



# MINISTRY OF SOCIAL DEVELOPMENT

*Te Manatū Whakahiato Ora*

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- 2 OCT 2014

Ms Lisa Marriott  
[fyi-request-1947-12ffa50f@requests.fyi.org.nz](mailto:fyi-request-1947-12ffa50f@requests.fyi.org.nz)

Dear Ms Marriott,

Thank you for your email of 25 August 2014 requesting, under the Official Information Act 1982, the following information:

- *Please provide a copy of the Welfare Debt Recovery cabinet paper from Regulatory Impact Statement (dated 8 November 2012)*
- *The Cabinet Paper referred to above (Tackling Welfare Fraud) has the analysis of any impact on human rights redacted (under s.9(2)(f)(iv)). As the legislation that this Cabinet Paper refers to is now enacted, can the redacted information on human rights be released please?*
- *Section 86(4) of the Social Security Act 1964 allows for debt recovery of excess payments from the estate of a welfare benefit recipient. Can you please advise how many times this option has been taken over the past three years (2011, 2012 and 2013)?*
- *Section 86(2) of the Social Security Act 1964 allows for a penalty of up to three times any excess amount to be applied, where excess amounts have been obtained as a result of fraud. Can you please advise how many times this option has been applied over the past three years (2011, 2012 and 2013)?*

The Ministry of Social Development takes very seriously its responsibilities in administering \$23 billion in government expenditure in providing income assistance and services to more than one million New Zealanders each year. The Ministry works hard to protect the integrity of the system to ensure it remains fair for all New Zealanders.

The Ministry does not tolerate benefit fraud. We actively seek to prevent, detect and reduce incidences of benefit fraud and our systems are constantly improving to allow us to do this. The Ministry takes a proactive and targeted approach to managing the risk of benefit fraud.

Please find enclosed copies of the two Cabinet papers you have requested: *Welfare Debt Recovery*, dated 14 November 2012 and *Tackling Welfare Reform*, dated 1 October 2012. Both documents are being released to you in full.

In all instances the Ministry will seek to recover excess overpayments from the estates of deceased welfare recipients. Information concerning how many times the Ministry has sought to recover excess payments from the estates of deceased welfare benefit recipients (section 86(4) of the Social Security Act 1964) is held on individual client files. In order to provide you with this information, Ministry staff would have to manually review

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thousands of files. As such I refuse your request under section 18(f) of the Official Information Act. This section allows me to refuse a request where substantial collusion is required to fulfil the request. I believe that the greater public interest is in the effective and efficient administration of the public service. I have considered whether the Ministry would be able to respond to your request given extra time, or the ability to charge for the information requested. I have concluded that, in either case, the Ministry's ability to undertake its work would still be prejudiced.

Section 86(2) of the Social Security Act 1964 allows the Ministry's National Fraud Investigation Unit to impose a penalty of up to three times any excess amount, if that excess amount was obtained as a result of fraud. I can advise that in the financial year 2011, 121 people had penalties applied to their fraudulent debt. In 2012, 160 people had additional penalties added and in 2013, 128 people incurred penalties as a result of their fraudulent debt.

Please note that benefit fraud statistics are publicly available at: [www.msd.govt.nz/about-msd-and-our-work/publications-resources/statistics/fraud-prosecutions/index.html](http://www.msd.govt.nz/about-msd-and-our-work/publications-resources/statistics/fraud-prosecutions/index.html)

I hope you find this information helpful. You have the right to seek an investigation and review of my response by the Ombudsman, whose address for contact purposes is:

The Ombudsman  
Office of the Ombudsman  
PO Box 10-152  
WELLINGTON 6143

Yours sincerely



Wendy Venter  
**Deputy Chief Executive, Risk and Assurance**

Chair  
Cabinet

## TACKLING WELFARE FRAUD

### Proposal

- 1 This paper seeks approval for three major initiatives to address welfare fraud. These initiatives are designed to encourage compliance with the welfare system, make it more difficult for people to defraud the welfare system and hold people accountable for their actions. The paper also notes a number of other enhancements to current responses to fraud.

### Executive summary

- 2 Welfare fraud and the resultant debt represent a significant cost to the taxpayer and the amount of debt outstanding is increasing each year. The Ministry of Social Development (MSD) is owed approximately \$485 million<sup>1</sup> in overpayment debt discovered from investigations and data matching, including prosecuted fraud. Any level of fraud in the welfare system is unacceptable. It undermines confidence in the welfare system and deprives the hardworking taxpayer of money that should be directed to those who genuinely need it.
- 3 When people defraud the welfare system, MSD pursues recovery of the sums involved and prosecutes cases which meet MSD and Crown Law guidelines for prosecution. However, the range of sanctions and penalties is insufficient for spouses and partners of beneficiaries where welfare fraud is occurring.
- 4 MSD needs to take a more targeted and comprehensive approach to welfare fraud that encourages compliance, deters offending or dishonest behaviour, provides appropriate consequences to people who commit, or benefit from, welfare fraud and improves the likelihood of recovering debt.
- 5 New information sharing measures between Inland Revenue and MSD which have recently been agreed will improve MSD's ability to detect welfare fraud.<sup>2</sup> This paper proposes three significant initiatives to further address welfare fraud, and which largely realise our manifesto commitments, by:
  - establishing an interagency collaborative action programme to address welfare fraud
  - strengthening the approach to relationship fraud, in particular by making both parties in a relationship accountable for relationship fraud
  - introducing new measures to respond to beneficiaries who have previously acted dishonestly in a welfare context.
- 6 The paper also sets out a range of other initiatives which enhance current practice and will enable MSD to work smarter when preventing and responding to fraud and recover more debt.

<sup>1</sup> \$106 million is from prosecuted fraud and \$379 million is from overpayments established through investigations and data matching. Some of the debt established through data matching is not from dishonest or fraudulent behaviour.

<sup>2</sup> An Order in Council has recently provided for an information sharing arrangement between MSD and Inland Revenue. A Memorandum of Understanding was signed off in June 2012 which enables Inland Revenue to proactively send information to MSD.

- 7 Overall this package will increase compliance and build confidence and trust in the welfare system. It will also enable MSD to better detect welfare fraud and recover debt established from fraud. Initially, better detection will result in more debt being established for repayment. Over time, prevention measures, better and earlier detection and improved recovery will help to curtail debt growth.
- 8 These proposed changes will work alongside the new benefit system and service model that has been developed as part of the welfare reform changes. Legislative changes will be required and Cabinet has approved a Bill to implement the proposals to be included in the 2012 Legislative Programme with a priority four (must be referred to a Select Committee in 2012) [SOC Min (12) 12/2 refers].

## Background

- 9 On 27 June 2012 Cabinet Social Policy Committee (SOC) agreed in principle to an overall approach for tackling welfare fraud [SOC Min (12) 12/2 refers]. This approach includes actions that derive from commitments we made in our manifesto and Post-Election Action Plan, namely:
  - funding a new team of fraud specialists and investigators focused on reducing abuse across the welfare system
  - undertaking an urgent review of the Social Security Act 1964 to make it easier to prosecute people who defraud the taxpayer (including reviewing the rules around relationship fraud to make them clearer)
  - giving power to authorities to actively seek to recover money gained fraudulently, and seizing assets of those convicted of fraud
  - focusing on welfare fraud and those abusing the system by sharing information in benefit applications with information held by other agencies.
- 10 SOC noted I would be reporting back with detailed proposals on:
  - front end initiatives that prevent fraud occurring in the first place
  - measures to increase deterrence and to improve compliance with repayment of debt
  - measures to improve the prosecution of people who defraud the welfare system.
- 11 SOC also asked for advice on any proposed changes to the current prosecution system for welfare fraud, including the role of departments.

## Current situation

- 12 An effective welfare system depends on beneficiaries acting honestly and engaging with MSD in good faith. The vast majority of beneficiaries declare their true circumstances and comply with their obligations. However, a small number of people commit welfare fraud by deliberately misrepresenting their circumstances in order to get money they are not entitled to receive.
- 13 Investigations into fraud are typically triggered by referrals from front line staff, allegations from the public, or from data matching<sup>3</sup>. Where fraud or an overpayment is found, a debt is

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<sup>3</sup> MSD matches its records with six other government agencies (Inland Revenue, Department of Corrections, New Zealand Customs Service, Department of Internal Affairs (matches with Births, Deaths and Marriages), ACC and Housing New Zealand Corporation) to identify beneficiaries who have a change in their circumstance, such as leaving the country, working, marrying or going to prison, and are being overpaid.

established and recovery of this pursued. MSD also prosecutes those who meet the guidelines for prosecution.<sup>4</sup>

14 In the 2011/12 financial year:

- 10,735 cases were investigated, resulting in 2,139 cases of overpayment being found
- of the 2,139 cases of overpayment, 714 cases were successfully prosecuted<sup>5</sup> (with debt of \$23.4 million being established) and 1,425 cases were not prosecuted (with a further \$18.4 million of debt established)
- 71,629 data matches were undertaken, which found 33,462 instances of overpayments leading to the establishment of a further \$46 million of debt.<sup>6</sup>

### Types of fraud

15 The two most common ways people fraudulently or dishonestly receive money to which they are not entitled are by:

- failing to declare employment and wages received (often by continuing on benefit after starting work)
- failing to declare a marriage or civil union-type relationship (particularly if the relationship starts, or resumes, while at least one partner is receiving a single or sole parent rate of benefit).

