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**SURVIVING WITHOUT CHOICE: AN EVALUATION
OF THE DISCRIMINATION OF BENEFICIARIES
WITH CHILDREN WITHIN THE SOCIAL SECURITY
SYSTEM**

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Abstract

Since its first inception, New Zealand's social security system has been guided by the notion of reciprocal obligations. However, obligations required on the part of beneficiaries, particularly those with children, have become increasingly more burdensome. The most recent amendments require beneficiary parents to return to work earlier and for longer hours. This is in addition to social obligations, which provide direction as to what is considered by the state to be good parenting and deserving of welfare support. The child rearing autonomy of beneficiary parents is also affected by the increase in work testing obligations for beneficiaries who have additional children. In conducting a s 19 discrimination analysis, this paper submits that these provisions constitute prima facie discrimination. Beneficiary parents are treated differently from non-beneficiary parents as the provisions that apply to them affect their ability to make valuable choices with regards to parenting methods, having additional children and returning to work. The discriminatory treatment does not only affect beneficiary parents. Welfare provision inevitably affects the children of beneficiaries who are reliant on this support and whose interests continue to be inadequately considered.

Keywords

Social Security Act 1964; discrimination; beneficiary parents; reciprocal obligations; Bill of Rights Act 1990, s 19.

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I Introduction

Recipients of welfare support with children are burdened with unique obligations, limiting their ability to choose how to live their lives. The most recent legislative reform regarding the obligations of these beneficiaries was the Social Security Amendment Act (No 2) 2015. This Act has been part of the Government's response to the issue of child poverty by enforcing greater work testing obligations on beneficiaries with children. These requirements are in addition to a range of other burdensome provisions that apply to beneficiary parents, including extensive social obligations¹ and limitations on child-rearing autonomy.² This paper challenges a number of Social Security Act 1964 provisions directed at beneficiaries with children, on the basis that they are prima facie discriminatory pursuant to s 19 of the Bill of Rights Act 1990 (BORA).

Part II evaluates the underlying concepts of citizenship and reciprocity that have informed the development of welfare in New Zealand, and outlines the burdensome obligations placed on beneficiaries with children. The more onerous work testing obligations indicate the commitment to employment required by the State to be a parent deserving of welfare. The imposition of social obligations³ regarding healthcare and education outcomes for beneficiary children provide direction as to what is considered by the state to be good parenting, punishing those who do not comply. Increasing burdens for those who choose to have additional children whilst receiving a benefit⁴ demarcates this choice as unacceptable or undeserving behaviour.

Part III identifies that the range of obligations imposed on beneficiary parents constitute prima facie discrimination. The Court of Appeal in its landmark decision of *Ministry of Health v Atkinson (Atkinson)* formulated a clear and workable test for discrimination,⁵ requiring differential treatment between comparable groups that results in material disadvantage. Beneficiary parents are materially disadvantaged by way of experience, rather than forgoing

¹ Social Security Act 1964, ss 60RA-60RC.

² Social Security Act 1964, s 60GAE.

³ Social Security Act 1964, ss 60RA-60RC.

⁴ Social Security Act 1964, s 60GAE.

⁵ *Ministry of Health v Atkinson* [2012] NZCA 184, [2012] 3 NZLR 456.

financial assistance. The obligations imposed on beneficiary parents impinges on their freedom of choice and makes them subject to scrutiny that does not apply to any other parents in New Zealand.

Despite a finding that the provisions are prima facie discriminatory, Part IV considers whether the discrimination is justified. Obligations related to work testing are justifiable because they are rationally connected and necessary to fulfill the objective of moving parents into paid employment. The social obligations are however not justifiable, as they are unrelated to the role of the social welfare system and disproportionate to the social good achieved.

The effect of the discriminatory provisions on the children of beneficiaries is evaluated in Part V. Children who grow up in benefit dependent households are at a greater risk of experiencing poverty⁶ and are therefore particularly vulnerable to welfare reforms. Although the most recent welfare amendments were intended to improve outcomes for children in hardship,⁷ the children are indirectly harmed through the burdensome obligations on their parents. Welfare is only one means of targeting the issue of child poverty, but positive reform could significantly improve outcomes for children in New Zealand.

II Obligations Required of Beneficiaries with Children

The life of beneficiary parents is encumbered by work testing, social obligations and limitations on child rearing autonomy. Beneficiaries are disadvantaged through the erosion of valuable choice. This challenges the boundaries of the concept of social citizenship that underlies welfare law. Furthermore, beneficiaries are also vulnerable to their benefit being reduced or removed through the system of sanctions under s 117,⁸ increasing the likelihood of financial hardship.

⁶ Michael O'Brien, "Child Poverty and child rights meet active citizenship: A New Zealand and Sweden case study" (2011) 18 *Childhood* 211 at 220.

⁷ Support for Children in Hardship Bill 2015 (23-2).

⁸ Social Security Act 1964, s 117.

A Citizenship and Social Security

Citizenship has been frequently discussed in relation to the study of welfare law.⁹ Discussion of citizenship was articulated in the work of T. H. Marshall,¹⁰ who defined citizenship as a status bestowed on all those who are full members of a community. Citizenship is a relationship between the individual and the state, characterised by both rights and responsibilities.¹¹ Marshall divided the rights of citizenship into three elements: political, civil and social rights. The concept of social citizenship is used to justify the existence of the welfare provision, to encourage inclusion and full participation of all members of society.

The nature of welfare rights and responsibilities and the balance between them is central to the idea of citizenship. The concept of conditionality describes the extent to which, if any, welfare rights should be dependent on citizens' agreement to meet responsibilities.¹² The idea that beneficiaries should discharge some degree of reciprocal obligation in exchange for the provision of income has been central to the social security system in New Zealand since its first conception in 1938. Welfare recipients, by returning to the workforce as quickly as possible, are considered to have discharged their duties to contribute to the labour force. The state, by enforcing conditionality, is seen to have discharged its duty to taxpayers to maintain a financially prudent system.

Reciprocal obligations between the state and citizen are not necessarily problematic, and are indeed consistent with the idea of social citizenship. The danger is when the obligations are too burdensome, and are no longer relevant to the primary aims of the provision of social security. Obligations on the part of the beneficiary are continuing to increase, as illustrated by the Social Security Rewrite Bill 2016.¹³ Part Three of the Bill titled "Obligations" sets out

⁹ Peter Dwyer *Understanding Social Citizenship: Themes and Perspectives for policy and practice* (Policy Press, UK, 2004) at 3.

¹⁰ Thomas Humphrey Marshall *Citizenship and Social Class and Other Essays* (Cambridge University Press, Cambridge, 1950).

¹¹ Penny Leonard *Promoting Welfare? Government information policy and social citizenship* (Policy Press, Bristol, 2003) at 10.

¹² Peter Dwyer, above n 9, at 16.

