New Zealand Law Society
Te Kāhui Ture o Aotearoa

Social Security Amendment Bill

Submission of the New Zealand Law Society Te Kāhui Ture o Aotearoa

8 January 2025

1 Introduction

1.1 The New Zealand Law Society Te Kāhui Ture o Aotearoa (**Law Society**) welcomes the opportunity to comment on the Social Security Amendment Bill (**the Bill**).

1.2 The Bill proposes to amend the Social Security Act 2018 (**the Act**), to (amongst other things) introduce non-financial sanctions, a requirement for certain applicants to complete a jobseeker profile questionnaire, and expand the use of automated decision-making.

1.3 This submission has been prepared with the assistance of the Law Society's Public Law Committee. Given the restrictive period for submissions (taking place over the holiday closedown), this submission is limited to the Law Society's most substantive comments.

1.4 The Law Society does not wish to be heard on this submission.

2 Requirement to complete jobseeker questionnaire (proposed sections 183A – 183D)

2.1 Clause 10 proposes a series of new provisions relating to the completion of jobseeker profile questionnaires. Proposed section 183A provides that, before an application can be assessed by the Ministry, the Ministry must require specified applicants to complete a jobseeker questionnaire to the 'satisfaction' of the Ministry. If the application has a spouse or partner who is not in their own right receiving or applying for a main benefit, New Zealand superannuation, or a veteran's pension, the Ministry must also require the person's spouse or partner to complete a jobseeker profile questionnaire.

2.2 Proposed section 183A(4)(b) allows the Ministry to revoke this requirement for the applicant or their spouse or partner only where the Ministry determines that it is unreasonable for the individual to have a completed jobseeker profile.

2.3 The drafting of these provisions is unclear in several respects:

(a) *The requirement that the form is completed to the Ministry's "satisfaction."* The purpose of this threshold is unclear in the context of a 'questionnaire,' which is either "completed" or is not. Whether the Ministry is "satisfied" by the information provided is more appropriately dealt with through whether the form has been "completed," rather than introducing a second subjective threshold and increasing the risk of arbitrary decision-making. The level of information required should instead be specified in a clearly worded form and as outlined below, conform with limits prescribed either in statute or regulation.

(b) *The information that must be provided in a jobseeker profile questionnaire appears to be at the discretion of the Ministry, without legislative guidance or prescription.* There is no proposed definition of 'jobseeker profile questionnaire,' nor any legislative prescription, guidance, or limitation on its form and content. This leaves the design of the questionnaire to the discretion of the Ministry. As a 'pre-benefit activity' (which is proposed to be mandatory), unsuccessful attempts to complete a questionnaire to the satisfaction of the Ministry may delay an individual's receipt of financial assistance. The introduction of this administrative hurdle – and the potential consequences of failure to complete the questionnaire

– makes it desirable to provide greater certainty than is currently contained in the Bill. This could be achieved by a prescribed format or guidance on the type of information that may be required in the questionnaire.

The Law Society recommends this is addressed in the Social Security Regulations 2018 (**the Regulations**), and suggests this could be achieved, for example, by:

(i) defining the term 'jobseeker profile questionnaire', including a list of information requirements the questionnaire should include, with a 'catch-all' provision along the lines of 'further information as MSD considers appropriate for the purposes of X'; or

(ii) otherwise specifying the nature of the information that the Ministry may require in the questionnaire, or that the information required must be for the purpose of 'X'.

(c) *Proposed section 184A(4)(b) allows the Ministry to impose the requirement to complete a jobseeker profile questionnaire by oral notice only.* This is inadequate. The Law Society is of the view that the requirement should be advised to the applicant in writing, including clear specification of the consequences of non-compliance. Advising an applicant in writing would not preclude the Ministry from also informing a person of the requirement orally, which we accept may be best practice. It would simply require that the Ministry subsequently provide written notice. Advising the person in writing is important because:

(i) There is greater risk that an oral requirement will be misunderstood or misinterpreted. This is particularly the case if the applicant is not proficient in English or intellectually disabled. An applicant may not feel comfortable voicing that they do not understand the requirement.

(ii) Provision of written notice may assist the applicant to seek advice or consult another person (including an advocate or support person) more readily than attempting to relay an oral conversation.

(iii) A written requirement is more amenable to standard wording than reliance on Ministry officials to communicate the requirement orally. This can be devised in advance to be clear and understandable.

(d) *The ability to revoke the requirement if the Ministry considers it is "no longer" reasonable* is phrased in a confusing manner. Proposed new section 183A(2) is mandatory: the Ministry "must" require a questionnaire if the legislative criteria are met, and there is no residual discretion. Use of the term "revoked" could suggest that the Ministry could originally advise the person that a jobseeker questionnaire is needed and then immediately "revoke" that requirement.

