



LEGISLATION ADVISORY COMMITTEE

PO Box 180
Wellington 6401

Phone 04 494 9897

Fax 04 494 9859

www.justice.govt.nz/lac

Email LAC@justice.govt.nz

01 November 2012

Chair
Social Services Committee
Parliament Buildings
P O Box 18 041
WELLINGTON 6160

Dear Chair

**SOCIAL SECURITY (BENEFIT CATEGORIES AND WORK FOCUS)
AMENDMENT BILL 2012 67-1**

Introduction

1. The Legislation Advisory Committee was established to provide advice to the Government on good legislative practice, legislative proposals, and public law issues. It has produced, and updates, Guidelines on the Process and Content of Legislation as appropriate benchmarks for legislation, which have been adopted by Cabinet.
2. The terms of reference of the LAC include:
 - to scrutinise and make submissions to the appropriate body on aspects of Bills introduced into Parliament that affect public law or raise public law issues;
 - to help improve the quality of law-making by attempting to ensure that legislation gives clear effect to government policy, ensuring that legislative proposals conform with the LAC Guidelines, and discouraging the promotion of unnecessary legislation.

3. This is an important and extensive Bill. We endeavour to summarise it, and then advance four major points.

The Bill

4. The objectives of this Bill are:

- to reduce benefit dependency;
- to increase the work focus of the benefit system and reward independence;
- to allow the focus of resources where they will be most effective in achieving these objectives;
- to bring a work focus to a greater number of beneficiaries and support them into work;
- to use benefit payments and sanctions to reinforce social norms and improve social outcomes.

5. The main amendments in the Bill are:

- revising the system of main benefits by replacing 7 existing benefits with 3 new ones: the job seeker support (replacing the unemployment benefit, sickness benefit, DPB for solo parents with a youngest child of 14 years or older, widows benefit for widows whose youngest child is 14 years or older, and DPB for women alone); sole parent support (replacing DPB for sole parents of children under 14 years); and supported living payment (replacing invalid's benefit and DPB for care of the sick or infirm);
- placing either full or part-time work expectations (depending on their ability to work) on all people on the job seeker support, although those temporarily unable to work can have their work obligations deferred for a period;
- a new approach to working with people in the benefit system who are sick or disabled, where the applicable benefit will differ depending on whether a person has or will ever be able to have capacity for work (those temporarily incapacitated will be on job seeker support, those permanently incapacitated will be on supported living but may still be required to undertake certain work preparation activities where they have the capacity);
- applying annual benefit expiry and reapplication provisions to all beneficiaries on jobseeker assistance;
- increasing the restrictions on when benefits can be paid to people while they are outside New Zealand so that in addition to those with work availability expectations, those with a specific work preparation requirements and those receiving an emergency benefit will not be paid a benefit while overseas unless they are granted an exemption for special circumstances;

- requiring all beneficiaries to inform WINZ of any international travel plans;
 - cancelling a benefit and not allowing resumption for 13 weeks where any beneficiary fails to accept an offer of suitable employment (previously this sanction applied only after two earlier failures to meet work obligations);
 - introducing drug testing requirements where a beneficiary is referred to a job or training programme where drug testing is a prerequisite, with financial sanctions for non-compliance;
 - requiring beneficiaries with children to meet social obligations, such as their children attending early childhood education from 3 years and school from 5 or 6 years, being enrolled with a primary health care provider and having Well Child checks done, in order to continue receiving the benefits;
 - stopping benefit payments to beneficiaries with a warrant to arrest that remain unresolved after 28 days from issue, provided the beneficiary is given appropriate notice and the opportunity to clear the warrant (except where the beneficiary poses a risk to public safety);
 - allowing WINZ to obtain more information about work capacity;
 - allowing WINZ to require a person to receive services from a contracted service provider;
 - allowing MSD to introduce preferred supplier arrangements for the procurement of good and services for disability allowance recipients in certain circumstances, requiring them to use that provider.
6. The nature of the amendments intended is such that legislation is necessary to achieve them.
7. The Bill does extend the subject matter of the Social Security Act beyond its current scope by including the social obligations (which involves education and health objectives), and arrest warrant obligations (which involves a justice objective) in the requirements for entitlement to benefits.
8. It should be noted that one of the four Regulatory Impact Statements relating to this Bill ("Welfare Reform - Proposals for Bill Two of Welfare Reform") has been redacted in several places.