16 In 2010/11, 67 per cent (41 cases out of 61) of those with overpayments of more than \$100,000 involved women in undeclared relationships. The total value of relationship fraud (prosecuted and non-prosecuted) detected in 2011/12 was \$20.3 million. Relationship fraud involves both people in a relationship, as financial interdependence and emotional commitment are essential factors that need to be met for MSD to establish that a relationship exists. Often both members of the couple will be acting dishonestly, but in the vast majority of cases only one of them incurs the debt.

17 Failing to declare employment and wages received made up approximately 54 per cent of all prosecutions in 2011/12 with a value of \$7.1 million. In addition, a high proportion of debt established through data matching is caused by this behaviour.

### Penalties available to MSD

18 MSD has limited penalties and responses to deal with welfare fraud. Current levers available are:

- seeking repayment of the overpayment
- issuing a written warning
- imposing a monetary penalty of not more than three times the overpayment (section 86(2) of the Social Security Act)
- seeking a criminal prosecution where the case meets the Crown Law and MSD guidelines for prosecution.

<sup>4</sup> MSD uses internal prosecution guidelines, which take into account evidential sufficiency and public interest factors, including the duration of offending, premeditation, sophistication and degree of culpability. Crown Law guidelines are also used to determine whether a prosecution should be commenced.

<sup>5</sup> In 2011/2012, 742 cases were prosecuted of which 714 were successful.

<sup>6</sup> The actual dollar value of the majority of data match cases was relatively minor. In 2011 for 76.5 per cent of the people identified in a data match it was a first overpayment. The average amount of overpayment for this group was \$890 which is less than the fortnightly amount paid to a couple receiving Unemployment Benefit and Accommodation Supplement.

- 19 Where people make a genuine mistake in their dealings with MSD they do not incur any penalties (although they must repay any overpayment).

### **Outstanding Debt**

- 20 MSD will always seek to recover any overpayment resulting from fraud or dishonesty. A high proportion of beneficiaries are repaying what they owe<sup>7</sup>, but even taking this into account the overall debt balance continues to grow, as the debt established each year exceeds the amount recovered or written off in that year. Some people also seek to avoid repaying their debts and others are difficult to locate.
- 21 As of 30 June 2012, MSD was owed approximately \$106 million of prosecuted fraud debt and \$379 million in overpayments from investigations and data matching.

### **Agencies with a common interest**

- 22 A number of agencies including MSD, Inland Revenue, ACC and Housing New Zealand Corporation deliver social assistance. New Zealand Police also have individuals that are of interest to them and who receive social assistance. Currently, there is no formal co-ordinated approach for agencies investigating and responding to social assistance fraud. This can lead to inconsistent or duplicated enforcement actions by the relevant agencies, and to individuals not being appropriately held to account.

### **Three key initiatives on welfare fraud**

- 23 A comprehensive approach to welfare fraud is needed that provides a coherent, fair and sustainable system, from prevention through to deterrence, detection and consequence. I propose three major initiatives that largely realise our manifesto commitments on welfare fraud. These include changes which will make it more difficult for people to defraud taxpayers, make it easier to catch those who do, and increase the likelihood of recovering debt caused by fraud. The initiatives are:
- Initiative 1: An interagency collaborative action programme to address welfare fraud
  - Initiative 2: Strengthening the approach to relationship fraud, in particular by making both parties in a relationship accountable for relationship fraud
  - Initiative 3: New measures to respond to beneficiaries who have previously acted dishonestly.

#### **Initiative 1: An interagency collaborative action programme to address welfare fraud**

- 24 To meet our manifesto commitment to set up a team of specialists and investigators, I propose taking an interagency approach to welfare fraud. MSD will lead the development of a new Welfare Fraud Collaborative Action Programme and provide a lead official for the programme who will be responsible for ensuring ongoing cross-agency participation and delivery of the programme.
- 25 The Welfare Fraud Collaborative Action Programme will also involve ACC, Inland Revenue, Housing New Zealand Corporation and New Zealand Police, all of which have an interest in reducing social assistance fraud. The approach has the support of all agencies concerned. The Welfare Fraud Collaborative Action Programme will include:

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<sup>7</sup> 92 per cent of current clients are repaying on average \$14.32 per week and 88 per cent of former clients have paid or are repaying within 12 months of leaving the benefit system and repayments are made at an average of \$23.27 per week.

- an implementation plan
  - an accountability framework, including governance arrangements, to ensure ongoing cross-agency participation and delivery
  - a memorandum of understanding
  - an agreed intelligence collection and sharing plan
  - specifics on how investigations will be run (joint investigations and taskforce operations)
  - work to identify barriers and solutions to maximising an interagency approach, e.g. information sharing constraints and differences in legal powers.
- 26 There is a risk that competing priorities will reduce participation in this initiative. Clear accountabilities, governance and regular reporting to joint Ministers will manage these risks.
- 27 The implementation plan for the Welfare Fraud Collaborative Action Programme is as follows:
- by the end of November 2012 – action plan completed
  - by June 2013 – a number of case investigations will have been completed and some will be in the prosecution process, a 12 month review of the initiative will be designed and agreed, and joint Ministers will have received quarterly reports on progress
  - by December 2013 – some cases will be before the Courts and the 12 month review, with costs, benefits, and proposals for change will be completed and reported to Ministers.
- 28 Agencies will resource implementation within their baselines for the first 12 months, and a 12 month review will examine the costs and benefits of the initiative, including whether additional funding is required for the future, and whether any enhancements are required from a privacy perspective.<sup>8</sup>
- 29 This is a new approach to fraud and, as such, it is impossible to accurately predict the additional number of cases or investigations which will arise. Although the overpayment debt established for agencies and the number of cases cannot be quantified at this point, I expect that there will be considerable progress made. Information about case numbers and quantity of debt will be captured and reported quarterly to joint Ministers and MSD are likely to improve our predictive modelling as the approach is implemented.

*Information sharing to support the initiative*

- 30 It is important that good information sharing practices underpin a co-ordinated approach to welfare fraud. The initial focus will be on sharing intelligence on the top offenders of each agency. Agencies will concurrently build a formal programme of intelligence sharing focusing on identity, income and relationship fraud. Investigations under the approach will be undertaken as follows:
- once probable cause to suspect an offence has been established for an individual(s), then information sharing for that case can occur using the maintenance of the law provisions within the Privacy Act 1993<sup>9</sup>
  - a joint investigation when more than two agencies are possibly being defrauded (with a lead agency designated), and a special investigation taskforce convened where three or more agencies are involved

<sup>8</sup> The Office of the Privacy Commissioner has been consulted on the work undertaken so far, and will be consulted further as part of this review.

<sup>9</sup> Information privacy principles 11(e) of the Privacy Act.

- consolidated charges and a single prosecution case taken by the Crown, where prosecution is pursued.
- 31 A range of other agencies would also play a role because they hold information that would inform investigations, including the Department of Corrections, New Zealand Customs Service, Immigration New Zealand, Department of Internal Affairs, Land Information New Zealand and the Ministry of Justice (Collections).
  - 32 Initially, existing provisions in the Privacy Act which authorise bilateral information sharing agreements will be used which will allow work to start with minimal cost. Over time new, multi-party information sharing agreements could be established if these are found to be necessary to strengthen this initiative.
  - 33 Strong governance arrangements will monitor and ensure compliance with the Privacy Act. Agencies will detect issues by analysing their own data, and data about individuals will be kept in-house until there are sufficient grounds for it to be shared using the maintenance of the law authorisation under the Privacy Act. This will allow agencies to build a single cross-agency view of the person's circumstances so that a single investigation and prosecution (if warranted) can be undertaken.