¹³ At the time of submission of this paper, the Social Security Rewrite Bill 2016 is in the Select Committee stage.

around 70 sections of obligations required by beneficiaries and only two sections regarding the obligations of the Ministry of Social Development (MSD).¹⁴ This demonstrates how the right to citizenship is increasingly being replaced by conditionality to prove deservingness. The treatment of beneficiaries with children is contrary to the aims of citizenship that include ensuring that all are equal and can fully participate in society.

B Social Obligations

Social obligations directed at beneficiary parents were introduced under the Social Security (Benefit Categories and Work Focus) Amendment Act 2013. Social obligations include:

- Taking all reasonable steps to ensure that 3-5 year old dependent children are enrolled with and attending recognised early childhood providers;¹⁵
- Taking all reasonable steps to ensure that all 6-16 year olds are enrolled in, and attending school;¹⁶
- Taking all reasonable steps to ensure that dependent children are enrolled with a primary health care provider;¹⁷ and
- Taking all reasonable steps to ensure that dependent children are up to date with health checks required by the health providers.¹⁸

These provisions are in stark contrast to other obligations under the Act that focus on finding and retaining employment. Instead, the social obligations aim to change the parenting behaviours of the beneficiary.

This is not the only instance where the social security system requires the demonstration of 'good behaviour' to be eligible for support. Under s 102B, beneficiaries are required to undertake and to pass a drug test. Failing the drug test will result in the imposition of a benefit sanction. The requirement to be sober from controlled drugs supports the social norm that the use of prohibited drugs is a societal wrong. But the critical difference between this and the

¹⁴ Social Security Rewrite Bill 2016 (122-1), ss 90-167.

¹⁵ Section 60RA(3)(a)-(b).

¹⁶ Section 60RA(3)(c).

¹⁷ Section 60RA(3)(d).

¹⁸ Section 60RA(3)(e).

social obligations outlined above is that taking drugs is illegal.¹⁹ The duty to enroll a child in a recognised early childhood provider or primary health care provider is not required of other members of society other than beneficiary parents.

Furthermore, concerns were raised during Parliamentary debates that these provisions perpetuate child poverty instead of aiding it.²⁰ If parents cannot afford to provide basic education and healthcare services for their children and therefore fail to meet the social obligations, punishing beneficiaries by cutting their incomes even further has been described as “absurd”.²¹

C Work Testing Obligations

Work testing obligations are set out under s 102A.²² These requirements no longer consist of ‘hard workfare’, such as work-for-the-dole. Instead, they include a wide range of discretionary work test activities as required by the Chief Executive (CE). Work testing obligations include, but are not limited to, being available for and taking reasonable steps to obtain suitable employment, accepting any offer of suitable employment, attending and participating in an interview or any opportunity of suitable employment, undertaking any work assessment, programme, seminar, or any other activity specified by the CE and reporting to the department on his or her compliance with work testing obligation as often, and in the manner, as required by the CE.²³ The range of work testing requirements is evidently expansive. Pressure to find work is even more challenging for beneficiaries with children, requiring them to balance the interviews, meetings, seminars, or any other activity that the CE requires them to undertake with their child care responsibilities.

The Social Security Amendment Act (No2) 2015 makes two key changes in terms of work testing for beneficiaries. Firstly, work testing obligations for recipients of a benefit with children under the scheme are required from when their youngest child turns three years old

¹⁹ Misuse of Drugs Act 1975, s 7(1).

²⁰ (20 September 2012) 684 NZPD 5536.

²¹ (20 September 2012) 684 NZPD 5536.

²² Social Security Act 1964, s 102A.

²³ Social Security Act 1964, ss 102A(1)(a)-(g).

instead of five.²⁴ There was no clear evidence presented by the MSD as to why the age is now three, apart from this being the age of the child when “most people return to work”.²⁵

The second amendment to work testing obligations is that part-time work has been extended from an average of 15 hours per week to 20 hours.²⁶ The interpretation section of the Act states that a part-time work-tested beneficiary includes a person with children between 3 and 14 years old who is a spouse or partner or a recipient of sole parent support.²⁷ Part-time work testing also applies to those receiving a benefit on the ground of sickness, injury, or disability but only if determined by the CE.²⁸ With the latter exception, the majority of part-time work-tested beneficiaries are beneficiaries with children, illustrating that this amendment was intended to target this group. Despite the persistent focus on employment, there has been limited attention given to improving the labour market reconnection system.²⁹ The scarcity of jobs for parents who have limited qualifications, work experience and restricted time availability is a major barrier to the transition away from welfare support.³⁰

To further contextualise the nature of work-testing obligations, the definition of “suitable employment” is very discretionary. Suitable employment is based on what the CE determines is suitable, not necessarily work that is best for the beneficiary and their dependents.³¹ This presumably precludes work-tested beneficiaries from turning down low-paid jobs in favour of attempting to secure higher paid, or higher skilled work.³² As a result, beneficiaries may take up precarious work, work that is characterised by labour insecurity and a lack of work-based identity.³³ Precarious workers have a higher risk of poverty, and are frequently found in non-

²⁴ Social Security Act 1964, s 3. Amended by the Social Security Amendment Act (No 2) 2015, s 4(2)-(4).

²⁵ (5 Nov 2015) 709 NZPD 7784.

²⁶ Social Security Act 1964, s 3(1). Amended by the Social Security Amendment Act (No 2) 2015, s 4(1)(b)(ii).

²⁷ Social Security Act 1964, s 3(1).

²⁸ Social Security Act 1964, ss 88F(2) - (7).

²⁹ Jonathan Boston and Simon Chapple, *Child Poverty in New Zealand*. (NZL: Bridget Williams Books, Wellington, 2014), at 135.

³⁰ Jonathan Boston and Simon Chapple, above n 29, at 145.

³¹ Social Security Act 1964, s 3.

³² Māmari Stephens “Seeking the common good or just making us be good? Recent amendments to New Zealand’s social security law” (2013) 44 VUWLR 383 at 394.

³³ Guy Standing *The Precariat: The New Dangerous Class* (Bloomsbury Academic, New York, 2011) at 12.

standard work arrangements such as on fixed term contracts or as subcontracted temporary employees.³⁴ For beneficiaries with children, finding work that is suitable to both parenting obligations and long-term stability is of particular importance because their children are dependent on their income.

The experience of receiving a benefit in New Zealand has been illustrated in two recent reports based on interviews and submissions.³⁵ Beneficiaries described the stigma they have experienced because they receive a benefit, with words such as “bludger” and “scum”³⁶ that convey an impression that people receiving a benefit are “lazy” or “fraudulent”.³⁷ One participant described the lack of empathy she had encountered at Work and Income in relation to:³⁸

What it’s like to raise kids on a benefit with \$100 for food, clothing, doctors, everything day in and day out. That if you needed something, well it was your fault for managing your pitiful allowance. It was harrowing to go to WINZ.

