

Submission to 18th Session of the United Nations Human Rights Council – Universal Periodic review on New Zealand's Human Rights Performance

Beneficiaries Advocacy Federation of New Zealand

A. Introduction

The Beneficiaries Advocacy Federation of New Zealand¹ is a nation-wide group of independent, non-government organizations whose collective purpose is to advocate for those New Zealanders who need assistance to access welfare rights, and obtain assistance, from their government.

We only became aware of the Universal Periodic Review a matter of days before the closing date for submissions; consequently, our submissions are not as detailed as we would have liked.

Because of that time constraint, we chose to focus our submissions on one matter only affecting the fundamental human rights of New Zealanders: their government's deliberate decision to deny access to justice in its latest amendment of the Social Security Act 1964².

Follow up to UPR and Treaty Body Recommendations

In New Zealand's first UPR the HRC recommended that it ensured that all subsequent legislation was in accord with the New Zealand Bill of Rights Act 1990³, which itself should appropriately reflect its international human rights obligations, did not limit its scope⁴.

The UPR also recommended that New Zealand took: appropriate measures to bring its domestic law into full compliance with the International Covenant on Civil and Political Rights⁵; further measures to ensure full and consistent protection of human rights in domestic law and policies⁶; and action to provide constitutional protection to both national and international human rights acts and standards⁷

1 "BAFNZ".

2 "the SSA".

3 "NZBORA"

4 (A/HRC 12/50, 24 September 2009, 61); A/HRC 12/8, para [81], recommendation 16.

5 Ibid, para [81], recommendation 18.

6 Ibid, para [81], recommendation 19.

7 Ibid, para [81], recommendation 20.

The Social Security Act 1964 – Background

The SSA is the primary legislative instrument providing for the delivery of welfare rights to New Zealanders.

Predecessor statutes date back to 1908 and, notably, 1938, when the first Social Security Act was enacted, resulting in the establishment of the welfare state in a recognizable form⁸.

Since the New Zealand government embraced neoliberalism, from 1984 onwards, its commitments to the principles of the SSA, in particular, and towards related rights contained in relevant international human rights instruments, generally, have been dishonoured⁹.

In 1991, the government cut welfare rates substantially, resulting in significant increases in poverty¹⁰. Political parties then in opposition made a great deal of political capital out of those cuts but then did nothing to restore them on attaining government in 1999¹¹.

In 2007, the government enacted further right-ward shifts in welfare law and policy, via amending legislation to the SSA that derogated even further from its international human rights obligations¹².

The 2013 Legislation Amending the SSA

The Bill, containing the amendments, was introduced to Parliament on 20 September 2012. After an unduly short period for public submissions, the committee considering the Bill reported back to Parliament on 13 March 2013. Final readings took place on 9 April 2013 and the Bill was enacted on 16 April 2013 as the Social Security (Benefit Categories and Work Focus) Amendment Act 2013

The provisions to which we wish to draw the attention of the HRC will take effect from 15 July 2013.

8 Most histories of New Zealand contain reference to the course of welfare provision in the 20th century, while the more recent mark the retreat from the state's earlier commitment to welfare rights. See, for example: Michael King, *The Penguin History of New Zealand*, (2007, Penguin, Auckland; John Martin, *Honouring the Contract* (2010, Victoria University Press, Wellington). For an outsider's view of New Zealand's welfare state and comparison with that of the United States, see: DH Fisher, *Fairness and Freedom: A History of Two Open Societies* (2012, OUP, Oxford).

9 See: King, *ibid*; Martin, *ibid*; Grant Duncan, *Society and politics: New Zealand Social Policy* (2004, Pearson, Auckland);

10 The government itself records, but otherwise ignores, evidence of growing poverty, and inequality, among New Zealanders. See: *Household Incomes, Inequality and Poverty* (Parliamentary Library Research Paper, House of Representatives, Wellington, December 2011); Andrew Bradstock, "Closing the gap between rich and poor", the *Otago Daily Times*, 30 October 2009, 11, noting New Zealand's low ranking, in terms of equality, among the OECD countries. See too: Richard Wilkinson and Kate Pickett, *The Spirit Level: Why More Equal Societies Almost Always Do Better*, (Allan Lane, London, 2009); Bagehot, "On equality", *The Economist*, 21 August 2010, 43, noting the relevance of *The Spirit Level* to both Left and Right on the political spectrum: "...[P]retending that equality of opportunity is a fundamentally different thing from greater equality of income seems too comfortable a conceit."

11 See: Brian Roper, *Prosperity for All? Economic, Social and Political Change in New Zealand Since 1935* (2005, Thomson Dunmore, Melbourne); Christine Cheyne, Mike O'Brien, Michael Belgrave, "Social Policy in Aotearoa New Zealand (4th edition) (2008, OUP, Auckland).

