

MODULE 1: LEGISLATION  
Unit L1: MAKING AND ACCESSING LEGISLATION

**INVESTIGATION UNIT  
TRAINING PACKAGE**

**(L)**

**LEGISLATION AND CASE LAW MODULE**

***Units***

<b>Unit L1</b>	<b><i>Making and Accessing Legislation</i></b>
<i>Unit L2</i>	<i>The Acts Administered by the Ministry</i>
<i>Unit L3</i>	<i>Investigative Powers and Information Gathering</i>
<i>Unit L4</i>	<i>Obligations, Reviews and Debt</i>
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## Unit L1: MAKING & ACCESSING LEGISLATION

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### Objectives

**By the end of this unit you will understand:**

- how legislation is made, changed and accessed
- the role of Select Committees in making legislation
- how legislation is structured
- how regulations are made

## Making and Accessing Legislation

### INTRODUCTION

Legislation is a name for the rules (Acts of Parliament) made by a governing body of this country for the better ordering of its life and government.

The governing body of New Zealand Parliament is made up of two parts:

- the representative of the Crown - the Governor General
- the House of Representatives - the Members of Parliament

Both parts are necessary for an Act of Parliament to come into existence.

### ACTS OF PARLIAMENT

Acts of Parliament ("statutes") are made by a formal process set by Parliament, under its Standing Orders.

The subject matter for Acts of Parliament comes from a variety of sources such as government department policy agencies, Members of Parliament or their parties, or by political pressure from the public.

Once such a proposal has been accepted by the governing party, it is sponsored by the Cabinet Member in whose jurisdiction the subject matter belongs. If not accepted by the governing party, a Member of Parliament may sponsor a private member's Bill.

A government sponsored bill is drafted by Parliamentary Counsel at the direction of the Cabinet Legislation Committee. After caucus approval and ultimate approval by Cabinet, the bill is introduced by the Cabinet Member into Parliament for its first reading. A private members bill is introduced directly by the Member to Parliament, though it has far less chance of being passed through the various stages.

## FIRST READING

This debate is to decide whether to allow the bill to proceed. If so allowed, the bill is then almost automatically referred to the appropriate Select Committee for perusal and discussion.

### *Select Committees*

Select Committees are set up by the Standing Orders of Parliament. New Zealand's Select Committee system enables Members of Parliament to examine issues in more detail than is possible in the House of Representatives. The system also enables members of the public to have direct input into parliamentary processes.

### *Appointment of Committees*

Select Committees are appointed from the members of the House at the start of each Parliament (after a General Election). Traditionally government always had a majority on Committees and always provided the chair. With the introduction of MMP the government has been forced to make concessions. In 2002 chair positions have been conceded to other parties who are supportive of the government. Junior Ministers outside Cabinet were also appointed to Select Committees. Parties are represented in proportion to party membership in the House. The areas of responsibility are reflected in the 13 subject Committees:

Commerce	Education and Science
Finance and Expenditure	Foreign Affairs, Defence and Trade
Government Administration	Health
Justice and Electoral	Law and order
Local Government and Environment	Maori Affairs
Primary Production	Social Services
Transport and Industrial Relations	

There are also five special committees, for example, Standing Orders (house procedures and practices). The Select Committee that deals with social development is the Social Services Committee.

## ***Committee Business***

Committee work includes examining bills (proposed laws). The House refers most bills to the relevant Committee which calls for public submissions. The public usually have one month to make them. Six months is generally allowed for consideration. People can give an oral presentation as well as providing written submissions. This makes the legislative process very accessible and can result in significant changes. The submissions that people make can be accessed on the parliamentary website [www.parliament.govt.nz](http://www.parliament.govt.nz)

After consideration by the Select Committee and any public submissions, the bill (incorporating any changes made by the Select Committee) is reported back to Parliament for its Second Reading.

### **SECOND READING**

At the Second Reading, Parliament is asked to accept the bill in principle. Once accepted, it is read for the second time, before being dealt with under the Committee stage of the bill. Here, the bill is debated on a clause by clause basis. During this latter phase, amendments can be suggested and either passed or rejected. Thus the bill eventually comes into its final form.

### **THIRD READING**

Parliament confirms the final form and the debate will be confined to the principles in the bill after the committee stage. After the Third Reading of the bill, Members of Parliament vote on its acceptance.

### **ROYAL ASSENT**

After acceptance by Parliament at the Third Reading, the bill is assented to by the Governor-General, on behalf of the Queen. Only at this point does the bill become an Act of Parliament. It will either include a date upon which the Act comes into effect; otherwise it will be when the Bill receives the Royal Assent.

The Social Security Act 1964 is an example of an Act of Parliament.