Many beneficiaries indicated that they felt powerless in the face of decisions being made on their behalf and without their input.³⁹ There is a stark imbalance of power between the individual beneficiary and Work and Income, especially regarding the power case managers have over income to pay for essential needs.⁴⁰

The Department’s got the axe above their head; they can cut off their benefit. I think that’s enormously intimidating...they’ve got huge power over these people, power of the most

³⁴ Deborah Tucker *‘Precarious’ Non-standard Employment: A Review of the Literature*. (Labour Market Policy Group, New Zealand, 2003).

³⁵ Welfare Justice (The Alternative Welfare Working Group) *Welfare Justice in New Zealand: What We Heard* (Caritas, Wellington, 2010); Kim Morton, Claire Gray, Anne Heins, Sue Carswell *Access to Justice for Beneficiaries: A community Law response* (Community Law Canterbury, Canterbury, 2013).

³⁶ Kim Morton, Claire Gray, Anne Heins, Sue Carswell, above n 35, at 37.

³⁷ Welfare Justice (The Alternative Welfare Working Group), above n 35, at 5.

³⁸ Kim Morton, Claire Gray, Anne Heins, Sue Carswell, above n 35, at 30.

³⁹ Welfare Justice (The Alternative Welfare Working Group), above n 35, at 6.

⁴⁰ Kim Morton, Claire Gray, Anne Heins, Sue Carswell, above n 35, at 33.

basic rights: food, clothing and shelter. And if you've got children too and you're terrified of having your benefit cut off, you're immediately disempowered.

The distressing everyday experiences with Work and Income amplify the burdensome nature of work testing obligations for beneficiary parents.

D Limitations on Child-rearing Autonomy

The effect of s 60GAE is that beneficiary parents who have an additional child are subject to earlier work testing. Under the definition of part-time work-tested beneficiary, work testing commences when the youngest child is three years old.⁴¹ However, under s 60GAE, the age of the additional child is disregarded in terms of work testing obligations once the child is 12 months old.⁴² An applicant falls under this section if they are receiving a main benefit, are already caregiver for a dependent child and are becoming the caregiver of an additional child.⁴³ This provision essentially disincentives beneficiary parents from having additional children through implementing more burdensome work testing obligations.

The provision makes the moral assumption that beneficiaries choose to have children for the purpose of continuing to receive a benefit. Furthermore, it assumes that beneficiary parents are less capable of making the right decisions with regards to their family, flagging this behaviour as inappropriate and undeserving of income support.

The rhetoric of 'welfare dependency' was used to justify the overbearing nature of this provision, as families who have subsequent children while on the benefit were considered to be at a higher risk of long-term welfare dependence.⁴⁴ However, this generalisation ignores the reality that many people do not rely on welfare by choice, but are dependent because there is no other option to provide for their family. Opposition to the Bill was concerned that the provision punishes women for choosing to have babies, entirely overstepping the role of the

⁴¹ Social Security Act 1964, s 3(1).

⁴² Social Security Act 1964, s 60GAE(2).

⁴³ Section 60GAE(1).

⁴⁴ Social Security (Youth Support and Work Focus) Amendment Bill 2012 (10-1) (explanatory note) at 7.

state.⁴⁵ Concern was also shown for the lack of discussion around valuing parenting as work and the limited and low wage positions that parents with young children will be forced into.⁴⁶

E Vulnerability to Sanctions

A recipient's failure to meet certain obligations without sufficient explanation is subject to a tiered system of sanctions under s 117, including cutting or suspending their benefit. The Welfare Working Group (WWG) in their 2011 report recommended that sanctions be used to coerce beneficiaries to comply with the many social and other obligations they recommended introducing.⁴⁷ The WWG acknowledged that some of the beneficiaries caught by the new sanctions would be parents, a dilemma that was dismissed by recommending "there be requirements to ensure the interests of children are safeguarded",⁴⁸ though not specifying what these requirements would be.

The increase in obligations applying to beneficiary parents inevitably means that there are more opportunities for beneficiaries to fail to meet the obligations. Therefore, beneficiary parents are arguably more vulnerable to the imposition of sanctions than ever before. This is particularly concerning for families whose only source of income is the benefit. The use of sanctions to control behaviour is contentious, as arguably providing fellow human beings with basic security should not be conditional on moralistically determined behaviour.⁴⁹ If certain behaviour is unacceptable, it should be made a law that applies to all.⁵⁰

The social obligations, work testing burdens and limitations on child-rearing autonomy mean that beneficiary parents are stripped of choice, are increasingly vulnerable to sanctions and subject to greater scrutiny. The implementation of greater conditionality and increased obligations on beneficiary parents has ultimately tipped the balance in favour of increasing responsibilities for beneficiaries, rather than rights. But beyond this conceptual tension is an

⁴⁵ Social Security (Youth Support and Work Focus) Amendment Bill, above n 44, at 7.

⁴⁶ Social Security (Youth Support and Work Focus) Amendment Bill, above n 44, at 16.

⁴⁷ Welfare Working Group *Long-Term Benefit Dependency: Recommendations* (Welfare Working Group, February 2011).

⁴⁸ Welfare Working Group, above n 47, at 23.

⁴⁹ Guy Standing, above n 33, at 175.

⁵⁰ Guy Standing, above n 33, at 175.

issue of illegality, premised on the inconsistency of these provisions with the human rights legislation in New Zealand.

III Discrimination in New Zealand

Not only are the obligations enforced on beneficiaries with children extensive and onerous, this paper submits that they amount to discrimination under s 19 of BORA. The purpose of s 19 is that a person or a group of persons is not improperly treated differently than other persons with whom they can be fairly compared.⁵¹ Different treatment will be improper if it is based on one of the prohibited grounds of discrimination set out in s 21(1) of the Human Rights Act 1993 (HRA)⁵² and the differential treatment cannot be reasonably justified. The non-discrimination principle is an important part of a society based on equality, democracy and freedom where each individual is valued as a person, worthy of dignity and respect.⁵³ The landmark decision of *Atkinson* established a clear and workable approach to discrimination as:⁵⁴

differential treatment on a prohibited ground of a person or group in comparable circumstances...[that] when viewed in context...imposes a material disadvantage on the person or group differentiated against.

This represents a two-step analysis for determining discrimination. Firstly, there must be differential treatment between comparable groups, and secondly, this treatment must result in material disadvantage.

A Is there Differential Treatment between Groups in Comparable Situations?

The inherent notion of “discrimination” is that one group of people has been treated differently compared to another group.⁵⁵ Consequently, any claim of discrimination involves a

⁵¹ Andrew Butler and Petra Butler *The New Zealand Bill of Rights Act: A Commentary* (2nd ed, LexisNexis, Wellington, 2015) at 837.

