



Submission to the Social Services Committee on the Social Security Legislation Rewrite Bill

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To: Social Services Committee

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Introduction

1. The Human Rights Commission ('the Commission') welcomes the opportunity to provide this submission to the Social Services Committee on the Social Security Legislation Rewrite Bill ('the Bill').
2. As its title indicates, the Bill rewrites the incumbent Social Security Act 1964 ('the Act') in order to make it more accessible and cohesive. The Commission notes that the Bill is intended to be largely neutral in terms of its impact on current policy. Nevertheless, the Bill introduces some policy reform, including:
 - Amending the principles of the Act to introduce a principle concerning support for investing in better long-term outcomes, thus providing legislative expression to the Government's "investment approach" policy.
 - Amending and renaming the orphans benefit, the unsupported child's benefit and the emergency benefit.
 - Introducing a new power to make regulations to specify groups of beneficiaries whose benefit instalments can be redirected without consent.

Summary of the Commission's positions and recommendations

3. The Commission supports the intention of the Bill and agrees with the Explanatory Note's description of the current Act as "awkward, disjointed and incoherent" due to its age and frequent amendments. Overall, the Commission considers that the Bill is a considerable improvement on the Act in terms of clarity and accessibility. For this reason, the Commission also supports the Bill's shifting of the provisions regarding residential care and disability support services and the artificial limb service into separate legislation.

4. The Bill is also being introduced against the backdrop of the significant substantive reforms of New Zealand's social security system that have occurred following the 2011 report of the Welfare Working Group ('WWG'). The Commission has provided the Committee with submissions on the human rights implications of many of the Social Security Amendment Bills that have been introduced in the wake of the WWG report¹.
5. As it currently stands, the Bill does not update the legislative framework to reflect the developments in human rights policy and law that have occurred during the Act's tenure. The Commission considers that the opportunity to do so should not be missed. Social security policy and service provision, in its various forms and machinations, directly impacts upon the human rights of people whose welfare and economic well-being is dependent on a benefit, either directly or indirectly.
6. Just as the re-write of the Act provides an opportunity to include the investment approach policy within the Act's principles, it provides a similarly significant opportunity to ensure that the primary legislative framework is applied in a human rights consistent way. Furthermore, the alignment of the Act's legislative purpose and framework with human rights principles enables a greater degree of policy congruence with the Government's commitment to measure its progress towards meeting the 2030 targets set by the UN Sustainable Development Goals, in particular those regarding the reduction of poverty² and inequality³.
7. In this submission, the Commission has made a number of recommendations aimed at enhancing the human rights consistency of the Act. A summary of the Commission's recommendations is set out below:

a. The Commission recommends that Clause 3(a) of the Bill is amended to include a new clause 3(a)(iv) that provides that a purpose of the Act is to

¹ These include submissions on the Social Security (Youth Support and Work Focus) Amendment Bill (12 April 2012), Social Security (Benefit Categories and Work Focus) Amendment Bill (1 November 2012), Social Security (Fraud Measures and Debt Recovery) Amendment Bill (10 October 2013), Support for Children in Hardship Bill (8 July 2015), Social Security (Extension of Young Persons Services and Remedial Matters) Amendment Bill (9 September 2015).

² The UN SDG targets on poverty include reduction, at least by half, in the proportion of men, women and children living in poverty in all its dimensions according to national dimensions.
<http://www.un.org/sustainabledevelopment/poverty/>

³ The UN SDG targets on reducing inequality include progressively and sustainably increasing the income growth of the bottom 40 percent of the population at a rate higher than the national average by 2030; and promoting and empowering the social, economic and political inclusion of all, irrespective of age, sex, disability, race, ethnicity, origin, religion or economic or other status by 2030;
<http://www.un.org/sustainabledevelopment/inequality/>

protect and progressively realise the Government's human rights obligations, including (but not limited to):