#### **Initiative 2: Strengthening the approach to relationship fraud**

- 34 We need to improve the way we deal with relationship fraud. Relationship fraud comprised close to a third of all welfare fraud prosecutions in 2011/12 and large sums of money are often involved if a person has incorrectly declared their relationship status<sup>10</sup> for some years. As in many other countries, relationship fraud in New Zealand is characterised by the inevitable complexity of socially unstable and rapidly changing relationships. Often both members of the couple will be behaving dishonestly, but in the vast majority of cases only the beneficiary is held accountable by incurring the debt and/or being prosecuted.
- 35 The centrepiece of this initiative is to make spouses and partners as well as beneficiaries accountable for welfare fraud. The proposals take into account that a spouse or partner will not always have the same degree of knowledge of the fraud that is being perpetuated as the beneficiary will have.
- 36 In cases of relationship fraud, when only one spouse/partner has claimed a benefit, generally that person is liable for the entire debt. In most circumstances, the beneficiary's spouse/partner is not liable for prosecution or to make any repayments even though he or she may have benefited from the benefit payments and been aware of them and their fraudulent nature.
- 37 Currently MSD has very limited options to hold spouses and partners accountable:
  - MSD can recover debt from the spouse or partner of a beneficiary where that spouse or partner has made a false statement to or otherwise misled MSD about his or her own circumstances, and as a result the beneficiary received benefit money to which they are not entitled.<sup>11</sup>
  - a spouse or partner can be prosecuted for providing misleading or false information or as a party to the fraud under the Crimes Act 1961.<sup>12</sup>

<sup>10</sup> People are considered to be part of a couple when they are in a relationship with another adult and where there is a degree of companionship in which they are committed to each other emotionally for the foreseeable future and financially interdependent. This includes couples who are married or in a civil union and couples who are living in a de facto relationship.

<sup>11</sup> Section 86(3) of the Social Security Act.

<sup>12</sup> Usually section 66 of the Crimes Act; reparation orders can be sought if a spouse or partner is guilty of fraud. A handful of partners are prosecuted each year, generally as a party to fraud.



38 In practice, spouses or partners are rarely prosecuted and/or held responsible for overpayments. A spouse or partner who knows that they are benefitting from welfare overpayments is presently liable neither for prosecution nor debt recovery.

#### Debt recovery from spouses and partners of beneficiaries

- 39 I want to ensure a more equitable system that holds spouses or partners accountable for welfare fraud so the consequences of welfare fraud are appropriately shared by both parties to the relationship. Not only will this be more equitable, but it will also protect the taxpayer by potentially limiting the cases of welfare fraud and will increase the likelihood that debt will be recovered fully and in a shorter period of time.
- 40 The full range of options available to MSD to recover debt from beneficiaries will be available when debt is sought from a spouse or partner of a beneficiary. These include civil suit, deductions from benefits and deductions from wages and other sources of income. These will assist in more efficient and timely collection of debt.

#### Social Security Act amendments

- 41 I propose amendments to the Social Security Act to significantly enhance the accountability of the spouse or partner of a beneficiary for welfare fraud. The amendments will:
- empower MSD to recover benefit debt from a spouse or partner who knowingly benefited or ought to have known<sup>13</sup> they were benefitting from benefit money being received by their spouse or partner to which they were not entitled (whether or not that spouse or partner is prosecuted in relation to the overpayment)
  - widen MSD's power to recover overpayment debt against a spouse or partner of a beneficiary<sup>14</sup> so that a debt can be recovered if a spouse or partner provides any false statements or misleading information that causes payments in excess of entitlement (currently the provision only covers information about the spouse or partner's own income and circumstances)
  - provide for appeal and review rights for spouses and partners for whom a debt has been established by MSD relating to their spouse or partner's benefit
  - create a new offence focusing on partners and spouses of beneficiaries.

#### *New offence focusing on spouses and partners of beneficiaries*

- 42 There are a range of options available for criminal law responses to spouses and partners of beneficiaries who are complicit in welfare fraud. Options include:
- retaining the status quo, or
  - creating a new offence so that it is an offence for a spouse or partner of a beneficiary to knowingly benefit from their partner's welfare fraud, or
  - creating a new offence so that it is an offence where a spouse or partner of a beneficiary knows or is reckless as to whether they are benefitting from their partner's welfare fraud.

<sup>13</sup> In essence a person "ought to have known they were benefitting from benefit money being received by their spouse or partner to which they were not entitled" when they would have known had they made inquiries that a reasonable person would have made. In other words, debt can be recovered from a spouse or partner who may not actually have known they were benefitting from a fraud, but should have been aware of the possibility or risk that they were. Examples of this might be where the benefit is paid into a joint bank account, or where the beneficiary pays for joint household bills without obvious income.

<sup>14</sup> Section 86(3) of the Social Security Act

- 43 The status quo has not proven an effective means of prosecuting spouses and partners who know they are benefiting from welfare fraud. Only a handful of cases are subject to prosecution each year as prosecution can only occur when evidence exists that a spouse or partner has incited or counselled their partner to commit fraud or when a spouse or partner makes false or misleading statements to MSD. Knowing that one is benefiting from welfare fraud is not, in and of itself, enough to qualify a spouse or partner as a party to fraud.
- 44 There are significant equity issues between the beneficiary and their spouse or partner. The beneficiary receives the money and is vulnerable to prosecution. Their spouse or partner benefits from the money, knows it is being fraudulently received and is not vulnerable to prosecution.
- 45 For this reason, I believe that a new offence directed at spouses and partners who know their partner is receiving the benefit fraudulently is balanced and fair. It places both partners to the relationship on an equal footing in that they both know the money is coming in and that its receipt into the household is fraudulent.
- 46 In my view, there is also good reason to extend criminality to those spouses and partners who were reckless as to whether they are benefiting from their partner's welfare fraud. It is not good enough for a partner or spouse to recklessly or wilfully turn a blind eye when it should be evident to them that their partner is committing welfare fraud and they are benefiting from that fraud.
- 47 Therefore, I prefer to create an offence which penalises those spouses and partners who knew or were reckless as to whether they were benefiting from their partner's welfare fraud. A person would be found to be reckless where they know that it is a risk that money is being derived from welfare fraud and they unreasonably proceed regardless. On conviction, a person would be liable to imprisonment for a term not exceeding 12 months or to a fine not exceeding \$5,000 or both.
- 48 This means that:
- a spouse or partner who knows, or are reckless as to whether they are benefiting from their partner's welfare receipt will be liable for debt recovery and prosecution
  - a spouse or partner who ought to have known they are benefiting from their partner's welfare receipt will be liable for debt recovery but not prosecution
  - a spouse or partner who could not have known they were benefiting from their partner's welfare receipt will not be liable at all.
- 49 These proposals are likely to extend the ability to seize assets owned or jointly owned by a spouse and partner of a beneficiary under the Criminal Proceeds (Recovery) Act 2009 due to the enhanced expectations on that spouse or partner.
- 50 IT systems changes will be required to allow system and process changes for establishing and recovering a debt, including where the partner/spouse is not a current beneficiary. The one-off cost of these changes is estimated to be \$0.5 million which will be funded from MSD baseline.
- 51 Approximately 700 cases per year of relationship fraud are likely to be affected by the new provisions. While it is not possible to quantify the impact of the proposal on the amount of debt collected, the ability to recover the debt will be enhanced, as MSD will be able to actively seek repayment from both parties, not just one.

### Other relationship fraud initiatives

52 I also propose initiatives to:

- ensure that applicants understand the definition of a de facto relationship and their obligations to report a change in relationship status by checking beneficiaries' understanding of the definition of a de facto relationship at application and providing more information prior to application, including information on relationship status rules in an online tool that applicants can use to assess their potential eligibility for a benefit
- improve the application process by asking people applying for Sole Parent Support<sup>15</sup> to provide details of a person who can confirm their relationship status (this is modelled on an approach currently used in Australia<sup>16</sup>). The purpose of asking people to supply this information is to encourage them to think carefully about the information they are supplying and the consequences of misleading MSD, either personally, or through a third party
- test a follow-up intervention for sole parents, which will allow MSD to check relationship status, ensure the beneficiary's circumstances have not changed, and provide beneficiaries with an opportunity to report any change to their circumstances (testing the follow-up interventions will occur at 16 to 20 weeks after the benefit application).