⁵² Human Rights Act 1993, s 21(1).

⁵³ Butler and Butler, above n 51, at 837.

⁵⁴ *Ministry of Health v Atkinson*, above n 5, at [109].

⁵⁵ Andrew Butler and Petra Butler, above n 51, at 859.

comparison between the treatment to which the complainant has been subjected to and the treatment to which some other person has been subjected. By reference to a comparator, the Court can determine whether the distinctions that are made from the provision are in fact on a prohibited ground.⁵⁶

In *Air New Zealand v McAlister*, Elias CJ for the majority observed that, for a claim in discrimination to succeed, “the choice of comparator is often critical”.⁵⁷ Finding the appropriate comparator group can prove very difficult. There is no template to be followed and the courts have not developed a methodology on how to ascertain the correct comparator.⁵⁸

The correct comparator group in this context is between parents receiving a benefit under the social security scheme and other non-beneficiary parents in society.⁵⁹ These two groups are in comparable situations because both groups are responsible for minors and have positive duties towards protecting and looking after their children.⁶⁰ Beneficiary parents are treated differently because of the range of positive obligations regarding work and parenting decisions that they are required to comply with, which other parents in New Zealand are not. Even if there is an expectation of *all* parents in society to fulfill some of the requirements, only beneficiary parents face punishment through the loss of welfare income if the requirements are not met. The differential treatment is based on a prohibited ground of the HRA. Section 21(1)(k)(ii) prohibits discrimination on the grounds of employment status, including being a recipient of a benefit under the Social Security Act 1964.⁶¹

In choosing this comparator group, it is important to recall that children of non-beneficiary parents will have a different experience compared with children of beneficiaries. The latter group is disadvantaged indirectly because of the burdensome obligations on their parents,

⁵⁶ *Child Poverty Action Group Inc v Attorney-General* [2013] NZCA 402, 3 NZLR 729 at [51].

⁵⁷ *Air New Zealand Ltd v McAlister* [2009] NZSC 78, [2009] 1 NZLR 153, at [34].

⁵⁸ Butler and Butler, above n 51, at 862.

⁵⁹ An alternative comparator group is that between beneficiaries who are parents with dependent children receiving a benefit and other recipients of main benefits.

⁶⁰ For example the Crimes Act 1961, s 152.

⁶¹ Human Rights Act 1993, s 21(1)(k)(ii).

affecting their family life and upbringing. However, despite the different experiences, comparing these two groups of children is not suitable. The disadvantages faced by children of beneficiaries are indirect and therefore it is harder to prove that they are caused by the differential treatment as opposed to other factors. The implications on children of beneficiary parents however should not be disregarded and are discussed in Part IV of this paper.

B Does the Differential Treatment Cause Material Disadvantage?

In *Atkinson*, the Court of Appeal departed from the High Court's approach of only requiring that the treatment result in "discriminatory impact",⁶² to requiring a higher threshold of "material disadvantage".⁶³ Disadvantages can consist of monetary disadvantages including ineligibility for a tax credit,⁶⁴ cessation of funding that assists participation in the community⁶⁵ or not receiving paid work.⁶⁶ Material disadvantage that cannot be measured in monetary terms is more difficult to determine. In overviewing the case law of discrimination in New Zealand, material disadvantage can include revocation of choice or being subject to extra scrutiny.⁶⁷ These examples are fundamental to this context, where the material disadvantages experienced by beneficiaries with children are the oppressive obligations that affect their freedom of choice and increase surveillance of their behaviour by the state.

1 Removal of choice

The former test for discrimination in New Zealand was the Court of Appeal case *Quilter v Attorney General*.⁶⁸ Although the approach taken by the Court has been subject to criticism⁶⁹ and has been replaced by the much clearer formulation in *Atkinson*, the two partly dissenting

⁶² *Ministry of Health v Atkinson* (2010) 9 HRNZ 47 (HC), at [136].

⁶³ *Ministry of Health v Atkinson*, above n 5, at [108]-[109].

⁶⁴ *Child Poverty Action Group Inc v Attorney-General*, above n 56, at [72].

⁶⁵ *Attorney-General v IDEA Services Ltd* [2012] NZHC 3229, [2013] 2 NZLR 512, at [164].

⁶⁶ *Ministry of Health v Atkinson*, above n 5, at [137].

⁶⁷ *Quilter v Attorney General* [1998] 1 NZLR 523 (CA); *Adoption Action Inc v Attorney-General* [2016] NZHRRT 9, (2016) HRNZ 622; *Air New Zealand Ltd v McAlister*, above n 57; *Northern Regional Health Authority Ltd v Human Rights Commission* [1998] 2 NZLR 218 (HC).

⁶⁸ *Quilter v Attorney General*, above n 67.

⁶⁹ Andrew Butler and Petra Butler, *The New Zealand Bill of Rights Act: A commentary* (LexisNexis, Wellington, 2005) at 491.

judgments offer some valuable analysis.⁷⁰ In this case, three lesbian couples were denied marriage licenses under the Marriage Act 1955. The majority ruled that a prohibition on same-sex marriage did not amount to a prima facie infringement of the appellants' right to be free from discrimination. In his dissent, Thomas J considered "the right to choose as a basic civil right of all citizens"⁷¹ and thus the prohibition of same-sex marriages effectively excludes homosexual couples "from full membership of society".⁷² This is a direct recognition of the importance of freedom of choice for all members of society, and the disadvantageous position that citizens are put in when this choice is removed.

A number of other discrimination cases in New Zealand with non-monetary material disadvantage also refer to the imposition on freedom of choice. In *Air New Zealand Ltd v McAlister*,⁷³ the Court considered that the detriment was Mr McAlister being dismissed from his job, effectively revoking his choice to stay in his desired employment. In *Northern Regional Health Authority Ltd v Human Rights Commission*,⁷⁴ it was found that qualified medical practitioners of non-New Zealand origin were disadvantaged as they were excluded from being able to practice as general practitioners, removing their choice to work in their desired profession. The case of *Adoption Action Inc v Attorney-General* dealt with a number of challenges against particular provisions of the Adoption Act 1955.⁷⁵ The Court found that there was material disadvantage in the removal of civil union couples and same-sex de-facto couples choice to adopt a child.⁷⁶

In this context, the obligations required of beneficiary parents impinge on their freedom of individual choice. The social obligations force parents to adopt specific parenting methods, which may be inappropriate for their children, and do not apply to any other parents in society. In implementing these obligations, Parliament is suggesting what behaviour comprises good

⁷⁰ Butler and Butler (2005), above n 69, at 494.

⁷¹ At 537.

⁷² At 537.

⁷³ At [27].

⁷⁴ At 242.

⁷⁵ *Adoption Action Inc v Attorney-General*, above n 67.