12 See: Margaret Bedgood, Kris Gledhill, *Law Into Action: Economic, Social and Cultural Rights in Aotearoa New Zealand* (2011, Human Rights Foundation, Auckland).

The provisions that we find most objectionable are those that exclude review and appeal rights, through the judicial branch of government, which are available to all citizens with the exception of those expressly excluded by legislation.. The relevant provisions of the 2013 amending legislation are section 11, amending section 12J of the SSA, and schedule 2, inserting a new section 10B into the SSA¹³.

To some extent, exclusionary provisions have applied for many years in New Zealand's social welfare legislation; however the 2013 amendments extend the reach of those provisions to a much wider range of administrative decisions, affecting much greater numbers of New Zealanders¹⁴.

The new provisions provide that New Zealanders unhappy with decisions by welfare bureaucrats may only appeal to a *Medical Appeal Board*¹⁵, the members of which are appointed, solely, by the welfare bureaucracy itself¹⁶.

Rights of review and appeal, to tribunals and Courts respectively, are expressly excluded by the new legislation.

Thus, New Zealanders adversely affected by decisions of the welfare bureaucracy, or individuals and entities contracted to it under the new legislation, are deprived of the protection of the judicial branch of government, for all the failings of that branch to actively protect fundamental human rights¹⁷.

International Human Rights Instruments affected

The Universal Declaration of Human Rights (the UDHR) (GA res 217A(III) UN Doc A/810 at 71 (1948))

Article 7: All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination.

Article 8: Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law.

Article 22: Everyone, as a member of society, has the right to social security and is entitled to realization, through national effort and international cooperation and in accordance with the organization and resources of each State, of the economic, social and cultural rights indispensable for his dignity and the free development of his personality.

Article 25(1): Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and

13 Both provisions are attached as an appendix to these submissions.

14 See appendix one to these submissions. Section 10B of the SSA, as amended by the 2013 legislation, excludes review and appeal rights in cases of 20 types of decision by the welfare bureaucracy or assessors contracted to it.

15 "MAB"

16 Which we believe to breach the fundamental common law principle of *nemo iudex in causa sua* ("no one may be a judge in their own case"). In this context, the decision-makers, whether the welfare bureaucracy itself, or contracted individuals or entities, operate under severe conflicts of interest.

17 See: Bedgood and Gledhill, op cit.

medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.

- (2) Motherhood and childhood are entitled to special care and assistance. All children, whether born in or out of wedlock, shall enjoy the same social protection.

Article 28: Everyone is entitled to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realized.

International Covenant on Civil and Political Rights (the ICCPR)

GA res 2200A (XXI) UN GAOR Supp (No 16) at 52, UN Doc A/6316 (1966), 999 UNTS 171, entered into force Mar 23, 1976

Article 2(3): Each State Party to the present Convention undertakes:

- (a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;
- (b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;
- (c) To ensure that the competent authorities shall enforce such remedies when granted.

International Covenant on Economic, Social and Cultural Rights

GA res 2200A (XXI), 21 UN GAOR Supp (No 16) at 49, UN Doc A/6316 (1966), 993 UNTS 3, entered into force Jan 3, 1976.

Article 2(1): Each State party to the present Covenant undertakes to take steps, individually and through international assistance and cooperation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all available means, including particularly the adoption of legislative measures.

Article 4: The States parties to the present Covenant recognize that, in the enjoyment of those rights provided by the State in conformity with the 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.

Article 9: The State Parties to the present Covenant recognize the right of everyone to social security, including social assistance.

United Nations Convention on the Rights of People with Disabilities (UNCRPD)GA Res 61/106, A/RES/61/106 (2006).

Note: the UNCRPD is incorporated into New Zealand domestic law by the UNCRPD Act 2008. The following references are to articles in the UNCRPD itself, not the Act.

- Article 1: Commits state parties to promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, and to promote respect for their inherent dignity.
- Article 4(a): Adopt all appropriate legislative, administrative and other measures for the implementation of the rights recognised in the Convention.
- Article 9: Enable persons with disabilities to live independently and participate fully in all aspects of life.
- Article 16: Protect persons with disabilities from all forms of violence, exploitation and abuse.
- Article 19: Respect the rights of persons with disabilities to live independently and be included in their community.
- Article 28: Safeguard and promote the realisation of the right of persons with disabilities to an adequate standard of living and social protection.

Conclusion

For New Zealanders, a welfare system that respects their fundamental human rights, as affirmed by the above instruments, is essential to their security.

The current government has intentionally enacted legislation to undermine that security, while its likely successors confine themselves to posturing and simulating displays of empathy; they have not pledged to repeal these provisions if they attain government in future.

On that basis, BAFNZ sees no alternative but to ask the HRC to take note of our concerns and send the appropriate to our government.