53 These changes will be implemented alongside welfare reform changes.

### Initiative 3: New measures to respond to beneficiaries who have previously acted dishonestly

- 54 MSD needs better tools to prevent re-offending. I propose a new set of consequences for low-trust beneficiaries (beneficiaries who have been prosecuted for fraud or have been investigated and had a debt established). People who have made a genuine mistake in their dealings with MSD will not be in this group.
- 55 Depending on the nature of their previous offending, MSD may impose one or more of the following requirements:
- completing most transactions face to face
  - removing the ability of these people to access self-service for some or all transaction types
  - requiring validation of information for each transaction, including verification of income and cash assets
  - redirecting benefit payments and use of a payment card - redirection allows certain types of costs to be paid directly to another party, controlling the way the beneficiary spends their money without reducing the amount of financial assistance that is provided.
- 56 This approach will give MSD tools to better prevent fraud and will reduce the scope for further dishonesty by this group.
- 57 MSD estimates that around 1,000 beneficiaries each year, who have been investigated and had a debt established against them (either with or without a prosecution), will be covered by this new low-trust model.

<sup>15</sup> Under the welfare reform changes Sole Parent Support will be paid to Domestic Purposes Benefit - Sole Parents and Widows with children younger than 14 years.

<sup>16</sup> In Australia, third party verification is a component of 'Member of a Couple Assessments' conducted by dedicated teams to ensure Centrelink customers are receiving the correct rate of payment. Centrelink piloted third party verification with other measures, including an additional relationship detail form, and considered that these combined measures were effective and therefore merited a full roll-out.

## Other initiatives to enhance current practice

- 58 MSD will also be implementing the following initiatives to enhance current practice:
- a new approach to recovering high value debts. MSD will target non-paying debtors to increase recovery of fraud debt and reduce the number of non-payers. This targeted approach will include using private debt collection agencies to locate individuals, taking civil recovery action, and undertaking full financial assessments of those who claim hardship as a basis for not making repayments
  - a communications strategy to ensure that people are informed about their obligations and are assisted to be compliant, and actively publicise measures as they come into force to maximise their deterrence impact
  - MSD working with New Zealand Police to seize the assets of people who commit fraud in order to recover more welfare fraud debt
  - making use of Ministry of Justice systems to recover debt, including credit reporting and collecting fines at airports, by seeking reparation orders at the time of sentencing people for welfare fraud
  - sending warning letters to people who have acted dishonestly that are tailored to the individual circumstances of the person receiving it. Evidence suggests that more personalised letters are more effective.<sup>17</sup>
- 59 I have considered other options for dealing with welfare fraud including benefit bans (a period of non-entitlement). I have however ruled out adopting this as there is limited international evidence as to whether benefit bans are effective as a deterrent to welfare fraud.<sup>18</sup>

## Current initiative: Enhancing information sharing between Inland Revenue and MSD

- 60 Inland Revenue and MSD have recently agreed to a new income information sharing system.<sup>19</sup> This new information sharing will capture beneficiaries' changes in employment earlier and more comprehensively through a streamlined process. This will improve MSD's ability to detect welfare fraud and will support the initiatives proposed here.
- 61 The new information sharing will:
- enable earlier detection - fewer people will receive a benefit they are not entitled to, and the size of benefit overpayments should reduce
  - assist in determining more accurate social assistance payments, such as when a benefit should be abated because of part-time earnings
  - strengthen the other initiatives in this paper, as the gains from improving investigation and recovery processes, prosecuting fraud where appropriate and encouraging compliance will be supported by better detection and information.
- 62 As a result of the information sharing some beneficiaries will have their benefits cancelled and others will have their benefit rate reduced. Other beneficiaries may have debts established and if cases of fraud are identified they will be investigated and prosecuted.
- 63 The first phase of information sharing will include all 320,000 working age beneficiaries. MSD will send a letter to all working age beneficiaries to advise them of the new information

<sup>17</sup> UK Cabinet Office (2012). *Applying behavioural insights to reduce fraud, error and debt*. For example, a trial undertaken by the UK Revenue and Customs showed that sending out a letter which included the sentence 'nine out of ten people in Britain pay their tax on time' and also mentioned the fact that most people in the recipient's local area had already paid, increased repayment of tax debts by 15 per cent.

<sup>18</sup> Northern Ireland, the United States of America and United Kingdom have some form of benefit bans.

<sup>19</sup> An Order in Council authorising Inland Revenue to provide information to MSD was signed on 30 April 2012.

sharing taking place, their obligations and how they can tell MSD about any change in their circumstances.

- 64 The next phases will include students, seniors and other types of income including from self employment, interest and dividends, and rental income. Information sharing will ensure that undeclared earnings of students, their spouses and/or parents will be detected in future, so the major student fraud risk is managed.
- 65 In terms of the broader issue of student fraud, I am advised that further work is required on what measures are required to address fraud in this area. MSD and MOE will report back to Ministers on this issue by June 2013. MSD and the Ministry of Education have advised that, for the time being, student allowances should not be covered by the other proposals in this paper at this stage<sup>20</sup>. Existing measures, such as establishing debt and investigations will continue to be applicable for students.
- 66 The savings from this policy will depend on the results of information sharing, the behaviour of people on learning about the new information sharing powers, and on behaviour once it takes effect. The indicative estimates in Table 1 are on the basis of historical experience and are a conservative view of the impact of the initiative on benefit receipt and debt establishment. The estimates assume that:
- as a result of the initial letter, one per cent of beneficiaries may cancel their benefit (3,200 people)
  - two per cent of current beneficiaries (6,400 people) in receipt of benefit are found to have no entitlement, resulting in benefit savings and overpayment-related debts being established
  - six per cent of current beneficiaries (19,200 people) found to be under-declaring income, resulting in benefit savings through increased abatement and overpayment-related debts being established
  - ongoing savings through preventing more people who don't have an entitlement coming into the system, and identifying instances of overpayments for current beneficiaries.

**Table 1 Indicative estimates of information sharing savings**

Initial (Sept 2012-Dec 2013)	Ongoing (annual, Dec 2013 onwards)
<ul style="list-style-type: none"> <li>· \$20 million reduction in benefit outlays due to people who cancel their benefit when the match is introduced</li> <li>· \$40 million reduction in benefit expenditure from benefit cancellation and increased abatement of benefit due to under-reported income identified by the match</li> <li>· \$70-90 million of debt established as a consequence of identified overpayments.</li> </ul>	<ul style="list-style-type: none"> <li>· Reduced benefit grants from early identification of people with income above qualifying thresholds</li> <li>· \$15-20 million reduction in benefit expenditure from increased abatement, due to better identification and declaration of previously under-reported income</li> <li>· \$10 million additional debt establishment through better identification of over-payments</li> <li>· \$10-15 million in year two, dropping to \$5-6 million in out-years, from recovery of the additional debt establishment.<sup>21</sup></li> </ul>

<sup>20</sup> This is because there are differences in how relationships and income are defined in Student Allowances and benefits.  
<sup>21</sup> This assumes that collection rates for those no longer on benefit will be maintained at 70 per cent repaying an average of \$25 per week, and for those that remain on benefit 92 per cent will have a deduction placed on their benefit with an average repayment of \$14 per week.

- 67 Further savings are expected from the identification of fraud and overpayments for supplementary assistance. These are not included in the estimates above.

### **The prosecution system for welfare fraud**

- 68 On 27 June 2012, SOC noted that I would be reporting back with advice on any proposed changes to the current prosecution system for welfare fraud, including the role of departments [SOC Min (12) 12/2 refers]. No changes are proposed to the current prosecution system for welfare fraud as a result of the proposals in this paper.
- 69 In July 2012, Cabinet confirmed the response to the Review of Public Prosecution Services [CAB Min (12) 26/6 refers]. As part of that response, Crown Law has been directed to undertake further work on prosecution arrangements, in consultation with government agencies with prosecution functions. A report is to be provided to the Attorney-General on any proposals for reform no later than 21 December 2012. That report will include consideration of the range of options that have been proposed for the conduct of public prosecutions, including the respective use of departmental prosecutors, Police prosecutors and Crown Solicitors. The approach that should be taken to prosecutions by government agencies, including prosecutions conducted by MSD, will be considered as part of this wider piece of work.
- 70 As part of developing these proposals, an option to repeal the current Social Security Act fraud offences was presented so there is sole reliance on the Crimes Act fraud offences. This may have had the advantage of sending a stronger message to the public and judiciary that welfare fraud is a serious criminal matter. However, I do not propose to proceed with such a change at this point, for the following reasons:
- MSD already can, and does, prosecute fraud under the Crimes Act where appropriate
  - requiring all prosecutions to be taken under the Crimes Act may undermine the goals of the Criminal Procedure Act 2011 which aims to make criminal procedures quicker, cheaper and more responsive<sup>22</sup>
  - it would impose additional costs on MSD, Crown Law and the court system
  - it would be inconsistent with practice elsewhere - other like agencies (eg ACC) would continue to retain offence provisions which provide lesser penalties (and disbar defendants from electing jury trial) in equivalent circumstances.