⁷⁶ At [148].

parenting, punishing those who fail to comply. The paternalistic approach removes the ability to make choices around the care and well being of beneficiaries' own children.

The provision regarding additional impinges on personal child-rearing decisions of beneficiary parents. There are no other laws or regulations that aim to punish or deter people from having children. Furthermore, the provision goes beyond enforcing a social norm. If the majority of women are going back to work once a child has turned three as suggested by Parliament,⁷⁷ then requiring parents to find part-time work once a child has reached 12 months is enforcing a punishment for unwanted behavior.

Work testing obligations also affect the choice of the beneficiary. Beneficiary parents are now required to work for longer hours and when their children are even younger, removing the ability for beneficiaries to chose the time that is appropriate for their family circumstances to return to the workforce. Although it could be argued that the choice to return to work for beneficiaries with children has always been controlled by the State,⁷⁸ the recent amendments comprise a significantly greater burden. At the age of 5, all children are required to be enrolled in a primary school,⁷⁹ therefore making the requirement for seeking part time employment more realistic and achievable. The inability for these beneficiaries to choose to care for their children full-time at such a young age materially disadvantages beneficiary parents over other parents in society. It should also be recalled that the expectations on part-time work tested beneficiaries is extensive, extending to essentially any measure specified by the CE. There was no consideration of whether the imposition of more extensive work testing obligations on beneficiaries with children as young as 3 may have adverse effects.

2 *Subjection to extra scrutiny*

Material disadvantage can also constitute being subject to extra scrutiny. In *Adoption Action Inc v Attorney-General*,⁸⁰ material disadvantage was considered in the sense of additional

⁷⁷ (21 May 2015) 705 NZPD at 3531.

⁷⁸ Before the amendment, part-time work-tested beneficiary was defined under s 3(1) as a person with a youngest dependent child aged 5 or older.

⁷⁹ Education Act 1989, s 20.

⁸⁰ *Adoption Action Inc v Attorney-General*, above n 67, at [90] and [193].

burdens or procedures that applicants endured in order to adopt a child under two separate provisions. These were the requirement for male applicants to prove “special circumstances” if wanting to adopt a female child, which female applicants did not have to show,⁸¹ and the requirement for parents with disabilities to undergo additional assessment of eligibility.⁸²

The social obligations act as another form of state scrutiny, monitoring the beneficiaries to ensure that the approached parenting behaviours are adopted. The increased surveillance only adds to the stigma that they are incapable of raising their own children. Importantly, the additional scrutiny does not apply to other beneficiaries nor any other parents in society. Furthermore, beneficiaries with children are subject to additional burdensome provisions that increase their chances of failure. The fulfillment of both work testing and social obligations is not required by any other group of beneficiaries under the social security system.

This paper submits that the treatment of beneficiary parents under the social security system constitutes prima facie discrimination. Beneficiary parents are treated differently from non-beneficiary parents through provisions in the Social Security Act that impose burdensome obligations. The provisions result in the removal of choice and subjection to extra scrutiny of beneficiary parents. These impacts have been considered by New Zealand case law as forms of material disadvantage for the purposes of a discrimination analysis.

IV Is the Discrimination Justified as a Reasonable Limit?

Although the provisions constitute discrimination as satisfied in Part III, this paper submits that the work testing obligations can be justified, while the social and child rearing limitations cannot. The finding of a prima facie breach is just one step in the process of determining lawfulness.⁸³ As required by s 5, the rights and freedoms contained in BORA may only be

⁸¹ Adoption Act 1955, s 4(2).

⁸² Adoption Act 1955, s 8(1)(a).

⁸³ *Smith v Air New Zealand Ltd* [2011] NZCA 20, [2011] 2 NZLR 171 at [39].

subject to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.⁸⁴

The correct approach to a s 5 analysis is set out by Tipping J in *R v Hansen*:⁸⁵

- (a) does the limiting measure serve a purpose sufficiently important to justify [curtailing the right]?
- (b) If so, then:
 - i. Is the limiting measure rationally connected with its purpose?
 - ii. Does the limiting measure impair the right...no more than is reasonably necessary for sufficient achievement of its purpose?
 - iii. Is the limit in due proportion to the importance of the objective?

The Attorney-General recently conducted a Section 7 Report considering the Social Security Legislation Rewrite Bill 2016 and its consistency with s 19 of BORA.⁸⁶ He considered that eligibility for benefits and obligations on beneficiaries are inherently discriminatory as they are based on drawing distinctions on a number of prohibited grounds of discrimination, but that the discriminatory provisions were for the most part justifiable.⁸⁷ Although not decisive, the Report should be acknowledged as it undergoes a similar analysis of the consistency of social security provisions with BORA. The Courts are not bound by the Attorney-General's assessment, but the combination of the view of the Attorney-General and the ratification by Parliament must command some respect.⁸⁸

⁸⁴ Bill of Rights Act 1990, s 5.

⁸⁵ *R v Hansen* [2007] NZSC 7, [2007] 3 NZLR at [104].

⁸⁶ Christopher Finlayson *Report of the Attorney-General under the New Zealand Bill of Rights Act 1990 on the Social Security Legislation Rewrite Bill* (8 March 2016).

⁸⁷ Christopher Finlayson, above n 86, at 2. The report considered that provisions relating to the advantageous treatment of the totally blind is inconsistent with s 19 of BORA and the inconsistency could not be justified under s 5 of that Act.

⁸⁸ *R v Hansen*, above n 85, at [109].

A Importance of the Objective and Rational Connection

The courts have dealt with the first two issues, the importance of the objective and rational connection, relatively succinctly as they are generally regarded as threshold issues.⁸⁹ They do not cause the same difficulties as the minimal impairment and proportionality inquiries, albeit it can be important how the legislative objective is defined as it can influence later questions.⁹⁰

The objective of the work testing and additional child obligations is to move beneficiary parents into paid employment as quickly as possible. This is in line with the purposes section of the Social Security Act 1964 that focuses on recipients being able to support themselves and their families, the re-entry of beneficiaries into paid employment and the alleviation of hardship.⁹¹ This is a sufficiently important purpose as there is little disagreement that paid employment is a societal good, decreasing the risk of poverty, social dislocation and improving health outcomes for both parents and children.⁹²

There is a clear rational connection between increasing work testing obligations and the objective of moving beneficiary parents into paid employment. This obligation ensures that beneficiaries with children are actively seeking longer part-time work opportunities at an earlier time to transition them into paid employment sooner. Earlier work testing for beneficiaries with additional children is also rationally connected to moving parents into paid employment. The broad purpose of s 60GAE includes providing earlier access to employment services and expectations, while recognising the care and development needs of children.⁹³ From parliamentary discussions, it is clear that these provisions were implemented to address the issue of welfare dependency, making welfare less attractive and encourage earlier participation in the workforce.⁹⁴

⁸⁹ *R v Hansen*, above n 85, at [121].