It also implies that if the Ministry identified at the outset that it would not be reasonable to require a questionnaire, it would nevertheless have to require the questionnaire before it could then be revoked. In practice, the Ministry may interpret subsection (4) as enabling it not to require a questionnaire in the first place if it does not consider that reasonable, it would be preferable to make this clear. We recommend qualifying subsections (2) and (3) by adding an exception

along the lines of "unless MSD considers the requirement is not reasonable in the circumstances of the person, of the person's spouse or partner, or both."

3 Cancellation of benefit for continued non-compliance

3.1 Proposed new section 233A (clause 12) provides that the Ministry must cancel a person's benefit if it has imposed a sanction under section 232(2)(a) or (b), and the person fails to re-comply within 13 weeks after the sanction took effect.

3.2 This means an unrectified first instance of non-compliance could lead to cancellation of a person's benefit; the most serious consequence in the hierarchy of sanctions set out at section 232 of the Act. This inconsistency with section 232 suggests a more gradual approach to imposing sanctions is preferable.

3.3 The Law Society notes that the 13 weeks specified in proposed section 233A(1)(b) is one week longer than the 3-month timeframe for filing a challenge to the Benefits Review Committee. In theory, that would allow the person an opportunity to challenge the original sanctions decision before it results in cancellation of their benefit.

3.4 However, it is not clear what the effect of a (still to be determined) challenge would be on the cancellation. Under regulation 247 of the current Regulations, the Committee must make a decision as "soon as practicable" after it receives an application for review. Its powers include confirming, varying, or revoking the decision.

3.5 The 13-week period allows a 1-week margin for the Committee to make a decision if a person seeks a review at week 12. However, we note:

(a) The Review of Decision process commences with an internal administrative review, for which five working days is prescribed as the target timeframe.

(b) If the applicant is then advised that the internal review upholds or partially upholds the decision, a further 10 working days is the target timeframe by which a report is to be prepared, a hearing scheduled, and the report and other information provided to the Committee.

(c) There is no statutorily prescribed timeframe within which the Committee must make a decision. Internal Ministry documentation suggests the total timeframe from request for review, through to decision by the Committee, should be a maximum of 32 working days.[1]

(d) However, we are advised there are extensive delays in the review process. The Ministry does not appear to proactively release information about timeliness of the review of decision process, however information from February 2024 indicates that the above timeframes were met for less than 25% of reviews.[2] It is

[1] Benefits Review Committee Co-ordinators Information Pack, Ministry of Social Development, August 2022, at page 3. Accessed via: https://www.msd.govt.nz/documents/about-msd-and-our-work/contact-us/complaints/committee-co-ordinators-information-pack.pdf

[2] Ministry of Social Development, response to request under the Official Information Act 1982, 20 February 2024, Accessed via: https://fyi.org.nz/request/25469/response/96760/attach/3/Fowler%20Decision%20Letter.pdf

not clear whether reviews pertaining to sanctions, where cancellation of a benefit is a prospect, are expedited.

3.6 Further, available data indicates that obligations failures and sanctions more often than not do not withstand scrutiny under review.[3] For disputes within the section 252(2)(f) process:

(i) In the quarter ending 30 June 2024, 132 of 3,852 disputed obligation failures were upheld. 3,552 were overturned.

(ii) In the quarter ending 31 August 2024, 72 of 2,181 disputed obligation failures were upheld. 2,046 were overturned.

For internal reviews following a section 391 application for review of decision:

(iii) In the quarter ending 30 June 2024, 1 of 22 decisions were upheld.

3.7 It is unclear how long it takes for the Ministry to complete review of a sanction decision where it is disputed under section 252(2)(f) of the Act, and it appears information is not held as to how long the Ministry typically takes to conduct an internal review following application for a review of decision under section 391.[4]

3.8 There is therefore a high risk that proposed section 233A will result in the cancellation of a benefit, where the originating sanction will later be overturned during one of two internal reviews, or by the Committee. There is also a high chance that the review process will not be expeditious – particularly in light of the impact of cancellation. In these circumstances, cancellation of the benefit may be disproportionately punitive. The absence of any discretion for the Ministry – section 233A will provide that the Ministry 'must' cancel the benefit – exacerbates that risk.

3.9 The Law Society considers it is preferable for section 233A not to take effect while a dispute, review or appeal of a decision remains undetermined. We note that as the cancellation is not related to eligibility, this does not raise the prospect of overpayment. While there may be concern that this will incentivise the lodgement of meritless applications for review of decision, the above data tends to suggest this is not a significant risk, and it is nonetheless a risk that can be met with more efficient review processes.