- (i) The reduction and alleviation of hardship due to income poverty and material deprivation.
 - (ii) The promotion of social inclusion.
- b. The Commission recommends that Clause 4 of the Bill is amended to include a new clause 4(f) in order to establish a requirement that any person performing or exercising a duty, function, or power under this Act must have regard to the Government's human rights obligations, including the welfare and best interests of any child or vulnerable adult who may be affected, directly or indirectly, by the exercise of a duty, power or function under the Act.
- c. The Commission recommends that the Social Services Committee reviews whether the qualifying criteria for the Supported Living Payment under clause 34 of the Bill adequately reflects the "reasonable accommodation" requirements of the UN Convention on the Rights of Persons with Disabilities.
- d. In light of the historical issues regarding the treatment of New Zealand residents with overseas pensions under s 70 of the Act, the Commission recommends that the Social Services Committee considers the equity and fairness of the current policy settings reflected in clause 173-175 of the Bill.
- e. The Commission recommends that the Committee reviews clause 421 and considers the extent to which redirection provisions ought to be included in primary legislation, given the human rights implications.
- f. The Commission recommends that the phrase "without good cause" is deleted from clause 421(2)(a). The Commission notes that the RIS does not appear to identify or analyse any circumstance where the use of redirection without good cause can be justified.

Human rights implications

8. Reform of social security legislation has inherent human rights implications. The rights to social security and an adequate standard of living are enshrined in human rights

treaties that the New Zealand Government has ratified, notably the International Covenant on Economic, Social and Cultural Rights⁴ ('ICESCR'), the UN Convention on the Rights of the Child⁵ ('UNCROC') and the UN Convention on the Rights of Persons with Disabilities⁶ ('UNCRPD').

9. International human rights principles provide that social security benefits are crucial public policy mechanisms for enabling all people to enjoy their right to an adequate standard of living. In its General Comment 19 on the right to social security⁷, the UN Committee on Economic, Social and Cultural Rights made a number of observations which are instructive when assessing the social security policy. These include the following:
- a. The right to social security includes the right not to be subject to arbitrary or unreasonable restrictions of existing social security coverage.⁸
 - b. Social security policy should be treated as a social good, not a subset of financial or economic policy.⁹
 - c. Family and child benefits are crucial mechanisms in enabling the protective functions of Article 9 and 10 of ICESCR (and by association Article 27 of UNCROC).¹⁰
 - d. Benefits must be of adequate value (both cash and in kind) to enable the realisation of, inter alia, the right to an adequate standard of living; and be accessible.¹¹
 - e. Qualifying criteria must be reasonable, proportionate and transparent. Sanctions should be circumscribed, reasonable and subject to due process protections.¹²
 - f. Special attention should be given to enabling vulnerable groups to realise their right to social security.¹³

⁴ Articles 9-11 – NOTE: The right to social security is a long standing international human right, recognised in the Declaration of Philadelphia 1944 and later incorporated in the 1948 Universal Declaration on Human Rights (Art. 22)

⁵ Articles 26 and 27

⁶ Article 28

⁷ UN Committee on Economic, Social and Cultural Rights, General Comment 19 on the right to social security, 4 February 2008, E/C.12/GC/19. General Comments are interpretations of aspects of treaties by the international body responsible for monitoring their implementation. As such they are regarded as the most authoritative legal interpretation of how a treaty should be implemented and indicate the requirements and standards that must be satisfied to ensure a State does not breach its international commitments

⁸ UN Committee on Economic, Social and Cultural Rights, General Comment 19 on the right to social security, 4 February 2008, E/C.12/GC/19, para 9

⁹ Ibid para 10

¹⁰ Ibid para 18

¹¹ Ibid para 22,23

¹² Ibid para 24

¹³ Ibid para 30

- g. There is a strong presumption against the adoption or introduction of retrogressive measures.¹⁴
 - h. Any persons who have experienced a violation of their right to social security have access to effective judicial recourse or other appropriate remedial avenues.¹⁵
10. The Commission notes that both the Bill's Regulatory Impact Statement ('RIS') and Explanatory Note acknowledge the nexus between social security policy and human rights¹⁶. The RIS states that "protection of human rights is fundamental to our democratic social system."¹⁷ The Explanatory Note appears to reflect this statement of principle, stating that the rewrite has been drafted in such a way so as to ensure that "matters relating to human rights and freedoms" and "provisions that confer economic rights", among other things, are included in primary legislation.
11. However, this policy-level acknowledgment of the importance of human rights in the social security system is not expressly reflected in the provisions of the Bill (clauses 3 and 4) that establish its purposes and principles.