### **Implementation - phasing changes with Welfare Reform**

- 71 Over the next three years the welfare system will be reformed to ensure that it encourages independence and personal responsibility, primarily through paid employment. The fraud initiatives will work alongside the new benefit system and service model that has been developed as part of the welfare reform changes. The fraud changes will assist welfare reform by ensuring that social assistance is only provided to those who meet the eligibility criteria. In particular, the initiatives further strengthen the application end of the welfare system and ensure that applicants understand their obligations and what constitutes a "relationship" for benefit purposes.
- 72 The welfare reform and fraud package changes are occurring as follows:
- The Social Security (Youth Support and Work Focus) Amendment Act 2012 focuses on young people and beneficiaries with children by:

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<sup>22</sup> If the Social Security Act provisions were removed, all charges for welfare fraud would be laid under the Crimes Act provisions and all defendants would continue to have the right to defend charges in front of a jury. Jury trials are expensive, and on average, take double the time to be concluded (12 months as apposed to six months for trials and judge alone).

- providing a new Youth Service with a greater focus on education and training for young people receiving financial assistance (implemented in August 2012)
- providing greater work expectations for sole parents and introducing work expectations for widows and women alone (implementation from October 2012)
- The Social Security (Benefit Categories and Work Focus) Amendment Bill simplifies the benefit system and brings in a clearer focus on work by:
  - extending work obligations, implementing the new benefit categories, and introducing drug testing, new health and disability assessments, and social obligations (implementation from July 2013)
- The Social Assistance (Fraud Measures) Amendment Bill will focus on tackling welfare fraud by:
  - holding spouses and partners accountable for relationship fraud as well as beneficiaries (implementation from November 2013).

### Monitoring and evaluation

- 73 Monitoring will support the ongoing improvement of the welfare fraud initiatives. MSD will monitor the initiatives by recording, monitoring and analysing fraud investigations, prosecutions and convictions through their Investigation Management System. This will be complemented by monitoring a series of other key indicators such as trends in overpayment debt amounts and recoveries, the overall level of debt owed, levels of income declared by beneficiaries, and benefit cancellation rates due to beneficiaries obtaining work.
- 74 Assessing the impact of fraud initiatives will be difficult as they are part of the wider package of welfare reform changes that are also likely to have an impact on the benefit population. While deterrence of welfare fraud may be one important objective, initiatives to improve our ability to detect fraud are likely to lead to an increase in debt in the short-term.
- 75 MSD will incur costs of \$55,000 for evaluating the follow-up intervention for sole parents, which will be funded from MSD baseline (the impact of the test will be determined once evaluation has been completed).

### Consultation

- 76 The Treasury, the Ministries of Justice, Education and Business, Innovation and Employment, the Department of Building and Housing, ACC, Housing New Zealand Corporation, Crown Law, the Office of the Privacy Commissioner, New Zealand Police, New Zealand Customs Service, Inland Revenue, and the State Services Commission were consulted. The Department of Prime Minister and Cabinet, the Department of Internal Affairs, Te Puni Kokiri and the Ministries of Health, Women's Affairs and Pacific Island Affairs were informed.
- 77 ACC, Inland Revenue, Housing New Zealand Corporation and New Zealand Police support the Welfare Fraud Collaborative Action Programme.

### Financial implications

- 78 The package has an estimated cost for MSD of approximately \$1.2 million, including approximately \$0.5 million in IT changes for recovering debt from spouses and partners. Costs will be met from value for money changes and minor reprioritisation.



## Human rights implications

- 79 The policy proposals contained in this paper may be inconsistent with the New Zealand Bill of Rights Act 1990 (NZBoRA) and the Human Rights Act 1993 in relation to the right to freedom from discrimination. This is because the proposal to make spouses and partners more accountable for relationship fraud, may raise issues in terms of the right to justice and discrimination on the grounds of family and marital status.
- 80 The limitations that may be imposed are arguably justifiable. However, the Ministry of Justice's final view on whether the proposals are consistent with the NZBoRA will not be known until the legislation has been drafted and considered.

## Legislative implications

- 81 Amendments would be required to the Social Security Act to give effect to proposals in relation to recovery of debt from, and prosecution of, spouses or partners.
- 82 Cabinet has approved a late bid for a Bill to implement the proposals in this paper to be included in the 2012 Legislation Programme with a priority four (must be referred to a Select Committee in 2012) [CAB Min (12) 12/2 refers].
- 83 I propose that legislation for the proposals in this paper be introduced in November 2012.

## Regulatory impact analysis

- 84 A regulatory impact statement (RIS) is attached.
- 85 A principal analyst in MSD, not otherwise involved in the preparation of this RIS or supporting material, has reviewed it and considers that the information and analysis summarised in the RIS meets the quality assurance criteria. The reviewer notes that assessing the impact of the proposed anti-fraud initiatives will be challenging as the level of fraud that MSD does not currently detect is impossible to quantify and that the proposals outlined in the RIS will be implemented alongside other operational changes and wider reforms to the social security system.
- 86 I have considered the analysis and advice of my officials, as summarised in the attached RIS, and I am satisfied that, aside from the risks, uncertainties and caveats already noted in this Cabinet paper, the regulatory proposals recommended in this paper:
- are required in the public interest
  - will deliver the highest net benefits of the practical options available
  - are consistent with our commitments in the Government statement "Better Regulation, Less Regulation".

## Gender implications

- 87 Measures in this paper for people who have debts as a result of fraud are, in the first instance, more likely to affect women. In 2010/11, 67 per cent (41 cases out of 61) of those with overpayments of more than \$100,000 involved women in undeclared relationships.
- 88 The proposal to recover fraud debt from spouses and partners will provide more equity to the recovery of debt and positively affect women as relationship fraud debt is shared between both partners where the spouse or partner knowingly benefited or ought to have known they were benefiting from benefit overpayments. In the majority of relationship fraud cases the beneficiary who is currently liable for the entire fraud debt is a woman.



## Disability perspective

89 There are no disability implications arising from the proposals in this paper.

## Publicity

90 I intend to make this paper available on the MSD website, with appropriate text withheld.

91 I also intend to actively promote these changes as they come into force, to leverage the maximum possible deterrence value from the new measures.

## Recommendations

92 It is recommended that the Committee:

- 1 **note** that on 27 June 2012 Cabinet Social Policy Committee agreed in principle to an overall approach for tackling welfare fraud [SOC Min (12) 12/2 refers] including how we would follow up on the commitments we made in our Post-Election Action Plan, and that I would be reporting back with detailed proposals on:
  - 1.1 front end initiatives that prevent fraud occurring in the first place
  - 1.2 measures to increase deterrence and to improve compliance with repayment of debt
  - 1.3 measures to improve the prosecution of people who defraud the welfare system

### *Interagency approach to address welfare fraud*

- 2 **agree** that our manifesto commitment to establish a new team of fraud specialists and investigators is best achieved by an interagency approach to welfare fraud to share intelligence, with joint investigations and prosecutions where appropriate
- 3 **direct** the Ministry of Social Development, as the lead agency, to work with Inland Revenue, ACC, New Zealand Police and Housing New Zealand Corporation to develop a Welfare Fraud Collaborative Action Programme which will enable sharing of intelligence and joint investigations and prosecutions
- 4 **direct** the Ministry of Social Development (as the lead agency) to:
  - 4.1 prepare a draft action plan on the Welfare Fraud Collaborative Action Programme by December 2012
  - 4.2 provide quarterly reports to the Associate Minister for Social Development, the Minister of Revenue, the Minister of Police, the Minister for ACC, and the Minister of Housing (joint Ministers) on progress
  - 4.3 review the Welfare Fraud Collaborative Action Programme and report back to joint Ministers by December 2013

### *Strengthening our response to relationship fraud*

- 5 **note** that the Ministry of Social Development is limited in its ability to hold the spouse or partner of a beneficiary accountable for relationship fraud

- 6 **note** that the Ministry of Social Development may only recover overpayments made in excess of authorised entitlements from a spouse or partner of a beneficiary if the spouse or partner makes a false statement or misleads about their own income and circumstances
- 7 **note** that a spouse or partner of a beneficiary can be prosecuted for welfare fraud if they make a false statement or mislead the Ministry of Social Development about their partner's benefit or if they are party through inciting or counselling their partner to commit fraud
- 8 **agree** that a spouse or partner of a beneficiary should have greater accountability for welfare fraud in relation to their partner's benefit