Understandable and accessible legislation

9. As an amendment Bill to the Social Security Act 1964, this Bill does not create understandable and accessible legislation. The Social Security Act must be one of the most, if not the most, amended Act on New Zealand's statute books. Since enactment the Act has been subject to amendment 131 times. Of the Act's current 457 sections and 32 schedules, 174 sections and 14 schedule have been previously repealed. This Bill repeals 35 sections and one schedule.

It introduces 54 new sections and 2 new schedules, and amends 51 current sections and 8 current schedules. As an example, one of the new sections will be called "section 60GAG". Reading through both this Bill and the Social Security Act as it will be when amended require much skipping between different sections and parts in order to understand an issue. Some of the new sections and current sections amended to include further subsections will be very long. For instance section 77 of the Act will become 14 subsections long and section 82 will become 18 subsections long.

10. All of this past and proposed amendment of the Social Security Act has left it in messy and confusing state. The Act is in need of a complete rewrite in order to create coherent, comprehensible, straightforward framework. Because of the nature of this type of legislation as a system of entitlements for New Zealanders in difficult, and potentially vulnerable, circumstances, there is even greater need for this legislation to be clear and accessible.
11. It should be acknowledged that this Bill attempts to improve upon the current comprehensibility of the Act by renumbering and renaming Parts, removing redundant headings and renumbering some sections.
12. At the very least the state of the Act makes it a prime candidate for reprint.

Basic principles of New Zealand's legal and constitutional system

13. The Bill raises a rule of law issue. In a number of instances, the Bill gives the Chief Executive of the Ministry of Social Development discretion about matters that affect an individual's entitlement for social support. For example, cl 9 introduces new s 11E, which gives the Chief Executive the discretion to determine whether someone has the capacity to seek, undertake and be available for work. Cl 11 introduces new s 20B, under which the Chief Executive has the discretion to regard a child as being the child of a benefit applicant if the child's parents are unwilling to support the child because of circumstances the Chief Executive considers exceptional. Sch 1 introduces new sch 3A, which gives the Chief Executive the discretion to disregard up to \$20 per week of a beneficiary's personal earnings to meet the cost of child care.
14. This approach is consistent with the Social Security Act in its present state as it does leave more than 50 decisions to the Chief Executive's discretion, and to some extent this type of legislation does require the decision makers to have some flexibility in how they apply rules. However, the reliance on the discretion of a decision-maker is something that is being used less frequently in modern legislation. The principle that the law should be clear and should apply consistently to all is central to our legal and constitutional system. This legislation is about essential practical assistance affecting individual's everyday lives. It should generally be possible to determine the criteria for entitlements by looking at the legislation, rather than relying on decision-making discretion on a case-by-case basis.

Appeal and review

15. The Bill re-enacts (ie repeals and replaces with a new section) s 56A of the Social Security Act which establishes the right of appeal on medical grounds to a medical appeal board in sch 2, which inserts new s 10B. This right of appeal applies to certain types of decision related to sickness, injury, disability and capacity of sickness beneficiaries to work. There is no further right of appeal from decisions of the medical board and its decisions bind the Chief Executive. The board comprises three members appointed by the Chief Executive who are medical or rehabilitation practitioners or persons with expertise in vocational training or support.
16. This is a more limited and less independent right of appeal than applies to other decisions under the Social Security Act, which may be appealed to a benefits review committee and then to the Social Security Appeal Authority. A further appeal may be made to the High Court on questions of law.
17. The new s 10B leaves the right of appeal to the medical board and the establishment of the board substantively uncharged from the right of appeal currently in s 56A. The Bill does apply this more limited right of appeal to the new decisions:
 - that a beneficiary has good and sufficient reason for failing to comply with a drug test obligation on the grounds that the beneficiary is addicted to, or dependent on, controlled drugs (cl 10);
 - regarding a person's entitlement to a benefit, deferral of work test obligations capacity for part-time work and capacity to meet work test obligations where these decisions are based on an assessment by a health practitioner (Part 1 of sch 2 inserting new s 10B(f)).
18. The Bill includes certain powers of the Chief Executive that are explicitly not subject to any right of review or appeal. These are:
 - the decision that a person must purchase goods or services that are being funded under the disability allowance from a preferred supplier nominated by the Chief Executive (cl 28);
 - the decision to pay a beneficiary's special assistance payment to a nominated preferred supplier for the supply of goods or services to the applicant (cl 49).
19. These powers are a particular type of decision regarding preferred suppliers of goods and services. It could be argued that these are of limited practical importance to a beneficiary so it is not necessary to make them subject to a right of appeal and presumably it is for reasons of cost and finality that the government would not want these decisions to be subject to review. However, these decisions could make important practical differences to disabled beneficiaries or could have significant commercial implications for suppliers. It may be more appropriate for legislation to include some type of review of the decision, albeit with a limited scope, rather than removing it altogether.