⁹⁰ *R v Hansen*, above n 85, at [121].

⁹¹ Social Security Act 1964, s 1A.

⁹² Ministry of Social Development *Reducing long-term welfare dependence* (Ministry of Social Development, August 2012) at 3.

⁹³ Section 60GAD.

⁹⁴ (27 March 2012) 678 NZPD 1294.

Social obligations, on the other hand, are not primarily aimed at insuring beneficiaries are able to work. The inconsistency of social obligations with the usually understood purposes of the Social Security Act was artificially addressed with the insertion of a new purpose provision.⁹⁵ This section maintains that a purpose of the Act is:⁹⁶

(d) to impose, on the following specified people or young persons, the following specified requirements or obligations:

...

iii. on people receiving certain financial support under this Act, social obligations relating to the education and primary health care of their dependent children.

However, the new purpose provision simply restates the types of requirements or obligations that the Act requires, rather than offering any guidance on why they are required.

Parliamentary debates are also unclear as to the objective of the imposition of social obligations. The Hon Paula Bennett merely stated that introducing social obligations was “to ensure that children in benefit-dependent homes get quality early childhood education, are enrolled with a doctor, and get their Well Child checks”.⁹⁷ It is only when considering materials external to Parliament, specifically the WWG report, that it becomes clear that “parental obligations” along with compulsory early childhood education and compulsory health checks were recommended with the objective of improving outcomes for children in the welfare system.⁹⁸

Although the improvement of outcomes for children is an important objective, it is entirely unclear why this has been addressed under welfare legislation as opposed to the more relevant Vulnerable Children Act 2014. Welfare legislation’s primary concern is income support and not the education and healthcare outcomes of children. It can be argued that the abrogation of

⁹⁵ Section 1A(d) was inserted by Social Security (Benefit Categories and Work Focus) Amendment Act 2013, s 5.

⁹⁶ Social Security Act 1964, s 1A(d).

⁹⁷ (20 March 2013) 688 NZPD 8722.

⁹⁸ Welfare Working Group, above n 47, Recommendation 27.

freedom cannot be fully justified when the imposition of positive duties and sanctions do not relate to the overriding purposes of the legislation.⁹⁹ The further conditionality that these requirements represent diminishes the pool of eligible welfare recipients, without enhancing the ability of the relevant beneficiaries to move into the workforce.¹⁰⁰

B Minimal Impairment

The main inquiry under this limb is that the Court is satisfied that the limit imposed on the right is no greater than is reasonably necessary to achieve Parliament's objective.¹⁰¹ The question of deference arises at this point,¹⁰² as well as a detailed economic analysis.¹⁰³

The deference given to Parliament may be greater or lesser according to the circumstances.¹⁰⁴ The Crown could argue that a greater leeway is afforded to the decision maker in these circumstances, as it is a matter involving social security and the allocation of resources.¹⁰⁵ Because the decision maker is Parliament, and it has manifested its decision in primary legislation, the case for allowing a degree of latitude is stronger.¹⁰⁶ Lord Neuberger in the House of Lords considered that social welfare payment policy "must inevitably be something of a blunt instrument" and that there will always be hard cases falling on the wrong side.¹⁰⁷

The Crown could argue that the nature of any budgetary decision is naturally discriminatory,¹⁰⁸ and it is Parliament's prerogative to allocate funds as it decides best. In cases concerning social security, the courts have shown a willingness to accept distinctions based on certain prohibited grounds where those distinctions are fixed for administrative convenience or fiscal

⁹⁹ Māmari Stephens, above n 32, at 396.

¹⁰⁰ Māmari Stephens, above n 32, at 394.

¹⁰¹ *R v Hansen*, above n 85, at [126].

¹⁰² See *R v Hansen*, above n 85, at [116]. The question of deference concerns the latitude the Courts give to Parliament's appreciation of the matter.

¹⁰³ *Butler and Butler*, above n 51, at 892.

¹⁰⁴ *R v Hansen*, above n 85, at [111].

¹⁰⁵ *Ministry of Health v Atkinson*, above n 5, at [172].

¹⁰⁶ *R v Hansen*, above n 85, at [117].

¹⁰⁷ *R (RJM) v Secretary of State for Work and Pensions* [2008] UKHL 63, [2009] 1 AC 311 at [54].

¹⁰⁸ *Butler and Butler*, above n 51, at 857.

concerns.¹⁰⁹ On the other hand, the fact that the decision is a monetary one does not undermine an analysis under s 5. It has been accepted that in the face of fiscal unsustainability a court should not simply accept that the decision made is justified.¹¹⁰ Parliament must show that in light of budgetary pressures, the actual decision made to discriminate was within a range of reasonable decisions, and that there were no reasonable alternatives available that were non-discriminatory and could achieve the same outcomes.¹¹¹

A comparable jurisdiction is the United Kingdom (UK), which has also seen a general shift towards ‘activation policies’ and an emphasis on ‘no rights without responsibilities.’¹¹² Critics of conditionality requirements and assumptions of negative behaviour in the UK point to the relevance of structural factors, in particular job availability and childcare issues, rather than behavioural factors for employment outcomes of beneficiary parents.¹¹³ Arguably, these could be a suitable and less imposing alternative to the strongly work-focused approach.

The work testing obligations only minimally impair the right of beneficiaries with children. Imposing work testing when the youngest child of beneficiaries is three instead of five will save a significant amount of money for the Government. It is estimated that this provision will move another 18,000 beneficiary parents into the part-time work obligations group, thus reducing the number of benefits provided.¹¹⁴ There is no evidence that alternative options were thoroughly considered by Parliament. Regardless of this, increasing obligations for parents to find work is almost inevitable in order to fulfill the objective of moving beneficiary parents into paid employment. Work testing is a core part of the social security system and is understandably used to ensure beneficiaries are ready, willing and able to transition off the benefit.

¹⁰⁹Butler and Butler, above n 51, at 886.

¹¹⁰ *Attorney General v IDEA Services Ltd.* above n 65, at [228]; *Ministry of Health v Atkinson*, above n 5, at [280].

¹¹¹ *Attorney General v IDEA Services Ltd (in stat man)*, above n 65, at [222].

¹¹² Adam Whitworth “Lone Parents and Welfare-to-Work in England: A Spatial Analysis of Outcomes and Drivers” (2012) 47 *Social Policy and Administration* 826 at 827.

¹¹³ Adam Whitworth, above n 112, at 829.

¹¹⁴ (21 May 2015) 705 NZPD 3531.