Clause 3 – the legislative purpose

12. Clause 3 of the Bill establishes the legislative purpose and is virtually identical to incumbent s 1A. Clauses 3(a) and (b) set out statements related to the fundamental purpose of a social security system – that is, to provide financial support to people (and their dependents) who are not in employment, are unable to work due to illness, sickness, disability or care responsibilities, or who are suffering financial hardship. These clauses can be characterised as broadly consistent with, yet narrower in scope, than Article 9 of ICESCR, which provides for a universal right to social security.
13. However, clause 3 of the Bill does not contain an additional purposive statement reflective of the human rights obligations upon the state to provide, among other things, an adequate standard of living to all persons¹⁸, the widest possible protection and assistance accorded to the family¹⁹, and special measures of protection and assistance

¹⁴ Ibid para 42

¹⁵ Ibid para 78

¹⁶ Ministry of Social Development, *Regulatory Impact Statement: Policy changes proposed as a part of the rewrite of the Social Security Act 1964* (hereafter 'RIS'), Part 1, p 8-15

¹⁷ Ibid at para 25, p 9

¹⁸ ICESCR Article 11.1

¹⁹ ICESCR Article 10.1

on behalf of all children, without discrimination for reasons of parentage or other conditions²⁰.

Clause 4 – legislative principles

14. Clause 4 of the Bill goes on to set out the principles that a person must have regard to when exercising a function under the Act. This is identical to the incumbent s 1B, but for an additional “investment approach” principle regarding the provision of additional assistance, support and services for people who have been identified as being at risk of long-term welfare dependency.
15. Clause 4 is particularly significant as it governs the operation of the Act, through the mandatory application of its principles in decision-making by MSD officials, Work and Income case managers and case officers, and other persons with statutory functions. However, clause 4 does not provide for any express obligation upon those decision-makers to take into account human rights principles in the course of exercising their legislative functions.
16. Such obligations include an obligation on the State to ensure that the best interests of the child are taken into account as a primary consideration in decision-making processes that affect them²¹. This includes the operation of the reforms to the Act’s sanctions regime introduced by the Social Security Amendment Act 2012, insofar as they apply to beneficiary parents and caregivers of dependent children.²²
17. The Expert Advisory Group on Solutions to Child Poverty (“EAG”) recognised that the social security policy must be implemented in a manner consistent with the welfare and best interests of the child, if child poverty is to be effectively alleviated in New Zealand. The EAG considered that it was imperative that New Zealand’s social security legislation ensured that the best interests of the child were applied in all decision-making procedures that impacted upon the household income of beneficiary households with children.

²⁰ ICESCR Article 10.3, UNCROC Article 26

²¹ UNCROC Article 3.1

²² Child Poverty Action Group (CPAG) has raised concerns regarding a lack of transparency regarding the use of sanctions, particularly in respect of the impact of sanctions on the well-being of affected children, see CPAG (2013) *Benefit Sanctions: Creating an invisible underclass of children* p 15-16, <http://www.cpag.org.nz/assets/Backgrounders/2-0%2028509%20Benefit%20Sanctions%20Report%20Sept%202013.pdf>

18. The EAG accordingly recommended that section 1B of the Social Security Act be amended to include a requirement that all persons carrying out functions under the Act give primary consideration to the best interests of the child when doing so²³, a position supported by the Commission in previous submissions to this Committee.

Predictive risk modelling

19. Furthermore, the human rights implications of social security policy extend beyond income-related economic and social rights. Evolving technology is leading to the introduction of new information-based service delivery mechanisms, such as predictive risk modelling, in the social sector. For example, the draft Approved Information Sharing Agreement (AISA) released by MSD for public consultation earlier this year seeks to enable the use of predictive risk modelling techniques designed to underpin the expanded Youth Service programme²⁴.