#### *Debt recovery from spouses and partners*

- 9 **agree** to empower Ministry of Social Development to recover benefit debt from a spouse or partner who knowingly benefited or ought to have known they were benefiting from benefit money being received by their spouse or partner to which they were not entitled (whether or not that spouse or partner is prosecuted in relation to the overpayment)
- 10 **agree** that the power to recover payments made in excess of authorised entitlements from the spouse or partner of a beneficiary under section 86(3) of the Social Security Act 1964 is no longer limited only to false or misleading information about the spouse or partner's own income or circumstances but is extended to apply to any false statement or misleading information made by the spouse or partner
- 11 **note** that the full range of debt recovery options available to the Ministry of Social Development to recover debt from beneficiaries will be available when debt is recovered from a spouse or partner
- 12 **agree** that spouses or partners for whom the Ministry of Social Development establishes overpayments have review and appeal rights

#### *Prosecution of spouses and partners*

- 13 **EITHER**
  - 13.1 **agree** that the status quo is retained and no new criminal offences are created for the spouses and partners of beneficiaries
  - OR**
  - 13.2 **agree** that it is an offence under the Social Security Act 1964 for a spouse or partner of a beneficiary to knowingly benefit from their partner's welfare fraud (*secondary option*)
  - OR**
  - 13.3 **agree** that it is an offence under the Social Security Act 1964 if a spouse or partner knows or is reckless as to whether they are benefiting from their partner's welfare fraud (*preferred option*)
- 14 **note** that a person would be found to be reckless where they know that it is a risk that money is being derived from welfare fraud and they unreasonably proceed regardless

### *Other relationship fraud initiatives*

- 15 **note** that the Ministry of Social Development will be implementing an approach to better prevent relationship fraud that involves:
  - 15.1 providing more information prior to application, including information on relationship status rules, in an online tool that applicants can use to assess their potential eligibility for a benefit
  - 15.2 checking beneficiaries' understanding of the definition of a relationship at application
  - 15.3 gathering details of a person who can confirm their relationship status from applicants for Sole Parent Support
  - 15.4 testing a follow-up intervention for recipients of Sole Parent Support to review entitlement at 16 to 20 weeks after the benefit application

### *Measures to respond to beneficiaries who have previously acted dishonestly*

- 16 **note** that the Ministry of Social Development will implement a new set of consequences for 'low trust' beneficiaries who have been prosecuted for fraud, or have been investigated and had a debt established

### *Enhancing current practices*

- 17 **note** that the Ministry of Social Development will be taking a more active and targeted approach to recovering high value debts and non-paying debtors in order to increase recovery of fraud debt and reduce the number of non-payers
- 18 **note** that the Ministry of Social Development will apply a more vigorous approach to seizing assets of people who commit fraud in order to recover more welfare fraud debt
- 19 **note** that the Ministry of Social Development where appropriate, will seek reparations at the time of sentencing people for welfare fraud, in order to use the Ministry of Justice Collection of Fines at Airports and credit checking systems
- 20 **note** that the Ministry of Social Development will send warning letters to people who have acted dishonestly that are tailored to the individual circumstances of the person

### *Income information sharing between Inland Revenue and the Ministry of Social Development*

- 21 **note** that a new income information sharing system between Inland Revenue and the Ministry of Social Development will be implemented which will capture beneficiaries' changes in employment earlier, and support the other initiatives in this paper

### *Other issues*

- 22 **note** that further work on the prosecution system for welfare fraud, including the role of departments, will be covered as part of Crown Law's report back to Cabinet Social Policy Committee by the end of 2012 on arrangements for conducting public prosecutions
- 23 **direct** the Ministry of Social Development and the Ministry of Education to undertake further work to investigate the issue of student fraud and whether additional measures are needed to address this fraud and report back by the end of June 2013

- 24 **note** that the initial net effect of the fraud initiatives in this paper will be to increase the overall level of debt owed to the Ministry of Social Development, but over the longer term the measures in the package will help to curtail debt growth

*Legislative implications*

- 25 **note** that some changes will be needed to the Social Security Act 1964 to enable the implementation of the proposals in this paper
- 26 **invite** the Associate Minister for Social Development to issue drafting instructions to the Parliamentary Counsel Office to amend the Social Security Act 1964, to give effect to the relevant proposals in the recommendations above
- 27 **authorise** the Associate Minister for Social Development, in consultation with other Ministers as appropriate, to make technical, policy and administrative changes to finalise legislation in keeping with the overall policy of the package
- 28 **note** that the Associate Minister for Social Development proposes that legislation be introduced in November 2012

*Publicity*

- 29 **note** that I will make this paper available on the Ministry of Social Development website, with appropriate text withheld.

Hon Chester Borrows  
Associate Minister for Social Development

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RELEASED UNDER THE OFFICIAL INFORMATION ACT

Chair  
Cabinet Social Policy Committee

## WELFARE DEBT RECOVERY

### Proposal

- 1 This paper seeks agreement to proposals that address the effect of a series of High Court decisions concerning recovery of welfare debt. Those decisions create uncertainty about the Ministry of Social Development's (MSD) powers and duties when recovering welfare debt. The proposed measures will establish a legislative duty on MSD to recover debt, balanced with discretion to determine the method and rate of recovery and to defer recovery in exceptional circumstances.
- 2 The paper also proposes that, in cases where fraud debt is also recoverable from a spouse or partner of a beneficiary, debt will be jointly recoverable from both parties.

### Executive summary

- 3 Welfare assistance is a major form of public expenditure and the public is entitled to expect that MSD will effectively recover welfare debts. This is part and parcel of MSD's obligations to manage public money responsibly under the Public Finance Act 1989.
- 4 MSD is owed a significant amount of money from fraud related debt, other benefit overpayments and recoverable assistance. This money should be recovered effectively and consistently. At the same time, repayment of debt should not cause significant hardship or impact adversely on children.
- 5 A recent High Court decision (*Harlen v Ministry of Social Development*) has found that MSD has almost complete discretion to recover or not recover welfare debt. This decision conflicts with MSD's current practice that all monies owed to the Crown are actively pursued and debts remain with each individual until all avenues to recover have been exhausted. When considered together with other previous High Court decisions, there is insufficient clarity about MSD's rights and obligations when recovering debt.
- 6 To reconcile these tensions, this paper proposes a legislative amendment that clearly imposes a duty on MSD to recover debt. Discretion to determine the method and rate of recovery or to defer recovery will remain. The paper proposes that Ministerial direction be given about how this discretion is exercised. These measures will provide greater certainty and clarity of debt recovery practices for MSD and its debtors, and ensure that MSD manages public money responsibly while, at the same time, being responsive to the circumstances of beneficiaries and their families.
- 7 This paper also specifies that debt will be recovered jointly from beneficiaries and their spouses or partners when both are liable for a fraud-related debt. This clarifies proposals to empower recovery of debt from spouses or partners who knowingly benefited or ought to have known they were benefiting from benefit money being received by their spouse or partner to which they were not entitled [CAB Min (12) 35/13 refers].

- 8 Joint liability means both the beneficiary and their spouse or partner will be responsible for the entire debt. Recovery of the debt will be determined according to the Ministerial directions proposed in this paper. This will enable a fair and consistent approach to debt recovery from the spouses and partners of beneficiaries as well as the beneficiary when the debt is the result of fraud.
- 9 The legislative amendments required to support these proposals will be included in the Social Security (Fraud Measures) Amendment Bill which I intend to introduce into the House this year [Cab Min (12) 12/2 refers].

## Welfare debt recovery

### Background

- 10 The Social Security Act 1964 empowers MSD to recover debt through a variety of methods, including court proceedings and deductions from benefits and other sources. MSD's current practice is to presume that all debt should be recovered<sup>1</sup>, and discretion is limited to the method and rate of recovery.
- 11 However, recent High Court decisions have questioned how MSD applies discretion to recover welfare debts. In the most recent decision, *Harlen v Ministry of Social Development*<sup>2</sup> (Harlen) the High Court held that:
  - there is no presumption in the Social Security Act that MSD will recover debt
  - in exercising the discretion to recover or not recover debt, MSD must consider:
    - a beneficiary's individual financial circumstances and the impact that ongoing benefit repayments would have on their ability to support themselves and any dependent children
    - international instruments such as the International Covenant on Economic, Social and Cultural Rights (ICESCR) and the United Nations Convention on the Rights of the Child (UNCROC) having regard to the adequacy of the beneficiary's standard of living and the impact debt collection would have on it and their dependent children.
- 12 The Court also noted that hardship does not necessarily preclude recovery, but is a factor that should be considered.
- 13 Earlier High Court decisions have also found that MSD has a discretion to recover debt but differ on other matters, such as the existence of a presumption of recovery, and the way in which the discretion should be exercised.
- 14 The risks caused by this lack of clarity and inconsistency, and the direction Harlen appears to be travelling in, is that MSD could be challenged to re-open individual cases, classes of cases or all cases where they have exercised discretion to recover debt.<sup>3</sup> In the absence of clarification to legal settings, MSD could be obliged to change their approach to debt recovery with a likely consequential reduction in the amount of welfare debt recovered.

