

Social Security (Benefit Review and Appeal Reform) Amendment Bill

Member's Bill

Explanatory note

General policy statement

The purpose of this bill is to make modifications to the benefit review and appeal provisions under the Social Security Act 1964 to ensure the review and appeal provisions operate fairly and independently of the Government Ministry responsible for the administration of that Act.

The benefit review regime that currently operates with regard to decisions, other than medical decisions, provides for a Benefits Review Committee that consists of one member appointed by the Minister of Social Development and two members who are staff members of the Ministry of Social Development. The perception among beneficiaries of that Benefits Review Committee structure is one of bias in favour of the Ministry of Social Development.

That perception has been reinforced by the recent Supreme Court judgment *Arbuthnot v Chief Executive of the Department of Work and Income*. Prior to the Arbuthnot judgment it had been widely understood that Benefits Review Committees performed a quasi-judicial function. However, the Supreme Court in Arbuthnot has found that the Benefits Review Committees' functions are purely administrative.

Beneficiaries therefore often wait well in excess of six months before the correctness of an adverse primary decision of the Ministry of Social Development can be independently considered by the Social Security Appeal Authority. Given that beneficiaries are often wholly reliant upon the Ministry to meet their day-to-day living expenses, such a delay in providing an independent judicial reconsideration of an adverse decision is unacceptable.

The quality of decisions made by Benefits Review Committees has historically been widely criticised by beneficiary advocacy groups and, on occasion, by the Social Security Appeal Authority. Benefits Review Committee decisions are frequently issued without adequate reasons for them being stated. Benefits Review Committee decisions also frequently rely on the Ministry of Social Development's policy, rather than comply with the statutory requirements of the Social Security Act 1964.

Medical Appeal Boards currently hear appeals by benefit applicants for child disability allowance, invalid's benefit, sickness benefit and veteran's pension against decisions made on medical grounds. Medical Appeal Boards have been subject to much criticism for their failure to operate a fair procedure that complies with the principles of natural justice. This is compounded by there being no right of appeal under the Social Security Act 1964 against a Medical Appeal Board decision.

The complexity of the Social Security Act 1964 results in beneficiaries frequently engaging advocates or solicitors to represent them at reviews and appeals. However, there is currently no provision in the Social Security Act 1964 for costs to be awarded in favour of successful review applicants. While there is provision for cost to be awarded in favour of successful appellants to the Social Security Appeal Authority, this power has traditionally been exercised sparingly by the Authority. Three undesirable consequences flow from these inadequacies in the current legislation:

- highly skilled advocates therefore often work for little or no remuneration
- beneficiaries who can least afford legal representation become indebted to solicitors
- beneficiaries inadequately represent themselves at review and appeal hearings.

The Social Security Act 1964 does not currently provide a specified manner for Ministry of Social Development staff to convey decisions to benefit applicants or beneficiaries. This results in decisions often being conveyed inadequately, and without notifying applicants of the right to review decisions with which they disagree.

Main changes to existing law

The main changes the bill makes to the existing law are as follows:

- The existing Benefits Review Committee structure is replaced by independent benefit reviewers who will be required to conduct reviews independently of the Ministry of Social Development, exercising due diligence and in accordance with the principles of natural justice. The reviewers will conduct the reviews in a manner similar to that currently provided for accident compensation claimants under the Injury Prevention, Rehabilitation and Compensation Act 2001.
- The Medical Appeal Boards that currently hear appeals by benefit applicants for child disability allowance, invalid's benefit, sickness benefit and veteran's pension against decisions made on medical grounds will be abolished. This function will be transferred to benefit reviewers, who will have the investigative powers to obtain expert medical evidence should they consider this necessary in particular reviews involving entitlement on medical grounds to these benefits. A right of appeal to the Social Security Appeal Authority will apply to decisions of reviewers on such entitlements.
- Reviewers will be required to award costs in reviews that are determined in the applicant's favour. There will be a discretion for reviewers to award costs in reviews that are not determined in the applicant's favour if the reviewer considers the review application was reasonably brought. The quantum of the review costs will be prescribed by regulations promulgated under the Social Security Act 1964. The new regulation making power will also extend to prescribing a scale of costs on appeal and to the general conduct of reviews and appeals.
- There will be a statutory requirement on decision makers in the Ministry of Social Development to notify their decisions

to beneficiaries and benefit applicants in writing and to advise them in writing of their review rights.

Clause by clause analysis

Clause 1 is the Title clause.