20. The use of AISAs (which override the standard protections set out in the Information Privacy Principles of the Privacy Act) to enable predictive risk modelling in the social security sector raises human rights considerations regarding both the right to privacy and the right to social security. UN treaty bodies have held that:

- a. Individuals have the right to ascertain what information is being held by public authorities, for what purpose, and have the right to correct or eliminate incorrect information held by those authorities.²⁵
- b. Qualifying criteria must be reasonable, proportionate and transparent.²⁶

21. In addition to its human rights implications, predictive risk modelling raises important ethical considerations in terms of its implementation and use²⁷. In the case of the draft

²³ EAG (2012) Working Paper 10: Reforms to the tax, benefit and active employment system to reduce child poverty, Recommendation 3, p 7, <http://www.occ.org.nz/assets/Uploads/EAG/Working-papers/No-10-Reforms-to-tax-benefit-and-employment-system.pdf>

²⁴ introduced by the Social Security (Extension of Young Persons Services and Remedial Matters) Amendment Bill 2015 – the Bill extends the Youth Service programme from current its application to 16 and 17 year olds to all 19 year-old beneficiaries with children and 18 and 19-year old beneficiaries without children who are considered at significant risk of long term welfare dependency

²⁵ UN Human Rights Committee, General Comment No 16 on the right to privacy (8 April 1988), para 11

²⁶ UN Committee on Economic, Social and Cultural Rights, General Comment 19 on the right to social security (4 February 2008), para 24

²⁷ Centre for Applied Research in Economics (2012) *Vulnerable Children: Can administrative data be used to identify children at risk of adverse outcomes?* Department of Economics, University of Auckland – this research was commissioned by MSD to investigate the use of predictive risk modelling in targeting early intervention

Youth Services AISA, there was no indication as to whether any ethical evaluation of the risk modelling mechanism would take place, nor was there any indication of whether an ethical framework will be developed to guide agencies in their assessment of risk scores and subsequent responses²⁸.

22. The Commission notes that MSD has recently stated in its response to the List of Issues prepared by the UN Committee on the Rights of the Child for the Government's upcoming 5th periodic UNCROC review, that it is developing a "Privacy, Human Rights and Ethics Framework" that will govern its operational use of predictive modelling.²⁹

23. The Commission welcomes this development. However, the example of predictive risk modelling illustrates the desirability of having human rights principles reflected in the purposive provisions of primary legislation, so that human rights compliant policy and practice occurs as a matter of course, rather than through ad hoc responses.

24. The Commission accordingly recommends that:

a. Clause 3(a) of the Bill is amended to include a new clause 3(a)(iv) that provides that a purpose of the Act is to protect and progressively realise the Government's human rights obligations, including (but not limited to):

(i) The reduction and alleviation of hardship due to income poverty and material deprivation.

(ii) The promotion of social inclusion.

b. Clause 4 of the Bill is amended to include a new clause 4(f) in order to establish a requirement that any person performing or exercising a duty, function, or power under this Act must have regard to the Government's human rights obligations, including the welfare and best interests of any

and reducing child and neglect. CARE found that, in that case, implementation should be subject to a full ethical evaluation, development of an ethical framework to guide agencies in how they should respond to risk scores, strong engagement from front-line providers and staff and careful, deliberate and phased implementation

²⁸ The Human Rights Commission pointed this omission out in its email submission to MSD dated 6 May 2016. The Commission also recommended that the AISA include a clause mandating the development of an ethical framework for agencies.

²⁹ MSD, *New Zealand Government response to the list of issues in relation to the Fifth Periodic Report under the United Nations Convention on the Rights of the Child*, June 2016, para 63

child or vulnerable adult who may be affected, directly or indirectly, by the exercise of a duty, power or function under the Act.