3.10 The same concerns apply in relation to the equivalent provisions for youth payments (proposed section 270A), and young parent payments (proposed section 280A).

---

3 Ministry of Social Development, response to request under the Official Information Act 1982, 10 October 2024. Accessed via: https://www.msd.govt.nz/documents/about-msd-and-our-work/publications-resources/official-information-responses/2024/october/10102024-numbers-of-beneficiaries-who-requested-a-review-of-sanction.pdf

4 Ministry of Social Development, response to request under the Official Information Act 1982, 13 June 2024. Accessed via: https://www.msd.govt.nz/documents/about-msd-and-our-work/publications-resources/official-information-responses/2024/june/13062024-the-brc-and-oia-process.pdf

4 Non-financial sanctions: money management and community work

4.1 The interaction between proposed sections 236A and 236B is not clear. Both provisions must be imposed where the Ministry is satisfied it is appropriate, and neither can be imposed at the same time. In circumstances where the Ministry is satisfied either option is appropriate, it is both required to but not permitted to impose both. Where this occurs, there is no guidance within the provisions as which sanction should be imposed.

4.2 The Law Society recommends the Bill is amended to provide a discretion as to whether money management or community work is the appropriate response, or, alternatively to grade the provisions. For example, the Ministry may impose community work if it has considered money management and has deemed that it would not be appropriate to impose that sanction.

Money management – proposed section 236A

4.3 The interaction between subsections (1) and (2) is unusual. Subsection (1) confers a discretion ('if' the Ministry is satisfied), however subsection (2) then provides that if satisfied the Ministry 'must' impose money management under subsection (2). The Law Society considers it would be preferable to specify objective, provable facts that establish section 236A as applying to the individual, with the discretion to then determine whether money management is actually imposed.

4.4 Subsection (2) requires the individual to attend an appointment with the Ministry and discuss their failure to comply with the relevant obligation, within five working days of receiving notice under section 252. The Law Society recommends including a discretion for the Ministry to allow that appointment to take place outside of the five working day period, if there is 'good and sufficient reason' (this phrase being one used throughout the Act).

Proposed Regulation 192A – 'participating supplier'

4.5 Clause 67 of the Bill proposes to insert new Regulation 192A into the Regulations. Proposed Regulation 192A prescribes the manner of payment for those subject to money management as a sanction for first failure. A prescribed proportion of the individual's main benefit, 'must' be paid into a payment card enabling the individual to obtain goods or services:

(a) that the Ministry considers are essential; and

(b) are from 'participating suppliers.'

4.6 A 'participating supplier' is defined in the proposed regulation as 'a supplier who has agreed with MSD to supply goods or services—

(a) that MSD considers are essential; and

(b) to a person on whom money management has been imposed; and

(c) on the person's presentation of the payment card.

4.7 However, there is no definition of an 'essential' good or service, and it is not clear whether 'essential' relates to the needs and circumstances of a particular person, or to a

more generic list of produces or services that the Ministry considers are generally essential.

4.8 Further, the Ministry's selection of 'participating suppliers' may present practical difficulties, particularly for those who reside in rural areas with fewer and/or lesser known retailers. That is, the Ministry will likely find it easy to include large outlets such as chain supermarkets, but it is not clear how this may apply to smaller outlets such as local grocers, butchers, ethnic supermarkets, markets, local pharmacies, and tradespeople.

4.9 It is important to have clarity on this, as a person who is subject to money management should know where the money can be spent, so that they can effectively plan their budgets. This accords with the principle that penalties should be sufficiently certain.

4.10 The Law Society considers it would be more appropriate to include an indicative list of the kinds of things that would fall into this category, rather than leave this entirely to the discretion of the Ministry.

Community work – proposed sections 236B – 336D

4.11 Proposed new section 236B places an onus on the person to find community work that the Ministry deems to be suitable and meet the prescribed minimum number of hours per week and prescribed minimum number of weeks. That work must be found within the prescribed period (proposed by clause 61 to be four weeks).

4.12 This is likely to be highly difficult for some individuals to comply with, and some factors will be wholly outside of the person's control. It may not be easy to find suitable voluntary work that meets the specific requirements. There may be some areas where there are no suitable options, such as smaller and rural communities. The fact that the measure is penal may also undermine the willingness of community organisations to participate.

4.13 The Law Society is of the view that it is problematic to impose a sanction that relies on extraneous factors outside the person's control, especially where that may have further sanctions consequences. This could violate the principle that laws should apply equally to all and should be clear and predictable. This is concerning as, under proposed section 236C, the failure without 'good cause' or 'sufficient reason' to comply with obligations under section 236B results in a person's benefit being reduced to zero.