Clause 2 is the commencement clause. It provides that the bill comes into force 3 months after the date it receives the Royal assent.

Clause 3 provides that the bill amends the Social Security Act 1964 (the **principal Act**).

Clause 4 sets out the purpose of the bill.

Clause 5 amends section 10A of the Social Security Act 1964 to repeal the subsections that govern the administration of the Benefits Review Committee structure and to provide that section 10A applies to the benefit review structure established by the new sections 10B to 10J.

Clause 6 inserts nine new *sections 10B to 10J* in the Social Security Act 1964.

- *Section 10B* sets out the procedure under which a beneficiary or applicant for a benefit makes an application for a review of decision.
- *Section 10C* requires that all applications for review be acknowledged in writing by the Ministry of Social Development.
- *Section 10D* requires that the chief executive of the Ministry of Social Development engage on contracts for services as many reviewers as are necessary for the conducting of reviews. It requires that no officer or employee acting under the chief executive's delegated authority can be a reviewer and that no reviewer can be engaged on a contract that has terms that could influence the reviewer, in conducting the review, in the chief executive's favour. *Section 10D* also provides a mechanism for allocating review applications for hearing by reviewers that ensures the independence of the reviewer.
- *Section 10E* requires that a reviewer must act independently when conducting a review and must disclose any previous involvement in the decision under review.
- *Section 10F* establishes the general principles for the conduct of reviews. It requires that the reviewer comply with the pro-

visions of the Social Security Act 1964 and any regulations made under it, comply with the principles of natural justice, exercise due diligence in decision-making, and adopt an investigative approach with a view to conducting the review in an informal, timely, and practical manner.

- *Section 10G* requires that a reviewer must hold a hearing unless either the review application is withdrawn by the applicant or the parties to the decision under review agree not to have a hearing. It also stipulates how the hearing must be convened and conducted.
- *Section 10H* ensures timeliness in issuing review decisions and requires that they be written, contain reasons for the review decision and notify the applicant of his or her right to appeal the review decision.
- *Section 10I* requires that the reviewer must put aside both the chief executive's decision and the policy and procedure followed by the chief executive in making the decision, and decide the matter only on the basis of its substantive merits under the Social Security Act 1964. It further provides that the reviewer must confirm, vary or revoke the chief executive's decision, and that if the reviewer revokes the chief executive's decision, that he or she must either substitute his or her own decision or require that the decision be made again in accordance with directions from the reviewer.
- *Section 10J* provides that all costs incurred by a reviewer in conducting a review shall be met by the chief executive. It also provides that costs shall be awarded in favour of a successful review applicant, and may be awarded in favour of an unsuccessful review applicant if the reviewer considers the review application was reasonably brought.

Clause 7 amends section 12K of the Social Security Act 1964 by inserting a new subsection (8A) to provide that the jurisdiction of the Social Security Appeal Authority in hearing any appeal is restricted to matters raised in the notice of appeal and such other matters as may be consented to by the appellant.

Clauses 8 and 9 abolish the Medical Appeal Boards and transfer their functions to reviewers. It also provides for a right of appeal to the Social Security Appeal Authority for unsuccessful review applicants

who have been declined child disability allowance, invalid's benefit, sickness benefit and veteran's pension on medical grounds.

Clause 10 amends section 81 of the Social Security Act 1964 by inserting a new subsection (4) to provide that the chief executive may not exercise his or her powers under section 81 to alter the decision of a reviewer, other than when new information that was not before the reviewer becomes available to the chief executive.

Clause 11 amends section 86J of the Social Security Act 1964 to require the chief executive to give notice to an applicant or beneficiary of any decision to which he or she has a right of review or a right of appeal. It further provides that such notices be written, contain the reasons for the decision; and give the applicant or beneficiary information about his or her rights to apply for review, including details of the time available to do so and an explanation of when applications can be made outside that time.

Clause 12 inserts a new section, *section 132K*, into the Social Security Act 1964 to empower the Governor-General, by Order in Council, to make regulations prescribing a scale of costs of reviews and appeals under the Social Security Act 1964 and prescribing rules for the conduct of such reviews and appeals.

Clause 13 makes consequential amendments to the Social Security Act 1964.