In contrast, the social obligations fail to meet the test for minimal impairment. Social obligations are an unnecessary additional requirement of beneficiary parents, controlling behaviours that are unrelated to the transition into paid employment. It could be argued that these provisions minimally impair beneficiary parents because in practice, *all* children are contacted by health care providers to ensure that they are up to date with health checks. With regards to the compulsory registration in an approved early childhood centre, parents will have to find childcare arrangements regardless of the social obligation, in order to meet part-time work testing requirements. But this argument disregards that beneficiaries are subject to punishment through sanctions if they do not comply with the requirements. The education and healthcare outcomes of children in hardship could be addressed with improved infrastructure and support, rather than by using the threat of sanctions.

The provisions limiting child-rearing autonomy of beneficiary parents also fail the test for minimal impairment. The objective of moving beneficiary parents into paid employment can be achieved without singling out and punishing those who have additional children while receiving a benefit. It could be argued that because of the discretion afforded to the CE as to the application of s 60GAE, the interests of beneficiaries are adequately safeguarded. Section 60GAF confers a broad discretion for the CE to refrain from applying s 60GAE if there are circumstances beyond the control of the client, making it inappropriate or unreasonable to apply that section.¹¹⁵ Regardless of this discretionary safeguard, this provision is not necessary to achieving the objective, nor is it desirable to limit child-rearing autonomy of beneficiaries in this way.

C Proportionality

Having conducted the minimal impairment analysis, “it inevitably becomes hard to say that the measure that results is not proportionate”.¹¹⁶ Ultimately, a balance is to be struck between the social advantage and harm to the right to be free from discrimination.¹¹⁷ In practical terms, it come down to whether the important social objective of moving beneficiary parents into

¹¹⁵ Section 60GAF.

¹¹⁶ *Child Poverty Action Group Inc v Attorney General*, above n 56, at [151].

¹¹⁷ *R v Hansen*, above n 85, at [134].

paid employment is proportionate to the oppressive provisions that constitute discriminatory treatment.

A problem with conducting this analysis is the way in which the social good of moving beneficiary parents into paid employment is accounted for. Welfare policy in New Zealand has been described as the “investment approach”.¹¹⁸ The investment approach is expressed using the term ‘forward liability’ as the key performance management tool for Work and Income.¹¹⁹ Forward liability is the total current and future fiscal costs of welfare, appropriately discounted.¹²⁰ Welfare dependency is conceptualised as a future contingent liability on the Government, the cost of which will fall on future tax-payers.¹²¹

Under this system, beneficiaries are regarded as a current or future cost to the Government. Success is defined by a reduction of costs, which is achieved by having fewer people receiving a benefit. How success is measured and prioritized is also clear from the WWG report, asserting that their recommendations could achieve the reduction of people on a benefit by around 100,000 by 2021 and a reduction in forward liability costs.¹²² But a decrease in beneficiary numbers is not necessarily a positive outcome. Movement off a welfare benefit may occur for non-employment reasons, including repartnering, emigrating, moving into further education, going to prison and moving into the black or grey economy.¹²³ Moving beneficiaries with children off the benefit can only be considered a success if they are moving into suitable, paid employment and improving outcomes for their families.

Despite the lack of evidence of the positive social outcomes for those transitioning off the benefit, it is likely to be considered as proportionate to greater work testing obligations. Although comprising more onerous work testing requirements for beneficiary parents than ever before, work testing is a key part of social security in New Zealand. The notion of

¹¹⁸ Simon Chapple, “Forward Liability and Welfare Reform in New Zealand” (2013) 9 Policy Quarterly 56 at 56.

¹¹⁹ Simon Chapple, above n 118, at 56.

¹²⁰ Simon Chapple, above n 118, at 56.

¹²¹ Simon Chapple, above n 118, at 57.

¹²² Welfare Working Group, above n 47, at 18.

¹²³ Jonathan Boston and Simon Chapple, above n 29, at 152.

reciprocity is premised on the idea that those who can work, should. Upholding the duties of seeking employment in return for receiving support from the Government is in this case, a proportionate outcome.

On the other hand, the discriminatory nature of the child-rearing burdens is disproportionate to the positive social objective of moving these parents into paid employment. Section 60GAE, the provision relating to additional children, similarly aims to achieve the positive outcome of transitioning beneficiary parents into paid employment. Beneficiaries falling under this provision are required to be seeking employment as soon as their youngest child is 12 months old, and therefore will be considered a lesser future cost to the Government than if they were required to undergo work testing when their youngest child is three. But it is likely that, considering the age of their child, the movement of these parents into precarious, insecure work will have greater adverse effects on their children and family life. The removal of the choice of beneficiary parents to care for their infant children is severe and disproportionate to the benefit gained from them moving into the work force two years earlier than other beneficiary parents to whom the provision does not apply.

The social requirements under s 60RA are targeted at a different social good, the improvement of health and education outcomes for beneficiary children. There is no evidence that the implementation of these provisions has achieved this. If anything, the additional strains on the beneficiary parent have only made them more vulnerable to sanctions. The implication of these provisions was poorly justified in the enacting legislation, and continues to sit uneasily within the principles provision of the Social Security Act. Again, there is a strong argument that the provisions conferring social obligations in particular constitute discrimination against beneficiaries with children and are an unnecessary additional burden in the Social Security Act.

In the case of *Taylor v Attorney General*, it was considered that there was jurisdiction for a Court to make a declaration of inconsistency where there had been a breach of BORA.¹²⁴ In

¹²⁴ *Taylor v Attorney General* [2015] NZHC 1706, [2015] NZLR 791 at [66].

this context, a Court may consider that both the social obligations under s 60RA and the burdens for having additional children under s 60GAE are inconsistent with the right to be free from discrimination and that a declaration should be made. For this to occur, a case would have to come before the Court challenging the provisions. It is therefore likely that beneficiaries with children will continue to be subject to the burdensome provisions as they continue to be justified under the idea of ‘reciprocal obligation’ within our welfare system.

V The Effects on Children of Beneficiaries

The analysis of the discriminatory provisions relating to beneficiary parents is important because it not only affects the parents, but also some of the most vulnerable children in New Zealand society. Children who grow up in benefit dependent households are at a greater risk of experiencing poverty¹²⁵ and are therefore particularly vulnerable to welfare reforms that affect the receipt of support for their family. For example, the extensive benefit reforms in 1991, which abolished the universal family benefit and significantly reduced benefits, including those for beneficiaries with children, were associated with a substantial rise in the child poverty rate.¹²⁶ Because of the relationship with child poverty, some have considered welfare reform as a priority:¹²⁷

We should as a country not accept that one in five New Zealand children live in relative poverty and face diminished life chances as a result...this is the most pressing welfare problem in New Zealand.

A Increased Vulnerability of Children

The discriminatory provisions place children in more vulnerable situations. As noted earlier, the WWG in their report although advocating the use of sanctions, recommended that the interests of children were safeguarded. Limiting sanctions for beneficiaries with children to a maximum reduction of 50% of the benefit is the only safeguard in place¹²⁸ and is considered

¹²⁵ Michael O’Brien, above n 6, at 220.