<sup>1</sup>Subject to some limitations relating to debt write-off and certain administrative errors referred to in section 86(9A) of the Social Security Act.

<sup>2</sup> [2012] NZAR 491

<sup>3</sup> Informal figures suggest that if MSD was directed to re-open cases where they are deducting debts from current beneficiaries with dependent children, there would be 81,757 cases involved, out of approximately 170,000 cases of current beneficiary debt.

## Current situation

- 15 MSD's current practice is to actively pursue recovery of all monies owed, while exercising discretion about the method and rate of recovery or, in exceptional circumstances, temporarily deferring recovery until a person's financial circumstance improves. This practice is generally reflected by staff negotiating realistic repayment rates with debtors so that significant hardship is not caused.<sup>4</sup>
- 16 Generally MSD has good systems in place to recover debt and a high proportion of people are repaying their debt.<sup>5</sup> An Auditor-General report from 2011 found that MSD uses well-established and appropriate systems to effectively recover money owed. However, there is little legislative guidance and only broad operational guidance to ensure consistency of approach in determining hardship, or how the discretion should be exercised and documented.
- 17 As at 30 June 2012, MSD was owed \$485 million in debt arising from investigations and data matching, including \$106 million owed as a result of prosecuted fraud. Harlen is also likely to impact on overpayments which are routinely picked up by Work and Income (\$176 million owed as at 30 June 2012).
- 18 Although recoverable assistance is provided on the explicit condition that it is repaid, and this is understood by the person receiving the assistance, it may still be subject to the discretions and obligations laid down by Harlen. This is because this assistance is deemed to be debt under the same provisions as benefit overpayments in the Social Security Act, ie the provisions considered in Harlen.<sup>6</sup>
- 19 For current beneficiaries, debt repayments are deducted straight from their benefit or other ongoing entitlement. For people no longer receiving income support, MSD's Collections Unit actively manages their debt repayments. In both circumstances, repayment levels are often negotiated to avoid causing significant hardship.

## Proposals to recover debt

- 20 We need to reconcile the tension between current practice, which presumes that debt will be always be sought and actively pursued, and Harlen, which determined that MSD might equally decide not to recover, as recover a debt.
- 21 To provide clarity and consistency to welfare debt recovery, I propose amendments to the Social Security Act so that:
  - there is a duty on MSD to recover debt
  - MSD may determine the method and rate of recoveryin exceptional circumstances, MSD may temporarily defer recovery of the debt
- the Minister responsible for the Social Security Act may issue, and MSD must comply with, directions about the matters that MSD must have regard to in setting the method or rate of recovery and the circumstances in which recovery of a debt may be deferred.

<sup>4</sup> Both clients and non-current beneficiaries are able to re-negotiate the rate of recovery at any time due to hardship.

<sup>5</sup> 92 per cent of current beneficiaries repaying on average \$14.32 per week and 88 per cent of former beneficiaries repaying or have paid within 12 months of leaving the benefit system and repayments are made at an average of \$23.27 per week.

<sup>6</sup> Recoverable assistance provides interest free advance payments of benefit or recoverable assistance grants for essential items, such as school uniforms or washing machines. Arrangements for repaying these advances or recoverable grants are made when they are approved. As at 30 June 2012, MSD was owed \$407 million in recoverable assistance.

- 22 I propose that the legislation give a specific power to the Minister to issue directions that are binding on MSD in regard to debt recovery, and not be directions under section 5 of the Social Security Act, as these directions are limited in scope<sup>7</sup> so they cannot override a statutory discretion.
- 23 The duty to recover debt is not intended to prevent MSD from writing-off debt under the Public Finance Act or not recovering debt where the Social Security Act (section 86(9A)) already directs that it should not be recovered.
- 24 This approach ensures a responsible approach to the recovery of public money while, at the same time, enabling reasonable and realistic recovery rates to be worked through with debtors, and the ability, in more exceptional circumstances, to temporarily defer recovery.
- 25 I believe that directions on welfare debt recovery will be helpful, especially given the need to balance effective debt recovery with the need to ensure that beneficiaries and their dependants are not subject to undue hardship. The range of options for providing such directions includes legislation, regulations, Ministerial direction and rules, and operational guidelines.
- 26 In my view, Ministerial direction is the appropriate mechanism for determining how MSD recovers debt. It will enable the Minister, from time to time, to balance the need to effectively recover public money and, at the same time, provide a sufficient degree of protection from undue hardship for beneficiaries and their dependants. Moreover, such directions are transparent, can be changed reasonably quickly when necessary and will require MSD to be consistent in how the directions are applied on a case-by-case basis.
- 27 Ministerial directions will also cover the more limited circumstances in which debt recovery could be deferred for a time, such as in cases of exceptional hardship. Such deferrals would be reviewable to determine whether the debtor's circumstances warrant such a response.
- 28 Operational guidelines will also be prepared within MSD to support Ministerial directions. The direction and the supporting guidelines will provide consistency and balance to how MSD balances the recovery of debt with issues of hardship (including hardship faced by dependant children).
- 29 These measures will address the effect of recent case law, strengthen current practice and ensure that there are consistent and appropriate welfare debt practices across MSD. It will also be fair to the taxpayer and current debtors, as it will make it clear that debt is to be recovered, while providing sufficient sensitivity to a debtor's individual circumstances.
- 30 They will also ensure that MSD's approach remains broadly consistent with other Government Departments. For example, Inland Revenue has a duty to collect the highest net tax practicable and maximise the collection of outstanding tax owed by taxpayers but has some discretion about recovery having regard to serious hardship and efficiency of resources used. ACC have a similar statutory power of recovery to MSD.

## Debt recovery for relationship fraud measures

### Background

- 31 On 1 October 2012, Cabinet agreed to empower MSD to recover fraud debt from a spouse or partner who knowingly benefited or ought to have known they were benefiting from benefit money being received by their spouse or partner to which they were not entitled [CAB Min (12) 35/13 refers].

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<sup>7</sup> Tyler v Attorney General [1999] 1 NZLR 211



- 32 Currently there is no legal mechanism for attributing debt to a spouse or partner of a beneficiary as well as the beneficiary, except in the rare cases where a spouse or partner made a false statement or otherwise misled MSD about his or her own circumstances. Accordingly, there are no practice guidelines in place for determining how fraud debt is attributed to, and recovered from both spouses and partners of beneficiaries, and beneficiaries in relationship fraud cases.
- 33 Case law about welfare debt recovery, especially Harlen, suggests that a clear approach is needed to confirm the manner in which MSD will recover debt from spouses and partners, as well as beneficiaries, under this new proposal.
- 34 The question arises whether the debt should be attributed jointly to both parties, or whether it should be split 50/50 between them.

#### Proposals

- 35 In my view there is good reason to attribute the debt jointly to both parties. That is, MSD will be able to recover from both of them until the debt is repaid. The method and rate of recovery for each party would be set depending on each individual's circumstances according to MSD discretion and Ministerial directions on recovery of welfare debt as proposed in paragraph 20 above. The advantages of taking this approach are:
- it is equitable to the extent that the full amount or part of the debt can be obtained from both parties according to his or her circumstances
  - it reflects that fraud is involved and taxpayers should be fully recompensed by either or both parties as soon as practicable.
- 36 Attributing the debt 50/50 would mean that the beneficiary's accountability for the fraud debt would halve from their accountability prior to the legislation coming into force. The purpose of the proposals is to have a more equitable approach to fraud, not to relieve the beneficiary of their accountability for the fraud. Additionally, such an approach would be equally unsatisfactory because a spouse or partner who is accountable for the fraud, and is in a demonstrably better financial situation than the beneficiary, would discharge their responsibility for the fraud after they have paid only half the amount due.
- 37 For example, a \$10,000 overpayment is attributed jointly to both parties to the relationship. The beneficiary's partner repays at \$50 a week and the beneficiary repays at \$10 a week. The difference in recovery rates is caused by the difference in their individual circumstances (they have separated). After three years, the partner has paid \$7,800 and the beneficiary \$1,560. Assuming their circumstances do not change, the debt is paid in full shortly thereafter.
- 38 If a 50/50 approach was taken in this example, MSD would not be able to recover more than half of the overpayment from the person with more ability to make repayments and it would take considerably longer (almost ten years assuming no changes in circumstances) to recover the full amount.
- 39 I propose that, to remove any uncertainty, the Social Security Act is amended to explicitly reflect this approach to relationship fraud cases so both parties are held jointly accountable for the debt.