Sue Bradford

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The Parliament of New Zealand enacts as follows:

- 1 Title**
 This Act is the Social Security (Benefit Review and Appeal Reform) Amendment Act **2009**.
- 2 Commencement**
 This Act comes into force 3 months after the day after the date on which it receives the Royal assent. 5
- 3 Principal Act amended**
 This Act amends the Social Security Act 1964.
- 4 Purpose**
 The purpose of this Act is to make provision for a benefit review process that is fair, and independent of the department that is, with the authority of the Prime Minister, for the time being responsible for the administration of the principal Act. 10
- 5 Review of decisions**

 - (1) **Section 10A(1)** is amended by omitting “This section applies” and substituting “**Sections 10B to 10J** apply”. 15
 - (2) Section 10A(1A) to (9) are repealed.
- 6 New sections inserted**
 The principal Act is amended by inserting, after section 10A, the following sections: 20

“10B How to apply for review

 - “(1) A person to whom section 10A applies may make an application for a review of a decision by giving an application that complies with **subsection (2)** to the chief executive.
 - “(2) The application must— 25
 - “(a) be written:

- “(b) identify the decision or decisions in respect of which it is made:
 - “(c) state the grounds on which it is made:
 - “(d) state the relief sought:
 - “(e) be made within 3 months of the applicant receiving notification of the decision. 5
- “(3) Despite **subsection (2)**, the chief executive must accept a late application if satisfied that there are extenuating circumstances that affected the ability of the applicant to meet the time limits, such as— 10
- “(a) where the chief executive failed to adequately notify the applicant of the decision or obligations of persons under this Act; or
 - “(b) where the applicant made reasonable arrangements to have the application made on his or her behalf by an agent of the applicant, and the agent unreasonably failed to ensure that the application was made within the required time; or 15
 - “(c) where the applicant was so affected or traumatised by events at the time of receiving the decision that he or she was unable to consider his or her review rights. 20

“**10C Chief executive to acknowledge receipt of review application**

When the chief executive receives a review application, he or she must send the applicant an acknowledgement indicating when the review application was received. 25

“**10D Chief executive to engage and allocate reviewers**

- “(1) The chief executive must engage on contracts for services as many persons as he or she considers necessary to be reviewers under this Act. 30
- “(2) The chief executive shall not engage as a reviewer any person who is an employee or officer of the department.
- “(3) The chief executive must not include in the reviewer’s contract any term or condition that could have the effect, directly or indirectly, of influencing the reviewer, when conducting a review, in favour of the chief executive. 35

- “(4) As soon as practicable after receiving an application for review, the chief executive must arrange for the allocation of a reviewer to the review even if he or she considers that there is no right of review in the circumstances.
- “(5) The chief executive must not allocate a claim to a reviewer who discloses to the chief executive any previous involvement in the decision or decisions under review other than as a reviewer. 5
- “(6) If for any reason the chief executive has to allocate a new reviewer to a review, the chief executive must do this as soon as practicable after becoming aware of the need to allocate a new reviewer. 10
- “10E Reviewer’s duty to act independently and disclose previous involvement**
- “(1) A reviewer must act independently when conducting a review. 15
- “(2) A reviewer to whom the chief executive proposes to allocate a review must disclose to the chief executive any previous involvement that the reviewer has had in the decision under review other than as a reviewer.
- “10F Conduct of review: general principles** 20
- The reviewer may conduct the review in any manner he or she thinks fit, but he or she must—
- “(a) comply with **section 10E**; and
- “(b) comply with any other relevant provision of this Act and any regulations made under this Act; and 25
- “(c) comply with the principles of natural justice; and
- “(d) exercise due diligence in decision-making; and
- “(e) adopt an investigative approach with a view to conducting the review in an informal, timely, and practical manner. 30
- “10G Conduct of review: hearing to be held**
- “(1) In the course of conducting a review, the reviewer must hold a hearing unless—
- “(a) the applicant withdraws the review application; or
- “(b) the applicant and the chief executive agree not to have a hearing. 35

- “(2) The reviewer must hold the hearing at a time and place that are—
- “(a) agreed to by all persons who are parties to the application and the reviewer; or
 - “(b) decided on by the reviewer if those persons do not agree. 5
- “(3) The reviewer must take all practicable steps to ensure that notice of the time and place of the hearing is given—
- “(a) to every person entitled to be present and heard at it; and
 - “(b) at least 7 days before the date of the hearing.
- “(4) The reviewer may admit any relevant evidence at the hearing 10 from any person who is entitled to be present and be heard at it, whether or not the evidence would be admissible in a court.
- “(5) The applicant and the chief executive are entitled to be present at the hearing, with a representative if they wish, and to be heard at it, either personally or by a representative. 15
- “(6) The reviewer must take reasonable steps to ensure that an accurate record of the evidence given at the hearing is taken.
- “(7) The reviewer must keep such records taken under **subsection (6)** for at least 2 years.
- “**10H Review decisions: formalities** 20
- “(1) The reviewer must make a review decision within 14 days after—
- “(a) the day on which the hearing of the review finishes; or
 - “(b) if there is no hearing, the date on which the applicant and the chief executive agree not to have a hearing. 25
- “(2) A review decision must—
- “(a) be written; and
 - “(b) contain the reasons for the decision; and
 - “(c) contain information about the right of appeal under section 12J. 30
- “(3) As soon as practicable after making a review decision under **subsection (1)**, the reviewer must give a copy of the decision to the applicant and the chief executive.
- “**10I Review decisions: substance**
- “(1) In making a decision on the review, the reviewer must— 35