¹²⁶ Jonathan Boston and Simon Chapple, above n 29, at 123.

¹²⁷ The Alternative Welfare Working Group, above n 35, at 22.

¹²⁸ Social Security Act 1964, s 121.

by Parliament as adequate protection. Reducing the already low income of beneficiaries with children by half will leave them unable to provide the basic life necessities for their family. From September 2014 to November 2015, around 80,000 sanctions were imposed by Work and Income, impacting 44,000 children.¹²⁹ The effects of sanctions on children belonging to these families is largely unknown and have been the subject of considerable concern.¹³⁰

The conditionality of welfare assistance could also be argued to violate the child's right to security, contravening the United Nations Convention on the Rights of the Child (UNROC). Under art 26, children have the right to benefit from social security and states should ensure that this right is fully realised.¹³¹ These rights are similarly protected by article 9 of the International Covenant on Economic, Social and Cultural Rights (ICESCR).¹³² The compliance with these international provisions is beyond the scope of this paper, but it is important to acknowledge the wider human rights and international legal significance of the issue.

B Inadequate Provision of Educational and Financial Support

The availability, accessibility and quality of childcare options are pressing concerns that were not satisfactorily considered with the implementation of greater work testing obligations on beneficiary parents. With the erosion of choice for beneficiary parents, at a minimum, supporting measures should be put in place to facilitate the more burdensome obligations and ensure the best outcomes for their children. Only 20-hours of free early childhood education is provided by the Government.¹³³ Therefore, should a part-time work tested beneficiary find part time work, this assistance does not take into consideration the travel time of getting

¹²⁹ (5 November 2015) 709 NZPD at 7785.

¹³⁰ Donna Wynd *Benefit Sanctions: Children - Not seen, not heard* (Child Poverty Action Group, Auckland, 2014).

¹³¹ United Nations Convention on the Rights of the Child [CRC] 1577 UNTS 3 (opened for signature 20 November 1989, entered into force 2 September 1990) art 26.

¹³² International Covenant on Economic, Social and Cultural Rights [ICESCR] 999 UNTS 3 (opened for signature 16 December 1966, entered into force 3 January 1976) art 9.

¹³³ Ministry of Education "Early Childhood Funding Handbook" (April 2015) <<http://www.education.govt.nz/early-childhood/running-an-ece-service/funding/ece-funding-handbook/20-hours-early-childhood-education/>> chapter 4.

children to and from early childhood centres whilst meeting the 20-hour work requirement. Furthermore, the strengthening of the work-test regime has also not been met with any requisite improvement of the early childhood education system.

The receipt of an adequate standard of income for parents who are unable to maintain sufficient paid employment is vital to ensure their basic needs are met. Determining what is an adequate income to raise a child is a complex issue. Although this is not the focus of this discussion, considering our current child poverty statistics, it is likely that the benefit system is failing on adequacy grounds. It is estimated that there are around 285,000 children in poverty, considerably more children than were falling under the adequate level of income prior to 1991.¹³⁴ From the perspective of children's welfare, all children should be entitled to a standard of living that enables them to have access to decent housing, clothing, medical care and a good education. As long as this standard is not adequately provided for, the welfare system is failing our children.

The Social Security Amendment Act (No 2) 2015 not only enforced greater obligations on beneficiary parents, but makes some improvement to providing for children in New Zealand. This legislative provision was a part of the \$790 million child hardship package announced in 2015.¹³⁵ The biggest policy change was the increase of benefit payments to beneficiaries with dependent children by \$25 a week.¹³⁶ While this policy has been widely praised as the first increase of benefit payments in real terms since 1972, welfare benefits were significantly cut in real terms in 1991, and again for many beneficiaries in 2005 with the introduction of Working for Families.¹³⁷ Furthermore, the \$25 per week figure is paid per family, not per child, which means that children in larger families do not receive the same advantage.¹³⁸

¹³⁴ Jonathan Boston and Simon Chapple, above n 29, at 124.

¹³⁵ For more information see Susan St John "Reflections on the Budget 2015: Child Hardship Package" (2015) 11 Policy Quarterly 20.

¹³⁶ Social Security Amendment Act (No 2) 2015, s 11.

¹³⁷ Susan St John "Reflections on the Budget 2015: Child Hardship Package" (2015) 11 Policy Quarterly 20 at 21.

¹³⁸ Data shows that almost half (46%) of children in hardship live in households with three or more children. For more information, see Bryan Perry *Measuring and Monitoring Material Hardship for NZ Children: MSD*

Vulnerability of children and inadequacy of financial and educational provision are some of the indirect effects of the social security provisions evaluated in this paper. The persistent problem of child poverty clearly illustrates how the welfare system is not doing enough for our children.

VI Conclusion

The provision of social security in New Zealand has varied over time, informed by the ideological beliefs of the Government of the day. A trend in reform of the Social Security Act 1964 has been the increase in obligations required of beneficiaries, in particular, those who have children. Obligations are no longer limited to work testing, but include provisions that control the behaviours of beneficiary parents. In particular, provisions impinge on the freedom of choice of beneficiaries' regarding parenting methods, returning to work and having additional children. If the obligations are not met, beneficiaries may be punished through a reduction of their benefit.

This paper concludes that the provisions are *prima facie* discriminatory pursuant to s 19 of BORA. In comparing beneficiary parents to other parents in New Zealand who have the freedom to make these decisions, beneficiary parents are materially disadvantaged. The stripping of beneficiaries' freedom of choice is in addition to the burdensome experiences with Work and Income, feeling powerless and struggling to make ends meet.

However, obligations relating to the earlier and longer hours for part time work tested beneficiaries are likely to be justified, as they are proportionate and necessary to fulfill the objective of moving beneficiaries into paid employment. In contrast, the implementation of social obligations and provisions discouraging additional children cannot be justified. These obligations control and monitor the parenting behaviours of beneficiaries, which is unrelated to the overriding principles of social security provision.

research and analysis used in advice for the Budget 2015 Child Hardship package, (Ministry of Social development, May 2015) at 24.

The disadvantages suffered as a result of the obligations imposed on beneficiary parents extend to their children. The imposition of more onerous obligations that are punishable by welfare cuts do not adequately safeguard the interests of the children, and increase their likelihood of experiencing hardship. Considering the persistent issue of child poverty in New Zealand it is disappointing that welfare provision is failing the most vulnerable members of society.

The provisions undercut the freedom of choice of parent beneficiaries and compromise their right to citizenship. Although the notion of reciprocity continues to be an important part of social security, obligations that impinge on the freedom of choice of beneficiaries, and are entirely unrelated to the purpose of welfare provision cannot be justified. Discriminatory treatment of beneficiary parents undermines their right to be recognised as a person, worthy of dignity and respect, and should not be tolerated within the social security system.

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