Privacy/Information Sharing

20. The Bill contains information sharing provisions. Clause 54 introduces new section 132L, which allows the Governor-General by Order in Council and on recommendation of the Minister of Social Development to make regulations for the purpose of the provision regarding the effect of a warrant to arrest a beneficiary on the beneficiary's warrant. The provision allows regulations to assist the Ministry of Social Development to perform these powers and functions by authorising the Ministry of Social Development, Ministry of Justice and the New Zealand Police to disclose to one another relevant personal information about beneficiaries with warrants to arrest. The provision limits personal information to which is about the beneficiaries to whom s 75B on warrants to arrest applies and which is necessary or desirable for giving full effect to or for the due administration of s 75B. The regulations may state the circumstances in which the Ministry of Justice or Police may release information to the Ministry of Social Development and the conditions with which the Ministry of Social Development must comply in dealing the information, and vice versa. The Minister must be satisfied that the Chief Executive has consulted the Privacy Commissioner and persons or organisations representing the interests of people whose information may be shared before recommending the making of the regulations.
21. Privacy and information sharing issues are the subject of some concern at present, particularly in relation to the Ministry of Social Development. The Privacy (Information Sharing) Bill (318-2) is currently before the House. It may be undesirable to proceed with a statutory information sharing scheme before this legislation is enacted. The Ministry of Social Development note in the Regulatory Impact Statement on warrants to arrest that information sharing critical to the success of this policy. It proposes that information sharing agreements will be undertaken once the Bill has passed.
22. The Privacy Commissioner does not appear to have been consulted about this reform and so the provisions of the Bill and the content of any proposed regulations have not been assessed by the Commissioner against the privacy principles. The RIS notes that there was limited time to undertake consultation before the Cabinet Paper on the Bill was required.
23. Further, the safeguards in this Bill requiring consultation with the Privacy Commissioner and representatives of those affected by the policy may be sufficient to ensure that information sharing scheme is appropriately narrow and protective of private information. There is a concern that the privacy and information sharing issues in this provision have not been given sufficient scrutiny.

Conclusion

24. This is important legislation. LAC has no concern (and indeed it is not its business) with the policy aspects of it. However there are aspects of the legislation which must be of real public and professional concern.

- (a) Given its tortuous history, the past and proposed amendments of the Act have left it in a messy and confusing state which are well below the level which should be expected of legislation in New Zealand. This is a serious matter. It could be rectified by the Committee expressing a strong view that this statute be a prime candidate for a rewrite by PCO.
- (b) The extent of the discretionary decisions which can be made by the Chief Executive (and likely would be spilled down by him or her) cuts across the modern principle of legislation that these sort of discretions should *not* be used. This is a serious rule of law problem.
- (c) On the privacy/information sharing front, there are serious concerns particularly with the interface between the Privacy (Information Sharing) Bill (318/2) which is currently before the House. The LAC is concerned that the privacy and information sharing issues in this provision have not been given sufficient scrutiny.

25. Thank you for taking the time to consider the Committee's submission. The Committee would like to be heard on this submission.

Yours sincerely

A handwritten signature in black ink, appearing to read "Grant Hammond". The signature is fluid and cursive, with a large initial 'G'.

Hon Sir Grant Hammond
Chair