- “(a) put aside the chief executive’s decision and look at the matter afresh on the basis of the information provided at the review; and
- “(b) put aside the policy and procedure followed by the chief executive and decide the matter only on the basis of its substantive merits under this Act. 5
- “(2) The reviewer must—
- “(a) confirm the chief executive’s decision; or
- “(b) vary the chief executive’s decision; or
- “(c) revoke the chief executive’s decision. 10
- “(3) If the reviewer revokes the chief executive’s decision, the reviewer must—
- “(a) substitute the reviewer’s decision for that of the chief executive; or
- “(b) require the chief executive to make the decision again in accordance with directions the reviewer gives. 15
- “(4) A review decision is binding on the chief executive and the applicant.
- “10J Costs on review**
- “(1) The chief executive is responsible for meeting all the costs incurred by a reviewer in conducting a review. 20
- “(2) Whether or not there is a hearing, the reviewer—
- “(a) must award the applicant costs and expenses, if the reviewer makes a review decision fully or partly in favour of the applicant: 25
- “(b) may award the applicant costs and expenses, if the reviewer does not make a review decision in favour of the applicant but considers that the applicant acted reasonably in applying for the review:
- “(3) The award of costs and expenses under this section must be in accordance with regulations made for the purpose. 30
- “(4) If any costs and expenses are awarded against the chief executive under this section, the chief executive is liable to pay them within 28 days of the decision to award them.”
- 7 Procedure on appeal** 35
- Section 12K is amended by inserting, after subsection (8), the following new subsection:

“(8A) At the hearing of any appeal, the jurisdiction of the Authority shall be restricted to matters raised in the notice of appeal and such other matters to which the appellant consents.”

8 Subsection 12J(2) repealed
Subsection 12J(2) is repealed.

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9 Section 53A repealed
Section 53A is repealed.

10 Review of benefits

Section 81 is amended by adding, after subsection (3), the following subsection:

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“(4) For the avoidance of doubt, nothing in this section permits the chief executive to review an entitlement to a benefit or a rate of benefit that has been established by a reviewer under section 10I, except in circumstances where information that was not available to the reviewer at the time of issuing the review decision subsequently comes to the attention of the chief executive.”

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11 Notices

Section 86J is amended by adding, after subsection (2), the following subsections:

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“(3) The chief executive must give notice to an applicant or beneficiary of any decision to which he or she has a right of review under **section 10B** or a right of appeal under section 12J of this Act.

“(4) Every notice under **subsection (3)** must—

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“(a) be written; and

“(b) contain the reasons for the decision; and

“(c) give the applicant or beneficiary information about his or her rights to apply for review, including details of the time available to do so and an explanation of when applications can be made outside that time.”

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12 Regulations relating to reviews and appeals

The following section is added after section 132J:

“132K Regulations relating to reviews and appeals

Without limiting the general power to make regulations conferred by section 132, the Governor-General may, by Order in Council, make regulations—

- “(a) prescribing rules for the conduct of reviews and appeals; and
- “(b) prescribing a scale of costs for the purposes of **sections 10J** and 12O.”

13 Consequential amendments

- (1) Section 12J(1)(e) is amended by omitting “section 10A”, and substituting “**section 10I**”. 10
- (2) Section 12J(1A)(b) is amended by omitting “section 10A”, and substituting “**section 10I**”.
- (3) Section 60Q(5) is amended by omitting “section 10A”, and substituting “**sections 10A to 10J**”. 15
- (4) Section 86(2B) is amended by omitting “section 10A”, and substituting “**section 10B**”.
- (5) Section 105A(4) is amended by omitting “section 10A”, and substituting “**sections 10A to 10J**”.
- (6) Section 105C(e) is amended by omitting “section 10A” and substituting “**section 10B**”. 20