Human rights implications – discrimination

Attorney-General's report – Supported Living Payment

25. In his report on the consistency of the Bill with the New Zealand Bill of Rights Act 1990 (NZBORA), the Attorney-General states that “eligibility for benefits, and obligations on beneficiaries are inherently discriminatory as they are drawing distinctions on a number of grounds of prohibited discrimination.”³⁰
26. However, while eligibility requirements require distinctions to be made, it should be emphasised that the overall purpose of a social security system is redistributive and aimed at alleviating poverty and achieving social inclusion, as the UN Committee on Economic, Social and Cultural Rights has held ³¹. The Committee has described the right to social security as being of central importance in guaranteeing human dignity for all persons when they are faced with circumstances that deprive them of their capacity to fully realise their economic, social and cultural rights³².
27. The Attorney-General characterises the purpose of New Zealand’s social security legislation in somewhat different terms, yet concludes that in order to meet this overarching purpose, the distinctions contained in the Bill are justifiable for the purposes of NZBORA, with one exception. That exception regards clause 33 of the Bill which provides that those who have a restricted work capacity, due to injury, health or disability, or who are totally blind.
28. The Attorney-General finds that clause 33 constitutes advantageous treatment for people who are totally blind as compared to other people with disabilities, thereby constituting unlawful discrimination under a 19 of NZBORA in such a way that is not justifiable.³³ People who are totally blind qualify for the SLP as of right and are entitled to receive the SLP in full, without abatement as a result of other income, as well as an additional allowance known as the blind subsidy.

³⁰ Report of the Attorney General under the New Zealand Bill of Rights Act on the Social Security Legislation Rewrite Bill, 8 March 2016 (hereafter ‘AG report’ para 10, p 2

³¹ UN Committee on Economic, Social and Cultural Rights, General Comment 19 on the right to social security, para 3

³² Ibid para 1

³³ AG report, paras 12, 19, 28

29. Part of the rationale for this finding is that, due to advances in technology and support mechanisms, there is no longer any “needs-based” justification for distinguishing the eligibility of totally blind people³⁴, as compared to other people with disabilities - who must be able to prove, among other things, a severe restriction to their capacity to work which necessitates that they are unable to work for more than 15 hours per week. The Attorney-General’s report refers to an estimate from MSD that 60 percent of the 1049 totally blind people currently in receipt of the SLP would no longer be eligible for the SLP if their distinctive eligibility criteria did not exist.³⁵
30. Given that one of the human rights elements of a social security system is to promote social inclusion, the Commission considers the main human rights issue with the SLP criteria is not so much about the nature of the entitlements for blind people and whether these are unduly advantageous, it is about whether the SLP is consistent with the principle of reasonable accommodation under the UN Convention on Persons with Disabilities (UNCRPD) in the way that it applies to all people with disabilities.
31. The UNCRPD defines reasonable accommodation as “necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden...to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms.”³⁶.
32. Article 5.3 of the CRPD goes on to provide that in order to promote equality and eliminate discrimination State Parties “shall take all appropriate steps to ensure that reasonable accommodation is provided.” Article 28 of the CRPD further provides that States Parties have an obligation to ensure that people with disabilities realise their rights to social protection and an adequate standards of living, without discrimination, thus implicitly incorporating the principle of reasonable accommodation.
33. The rigid eligibility criteria of the SLP under clause 34 of the Bill does not reflect the principle of reasonable accommodation under the UNCRPD. There is no provision for any administrative discretion to make the “necessary and appropriate modifications and adjustments” that are required to ensure that people with disabilities are accorded their right to social security. “Bright line” policies, such the 15-hour threshold under clause 34(3), may be more expeditious for a government to implement and administer,

³⁴ AG report, para 26-28; also see the RIS at para 31

³⁵ Para 16

³⁶ CRPD Art 2

but may be problematic when assessed against the reasonable accommodation principle.

34. The Commission notes MSDs position that the SLP policy regarding people who are totally blind is an “anomaly” and its recommendation that it be removed. The Commission further notes MSDs indication that any change is intended to be introduced following future revisions to the Disability Action Plan.³⁷
35. Given this context, the Commission would encourage the Social Services Committee to approach the issues raised by the Attorney-General and the RIS about the SLP through the lens of reasonable accommodation under the CRPD. Retrogressive measures are clearly undesirable and are inconsistent with human rights standards as regards social security policy. Accordingly, consideration ought to be given to whether the current policy is sufficiently designed and nuanced to enable full consistency with the Government’s human rights obligations under the CRPD.
- 36. The Commission accordingly recommends that the Social Services Committee reviews whether the qualifying criteria for the SLP under clause 34 of the Bill adequately reflects the “reasonable accommodation” requirements of the CRPD.**