4.14 More generally, the Law Society queries whether this should be a sanction. It is not related to the management of funds, or money paid, and it is a punitive action decided not by an independent court or tribunal, but instead imposed by an official. It imposes a further, positive obligation on a person and restricts how they can spend their time. Such an obligation may be more suited to assisting a person to become qualified, so they can find appropriate work, rather than a penalty.

4.15 Finally, where there is good and sufficient reason why a person cannot meet the requirement for community work experience, proposed section 236D would require the Ministry to impose a replacement sanction that reduces the individual's main benefit by half. The Law Society is of the view that this is disproportionately punitive and questions how, if good and sufficient reason exists, it could be properly determined in the first

instance that it is appropriate in the circumstances to apply community work as a sanction, this being a requirement of proposed section 236B(1)(c). It does not seem justifiable, if there is good cause to fail to comply, to reduce a benefit by half. Where there is good reason, we suggest money management be available instead as the alternative.

5 Use of automated systems

5.1 Clauses 52 and 53 of the Bill propose to amend section 363A of the Act, to expand the decisions which may be made by automatic electronic systems. Presently, automated systems may only be used to 'make any decision, exercise any power, comply with any obligation, or take any other related action under any specified provision', where that specified provision is about the effect of child support income on a person's benefit (or other assistance) entitlement.

5.2 Clause 52 will extend section 363A to enable the use of automated systems in respect of sanctions, including sanctions on young persons and young parents.

5.3 This raises significant concern about how the use of automated systems will apply where the sanctions provisions involve some form of evaluative judgement, for example those relating to money management and community work. As identified in the Regulatory Impact Statement for the Bill, non-financial sanctions '*will introduce more complexity into the system due to the associated administration and interface with recompliance activities*.'[5] Further, there are matters that can lead to sanctions which require evaluative judgment (for example section 125, Undertaking planning for employment). It is unclear how automated systems are intended to accurately and appropriately operate where evaluative judgment is required, or where the potential for sanction arises following the exercise of evaluative judgment.

5.4 While the Department Disclosure Statement states that the Bill 'expands the current limited enabling provision to support automated decision making (ADM) in the 26-week reapplication process and processes within the traffic light system',[6] clause 52 is not limited in any way and the accompanying documentation for the Bill contains no analysis of the proposal. All that exists to constrain or guide the Ministry's use of automated systems in respect of sanctions would be the Ministry's 'Automated Decision-Making Standard', gazetted on 20 June 2023 as required by section 363B of the Act (the **Standard**).[7]

5.5 The Standard allows the use of automated decision-making for discretionary decisions where 'legal risk' is identified and either mitigated or accepted.[8] In terms of the required level of accuracy, the Standard requires only that accuracy and reliability are 'assessed' to ensure 'insofar as possible, that automated decision-making is producing expected results, that automated decisions do not deny clients full and correct entitlement (FACE), and bias and discrimination is well managed.'[9] However, it is only in the case of unintended bias which cannot be removed or sufficiently mitigated, that the Standard

5 At para 112.
6 At page 4.
7 "Notice Under the Social Security Act 2018" (20 June 2023) *New Zealand Gazette* No 2023-sl2877.
8 At 1.3, 3.3.4.
9 At 3.2.1.

requires the intervention of substantial human involvement. Such laxity is concerning where automated systems may now be used for the implementation of sanctions and punitive restrictions. It appears the Standard may no longer operate as an adequate safeguard, if these amendments proceed.

5.6 By contrast, legislative permission for the use of automated systems in other regimes contain parameters within the primary legislation:

(a) Section 124F of the Biosecurity Act 1993;

(b) Sections 28 to 29A of the Immigration Act;

(c) Section 374 of the Food Act 2014;

(d) Section 296 of the Customs and Excise Act 2018, and

under each of these Acts, the imposition of punitive measures follows conviction or application to the court.

5.7 The potential for automated decision-making in the imposition of sanctions or penalties is novel. In the absence of publicly available material analysing or justifying this proposal (or detailing safeguards), and more detailed legislative parameters, the Law Society is of the view that the proposed extension of automated decision-making is inappropriate in this context.

5.8 The Law Society recommends that clauses 52 and 53 are removed from the Bill, pending further analysis and development of appropriate safeguarding measures. If the proposal is to proceed, we recommend that sanction decisions involving evaluative judgment (or what the Standard refers to as 'discretionary decisions') are specifically excluded from the provision.

David Campbell
Vice-President