- 40 I also propose to make it clear that review and appeal rights in relation to MSD's decisions about certain aspects of debt recovery are limited to the debtor's own circumstances. This would mean that a person may review and appeal decisions about means and rate of debt recovery in relation to them, but not decisions made about debt recovery from the other party. To avoid doubt, this means that a beneficiary cannot review or appeal a decision that a spouse or partner is not liable for a debt. This will ensure that the appeal and review processes continue to be used for decisions that have a direct, rather than consequential, impact on a beneficiary or other affected person. To allow a person to review decisions made about their spouse or partner would risk appeals and reviews being used to sustain conflict between the parties rather than respond to MSD's decision-making.
- 41 I also propose to make it clear that a spouse or partner from whom it is sought to recover debt may review and appeal decisions about his or her liability, including the decision that the beneficiary obtained a benefit or other payment by fraud as this is an essential ingredient of spouse's or partner's liability.

### **Consultation**

- 42 The Treasury, the Ministries of Justice, Education and Business, Innovation and Employment, the Department of Building and Housing, ACC, Housing New Zealand Corporation, Crown Law, the Office of the Privacy Commissioner, New Zealand Police, New Zealand Customs Service, Inland Revenue and the State Services Commission were consulted. The Department of Prime Minister and Cabinet, the Department of Internal Affairs, Te Puni Kokiri and the Ministries of Health, Women's Affairs and Pacific Island Affairs were informed.

### **Financial implications**

- 43 There are no financial implications.

### **Human rights implications**

- 44 The policy proposals contained in this paper may be inconsistent with the New Zealand Bill of Rights Act 1990 (NZBoRA) and the Human Rights Act 1993 in relation to the right to freedom from discrimination. This is because the proposals relating to spouses and partners accountability for relationship fraud may raise issues in terms of the right to justice and discrimination on the grounds of family and marital status.
- 45 The limitations that may be imposed are arguably justifiable. However, the Ministry of Justice's final view on whether the proposals are consistent with the NZBoRA will not be known until the legislation has been drafted and considered.

### **Legislative implications**

- 46 Amendments would be required to the Social Security Act to give effect to these proposals.
- 47 On 1 October 2012 Cabinet agreed to a package of measures for improving responses to welfare fraud [CAB Min (12) 35/13 refers]. A Bill is planned to be introduced this year to give effect to these changes and any amendments arising from this Cabinet paper can be incorporated into that Bill.
- 48 Cabinet has approved a late bid for a Bill to implement the proposals to be included in the 2012 Legislation Programme with a priority four (must be referred to a Select Committee in 2012) [CAB Min (12) 12/2 refers].
- 49 I propose that legislation for the proposals in this paper be introduced in December 2012.

## Regulatory impact analysis

- 50 A regulatory impact statement (RIS) is attached. This RIS accompanied the Tackling Welfare Fraud paper considered at Cabinet on 1 October 2012 and is modified to take into account the proposals requiring legislation proposed in this paper [CAB Min (12) 35/13 refers].
- 51 A principal analyst in MSD, not otherwise involved in the preparation of this RIS or supporting material, has reviewed it and considers that the information and analysis summarised in the RIS meets the quality assurance criteria. The reviewer notes that assessing the impact of the proposed anti-fraud initiatives will be challenging as the level of fraud that MSD does not currently detect is impossible to quantify and that the proposals outlined in the RIS will be implemented alongside other operational changes and wider reforms to the social security system.
- 52 I have considered the analysis and advice of my officials, as summarised in the attached RIS, and I am satisfied that, aside from the risks, uncertainties and caveats already noted in this Cabinet paper, the regulatory proposals recommended in this paper:
- are required in the public interest
  - will deliver the highest net benefits of the practical options available
  - are consistent with our commitments in the Government statement "Better Regulation, Less Regulation".

## Gender implications

- 53 Measures in this paper in relation to debt recovery will predominantly affect women because there are more women receiving welfare assistance than men.
- 54 In the majority of relationship fraud cases the beneficiary who is currently liable for the entire fraud debt is a woman. Therefore recovering fraud debt jointly will positively affect women. Fraud debt will now be shared jointly between both partners where the spouse or partner knowingly benefited or ought to have known they were benefiting from benefit overpayments.

## Disability perspective

- 55 There are no disability implications arising from the proposals in this paper.

## Publicity

- 56 I intend to publicise these changes upon the introduction of the Bill into the House.

## Recommendations

- 57 It is recommended that the Committee:

### *Welfare debt recovery*

- 1 **note** that the recent High Court decision of *Harlen v Ministry of Social Development* [2012] NZAR 491 found that the Ministry of Social Development has a broad discretion when deciding whether to recover or not recover welfare debt
- 2 **note** that this, and other High Court decisions, conflicts with the Ministry of Social Development's practice of always seeking to recover a welfare debt

- 3 **agree** that the Social Security Act 1964 be amended so that:
- 3.1 the Ministry of Social Development has a duty to take such steps as are practicable recover debt due to the Crown within the meaning of the Social Security Act 1964
  - 3.2 this duty will not prevent debt write-off under the Public Finance Act 1989 and is subject to the provision that certain debts due to administrative errors must not be recovered under section 86(9A) and (9B) of the Social Security Act 1964
  - 3.3 the Ministry of Social Development has a discretion to determine the method and rate of recovery on a case by case basis and decisions made about the method and rate of recovery can be reviewed from time to time
  - 3.4 in exceptional circumstances, the Ministry of Social Development may temporarily defer recovery of the debt
  - 3.5 there is a new power for the Minister responsible for the Social Security Act 1964 to issue directions about the matters that the Ministry of Social Development must have regard to in setting the method or rate of recovery of debts and the exceptional circumstances in which recovery of debts may be deferred and that the Ministry of Social Development must comply with any directions so issued by the Minister
- 4 **note** that in certain cases it will be uneconomic to recover debt, for example, if the debt is small
- 5 **agree** that duty to recover debt due to the Crown within the meaning of the Social Security Act 1964 does not extend to cases determined by the Ministry of Social Development as uneconomic to recover

*Recovery of fraud debt under new measures*

- 6 **note** that on 1 October 2012 Cabinet agreed to a package of fraud measures [CAB Min (12) 35/13 refers] including a legislative change to:
- 6.1 empower recovery from spouses and partners who knowingly benefited or ought to have known they were benefiting from payments, credits, or advances obtained by fraud by their beneficiary spouses or partners to which they were not entitled
  - 6.2 empower recovery from spouses or partners who not only have made a false statement or misled the Ministry of Social Development about their own circumstances but also about the beneficiary's circumstances
- 7 **note** that there are no practice guidelines in place for determining how fraud debt is attributed to, and recovered from, spouses and partners of beneficiaries and beneficiaries in welfare fraud cases
- 8 **agree** that the Ministry of Social Development will attribute fraud debt jointly when both parties to the relationship are accountable for the fraud
- 9 **agree** that rates of recovery on a case by base basis will be determined for each party in line with Ministerial directions on welfare debt recovery referred to in recommendation 3.5 above
- 10 **agree** that a person (whether or not they are a beneficiary or the beneficiary's partner or spouse) cannot review or appeal decisions about means and rate of debt recovery from

their partner or spouse and, to avoid doubt, a beneficiary cannot review or appeal a decision that a spouse or partner is not liable for a debt

- 11 **agree** that a spouse or partner from whom it is sought to recover debt may review and appeal decisions about his or her liability for the debt, including a decision that the beneficiary obtained a benefit or other payment by fraud

*Legislative implications*

- 12 **note** that changes will be needed to the Social Security Act 1964 to enable the implementation of the proposals in this paper
- 13 **note** that the legislative amendments required to support these proposals will be included in the Social Security (Fraud Measures) Amendment Bill which the Associate Minister for Social Development intends to introduce into the House in December 2012 [Cap Min (12) 12/2 refers]
- 14 **invite** the Associate Minister for Social Development to issue drafting instructions to the Parliamentary Counsel Office to amend the Social Security Act 1964, to give effect to the relevant proposals in the recommendations above
- 15 **authorise** the Associate Minister for Social Development, in consultation with other Ministers as appropriate, to make technical, policy and administrative changes to finalise legislation in keeping with the overall policy of the package
- 16 **invite** the Minister responsible for the Social Security Act 1964, once the legislative amendments referred to above are passed, to issue directions to the Chief Executive of the Ministry of Social Development in terms of recommendation 3.5 above

*Publicity*

- 17 **note** that I intend to publicise these changes upon the introduction of the Bill into the House.

Hon Chester Borrows  
Associate Minister for Social Development

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