Overseas pensions – s 70

37. Over the years, the Commission has received numerous discrimination complaints regarding the effect of s 70 of the Social Security Act on the superannuation entitlements of New Zealand residents who have an overseas pension, with 86 complaints received from 29 May 2000 to 29 May 2016.³⁸ Section 70 provides that such persons shall have their superannuation entitlements reduced by the amount of the overseas pension, or an amount determined by MSD.
38. In practice, section 70 applies to government-administered schemes, other than Government Occupational Pensions (where the person has worked for, or been in the service of, an overseas government) including those where the pension comprises

³⁷ RIS, paras 62 and 63

³⁸ In addition, the Office of Human Rights Proceedings is currently providing representation to a number of people for the purposes of bringing a claim in respect to whether the spousal deductions clause under s 70 constitutes unlawful discrimination under the Human Rights Act. The matter is currently at a preliminary stage, with proceedings yet to be filed in the Human Rights Review Tribunal.

purely of monies contributed by the individual. It does not apply to privately managed schemes.

39. The Courts have held that whether or not an overseas government has contributed to the funding of a pension scheme is irrelevant to a s 70 enquiry³⁹ although they have also noted that it “might be seen as an unhappy policy choice that a self-funded scheme administered by a foreign Government is treated one way, and a self-funded scheme administered by a private body is treated another...Parliament evidently has remained content with its choice.”⁴⁰

40. In addition, in its report *Human Rights in New Zealand 2010*, the Commission noted that “concerns had been raised about inequities and anomalies resulting from s 70 of the Social Security Act”⁴¹ and has previously made submissions to the Social Services Committee on its effect.⁴²

41. The Commission notes that clauses 173-175 of the Bill updates the current scheme under s 70 of the Act and, while the new clauses do not introduce substantive changes, they are considerably clearer.

42. Clause 413 of the Bill also provides that regulations may be issued that prescribe categories of overseas pensioners with whom MSD may enter into arrangements. The development of new regulations under this clause will provide, among other things, an opportunity to address some of the current anomalies and inequities that the Commission and the Courts have commented on, including the evident inequity between the treatment of people who have self-funded their overseas pensions privately or through a government-administered scheme.

43. Given the ongoing complaints the Commission receives regarding the inequitable impact of current policy, we would welcome the opportunity to provide MSD with input. The Commission would also recommend that the Social Services Committee closely monitors the development of regulations under clause 413.

44. In light of the historical issues regarding the treatment of New Zealand residents with overseas pensions under s 70 of the Act, the Commission recommends that

³⁹ *Latimer v Chief Executive of MSD* [2015] NZHC 2779 at [21]

⁴⁰ *Boljevic v Chief Executive of MSD* [2012] NZAR 280 (HC) per Kos J at [35]

⁴¹ Chapter 15, p 227

⁴² Human Rights Commission on Social Assistance (Payment of New Zealand Superannuation and Veterans Pension Overseas) Amendment Bill 2009

the Social Services Committee considers the equity and fairness of the current policy settings reflected in clause 173-175 of the Bill.

