make the restoration of a benefit discretionary. The Bill does not contain a mandatory requirement for the Department to instruct the Ministry to restore the benefit even when the person has begun to comply with their sentence or the instruction contained in the written warning. The punitive consequences of the Bill ought not to continue once its aim (that is, of ensuring compliance with the sentence) has been achieved. The Law Society recommends that the Committee substitute the word "may" with "must" so that the Department has an obligation to instruct the Ministry to restore the benefit as soon as it is satisfied the person is complying with their sentence.
 - b. Secondly, the meaning of "restore" is unclear. The Social Security Act 1964 does not define this term. It is unclear whether, upon the Department being satisfied that the person has begun to comply with their sentence, the benefit may be backdated to the date at which the person became compliant or even to a period prior to compliance being achieved (on, say, humanitarian grounds). The effect on a person may be acute where, for example, there is delay in the Department becoming aware of his or her compliance or in the Department instructing the Ministry. The Law Society recommends that the intent of the Bill is clarified so as to ensure that back-payment of a restored benefit to the date at which a person became compliant is required and that back-payment to an earlier point in time is possible.

9 Notifications

- 9.1 Proposed section 182 would apply only to persons if they have been notified by the Department of the potential consequences of proposed Part 6, and if that notification is given within 30 days of their sentence being allocated to a case officer within the Department. The Department can give notification either verbally or in writing.
- 9.2 Allowing notifications to be given verbally raises concerns. There is no requirement for the Department to record the giving of a verbal warning. The Bill does not set out the procedure to be followed if a person challenges a direction given by the Department under this Part on the basis that they were not subject to Part 6 because they had not received a warning, where the Department gave only a verbal warning.
- 9.3 The Law Society recommends that the provision for verbal notification is removed, so that a notification must be given in writing.

10 Age discrimination

10.1 A "benefit" for the purposes of the Bill excludes:

- a. New Zealand Superannuation;
- b. a living alone benefit payable under the New Zealand Superannuation and Retirement Income Act 2001; and
- c. a living alone benefit payable under the War Pensions Act 1954.

10.2 To be eligible for New Zealand Superannuation, a person must be aged 65 or older. Subject to certain requirements as to the length of time lived in New Zealand prior to receiving New Zealand Superannuation, it is a universal benefit.

10.3 The net effect of the Bill is that the proposed directions procedure cannot be used against a person who is of New Zealand Superannuation age, even where that person is non-compliant with the terms of their community-based sentence or related instruction. This appears to discriminate on the ground of age. No justification is provided for this distinction.

10.4 In the absence of justification, the Law Society recommends that the Committee considers whether to amend the definition of "benefit" in section 182(2) by removing the exclusion of entitlements under the New Zealand Superannuation and Retirement Income Act 2001 so as to avoid discrimination on the ground of age.

The Law Society does not wish to be heard.

A handwritten signature in blue ink, appearing to read "Nerissa Barber". The signature is written in a cursive style with a large initial 'N'.

Nerissa Barber
Vice President
30 September 2016