Appendix One to: Submission to 18th Session of the United Nations Human Rights Council – Universal Periodic review on New Zealand's Human Rights Performance Beneficiaries Advocacy Federation of New Zealand

Social Security (Benefit Categories and Work Focus) Act 2013

“Appeals to medical board

“10B Right of appeal on medical grounds

- “(1) Any applicant or beneficiary affected may appeal to the Board against a decision of the chief executive that is—
 - “(a) a decision that a claim for a child disability allowance is

declined, or that any such allowance is cancelled, in either case on the ground that the child is not a child with a serious disability (within the meaning of section 39A(1) and (2)); or

- “(b) a decision that a claim for a supported living payment on the ground of sickness, injury, disability, or total blindness is declined, or that any such benefit is cancelled, in either case on medical grounds; or
- “(c) a decision under section 60Q(1)(bb) that a person in receipt of a supported living payment on the ground of sickness, injury, disability, or total blindness has the capacity to comply with obligations under section 60Q(3); or
- “(d) a decision under section 60Q(1)(bc) that a person in receipt of a supported living payment on the ground of caring for a patient requiring care has the capacity to comply with obligations under section 60Q(3); or
- “(e) a decision that a claim for jobseeker support on the ground of sickness, injury, or disability is declined on medical grounds or on grounds relating to a person's capacity for work, or that a person's jobseeker support on the ground of sickness, injury, or disability is cancelled on medical grounds or on grounds relating to the person's capacity for work; or
- “(f) a determination under section 88F(2) that a jobseeker support beneficiary on the ground of sickness, injury, or disability has, while receiving that benefit, the capacity to seek, undertake, and be available for part-time work, and so is required to comply with the work test on and after a date specified in a notice under section 88F(4); or
- “(g) a confirmation, amendment, revocation, or replacement under section 88F(6) of a determination, and that results in a determination of the kind specified in paragraph (f) of this subsection; or
- “(h) a decision on medical grounds under section 88I(2) to decline an application under section 88H(2) by a beneficiary granted jobseeker support (other than jobseeker support granted on the ground of sickness, injury, or disability) for deferral of all or any of the beneficiary's work test obligations; or
- “(i) a decision on medical grounds under section 88I(7) to revoke a deferral granted under section 88I of all or any work test obligations of a beneficiary granted—
 - “(i) jobseeker support (other than jobseeker support granted on the ground of sickness, injury, or disability); or
 - “(ii) jobseeker support granted on the ground of sickness, injury, or disability; or
- “(j) any of the following made in reliance on any work ability assessment by a health practitioner under section 100B:
 - “(i) a determination whether the person assessed is entitled

to a benefit and, if so, what kind of benefit:

- “(ii) a determination whether the person assessed, being a person in receipt of jobseeker support (other than jobseeker support granted on the ground of sickness, injury, or disability), is entitled on an application under section 88H, or under section 88I(4), to deferral of work test obligations under section 88I:
- “(iii) a determination whether the person assessed, being a person in receipt of jobseeker support on the ground of sickness, injury, or disability, has for the purposes of section 88F(2) the capacity to seek, undertake, and be available for part-time work:
- “(iv) a determination whether the person assessed, being a person who is subject to work test obligations or work preparation obligations under section 60Q, has the capacity to meet those obligations; or
- “(k) a decision under section 116C(2)(a) to the effect that a beneficiary does not have a good and sufficient reason, on the ground that the beneficiary is addicted to, or dependent on, controlled drugs, for either or both:
 - “(i) not complying with a drug testing obligation under section 102B(1):
 - “(ii) failing to apply for suitable employment that requires candidates to undertake drug tests; or
- “(l) a decision to decline a claim for a veteran's pension under section 70 of the War Pensions Act 1954, or to cancel any such pension, in either case on the ground of the applicant's or beneficiary's mental or physical infirmity.

“(2) An appeal under this section must be made within—

- “(a) 3 months after the decision has been communicated to that person; or
- “(b) any further period the Board may (if it considers there is good reason for the delay) allow on application made before or after the end of that 3-month period.

“(3) The chief executive is bound by the Board's decision on an appeal under this section.

“(4) The Board is to comprise 3 members to be appointed by the chief executive for the particular purpose, being medical practitioners, rehabilitation professionals (as defined in subsection (5)), or other persons having appropriate expertise in the fields of vocational training or vocational support for persons with sickness, injury, or disability.

“(5) Rehabilitation professional, in subsection (4), means a person who is—

- “(a) a person professionally engaged in the rehabilitation of persons from sickness or accident or with disabilities; or

- “(b) a nurse; or
- “(c) an occupational therapist; or
- “(d) a physiotherapist; or
- “(e) a psychologist.”

Rights of appeal: work test obligations: drug testing obligations

11 Section 12J amended (Rights of appeal)

- Before [section 12J\(1A\)](#), insert:
 - “(1AB) No appeal lies under subsection (1)(a) against a decision under section 116C(2)(a) against which an appeal lies under section 10B(1)(g) to the medical board.”