Policy updates

Amending and renaming existing benefits

45. Clause 59 introduces a new benefit named the “Exceptional Circumstances Benefit” (‘ECB’) to replace the current emergency benefit under s 61 of the Act. The qualifying criteria for the ECB on their face is less prescriptive. The benefit rate remains at the discretion of MSD. Clause 59 also introduces a discretionary work-test obligation, and sanctions will be able to be imposed for non-compliance. Social obligations in respect of dependent children (as regards attendance at school and early childhood education) also apply to recipients of the ECB under clause 114 of the Bill.
46. Clauses 42 to 44 introduce a Supported Child Payment (SCP) to replace the previous orphans benefit (OB) and unsupported child benefit (UCB) set out under ss 28-31 of the current Act. The amendments consolidate the current entitlements under those benefits and replace their outdated terminology. The Bill, however removes the current entitlement of step-parents to receive the orphans benefit, consistent with the current UCB eligibility criteria. The RIS considered that while extending SCP eligibility would be fair and transparent, step-parents are, like other parents, eligible for income support through their own benefit or through the Working for Families tax credits, essentially leading to a dual entitlement not available to other parents⁴³. Transitional provisions of the Bill, however, enable step-parents currently receiving the OB to continue to do so and provides that OB applications made before the legislative changeover will be determined as SCP applications using the criteria under the 1964 Act.⁴⁴
47. The impact of these amendments is difficult to predict. While they do not appear to introduce a significantly narrowing or broadening of eligibility criteria, it will be critical that their introduction does not have a detrimental impact on current and future recipients. In the case of the ECB, it will be particularly important that the exercise of administrative discretion is guided by the application of human rights principles. We accordingly reiterate our recommendation at paragraph 24b above that the Bill include a principle under clause 4 that any person performing or exercising a duty, function, or

⁴³ RIS para 139

⁴⁴ Schedule 1, clauses 4, 5, 7

power under its auspices must be required have regard to the Government's human rights obligations when doing so.

Redirecting benefits

48. Clause 421(2)(a) enables regulations to be developed to specify circumstances in which payments made to a beneficiary may be redirected with or without good cause, or with or without the beneficiary's consent. The Commission is concerned by the approach taken by the Bill and notes that the policy rationale for this reform is not explained in the Bill's Explanatory Note.
49. Part 3 of the RIS covers this aspect of the reform in some detail. The RIS notes that redirection of benefits to third parties to manage are "a useful tool for enabling clients to budget within their benefit income...".⁴⁵ The RIS points to UK research that indicates that the redirection of benefit income can have positive effects (such as enabling management of debt and avoiding creditor sanctions) and negative effects (for example, leaving low income households with insufficient finances to cover household expenses).⁴⁶
50. What is clear, however, is that the redirection of income without good cause or consent raises human rights considerations, particularly where doing so would impact detrimentally on the subject's economic right to an adequate standard of living.
51. The RIS indicates that the rationale for clause 421 appears largely to underpin current redirection practices that are undertaken to pay social housing rent. The RIS goes on to state that, in terms of rights compliance, "we [MSD] consider that the approach in the case of social housing is justifiable...we have confidence in the advice on the [NZBORA] compatibility in part because the Ministry and its legal representatives have had success in defending policies that have been the subject of complaints."⁴⁷
52. That may well be the case but we would expect a more robust approach to developing human rights consistent policy.
53. Clause 421 is open-ended in terms of its application and does not include any reference to social housing. Likewise, the Bill's Explanatory Note does not refer to any

⁴⁵ RIS, para 91

⁴⁶ RIS, para 92

⁴⁷ RIS, para 115

intention for the provision to be primarily directed towards this purpose. In addition, the Attorney-General does not appear to have specifically considered clause 421 in his s 7 report.

54. The Commission considers that the Bill's overall approach to the redirection of benefit income under clause 421 does not appear to conform with the human rights requirement that social security qualifying criteria is reasonable, proportionate and transparent.⁴⁸ The approach is also inconsistent with the Explanatory Note's statement of intent that "matters relating to human rights and freedoms" and "provisions that confer economic rights" will be included in primary legislation.

55. The Commission considers that the development and implementation of any regulatory framework under clause 421 of the Bill should be consistent with human rights standards and principles. The issues arising from clause 421 further emphasises the importance of ensuring that the purposive provisions of the Bill under clauses 3 and 4 of the Bill expressly obligate human rights consistent policy development, implementation and administrative decision-making.

56. The Commission accordingly recommends that:

- a. The Committee reviews clause 421 and considers the extent to which redirection provisions ought to be included in primary legislation, given the human rights implications.**
- b. That "without good cause" is deleted from clause 421(2)(a). The Commission notes that the RIS does not appear to identify or analyse any circumstance where the use of redirection without good cause can be justified.**

⁴⁸ UN Committee on Economic, Social and Cultural Rights, General Comment 19 on the right to social security, 4 February 2008, E/C.12/GC/19, para 24