### **REGULATIONS**

Many Acts of Parliament provide for the making of regulations. Regulations do not go before Parliament but are made by the Governor-General acting by order in council. They are usually drafted by the government department

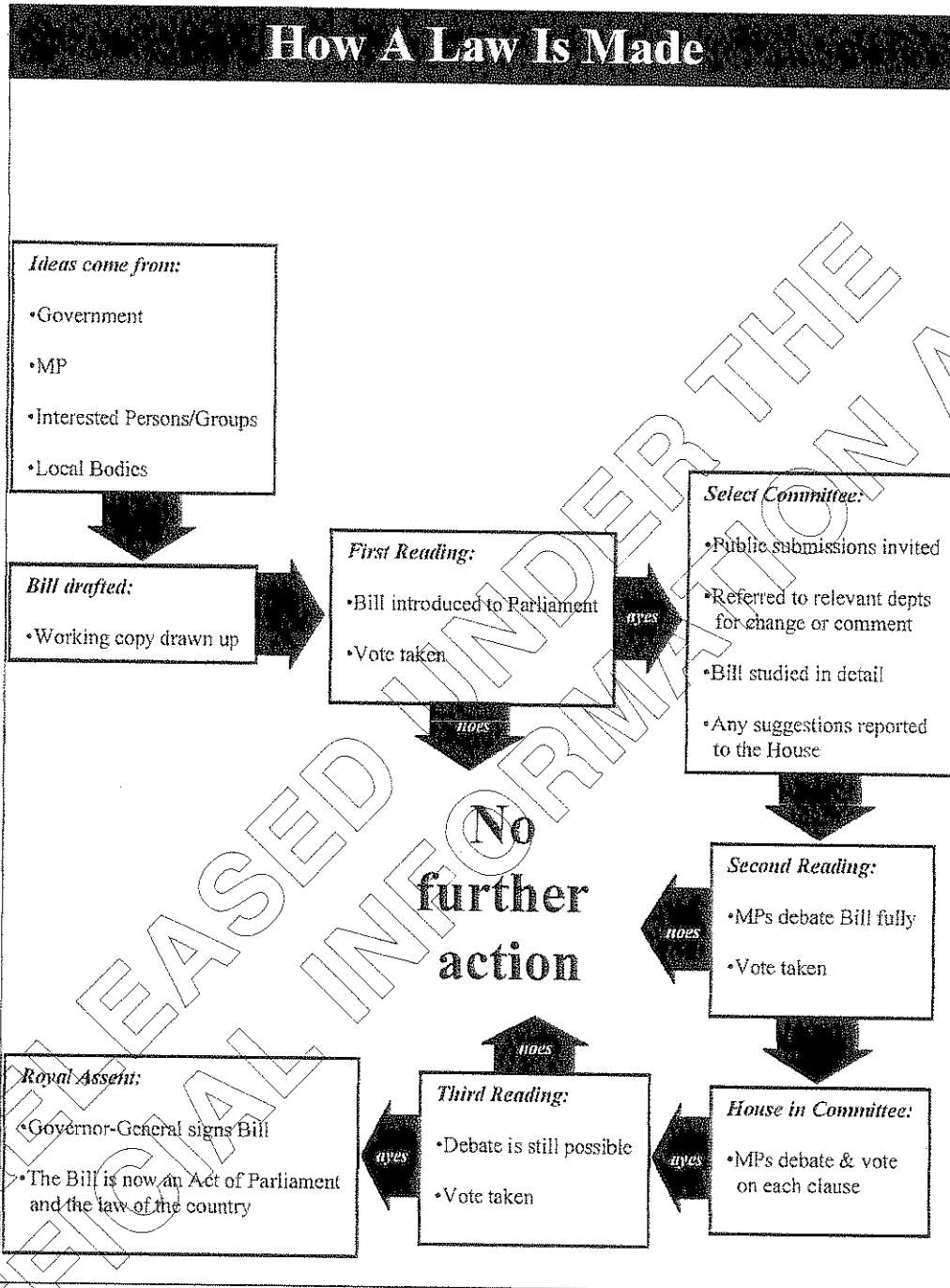
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responsible for its administration. They provide more mechanical provisions arising from the Acts of Parliament which provide for them.

The Social Security (Temporary Additional Support) Regulations 2005 are regulations administered by the Ministry of Social Development. These regulations describe chargeable income and allowable assets and costs that would make a client eligible or ineligible for Temporary Additional Support.

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## How A Law Is Made



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## ACCESS TO LEGISLATION AND ACTS OF PARLIAMENT

Legislation can be amended and it is vital that the most up to date version of legislation is used. All Acts and Regulations are printed by the Government Printer and available through their agents throughout New Zealand. Acts of Parliament are available at larger New Zealand libraries.

The Ministry also has an unofficial continuing update of the Social Security Act 1964. The legislation may be accessed through the INET and MAP. Other legislation that the Ministry uses such as the Education Act 1989 can be found on the government legislation website [www.legislation.govt.nz](http://www.legislation.govt.nz).

## ACCESSING LEGISLATION

One of the fundamental skills in applying the law to your work is the ability to read an Act. To do so you need to understand how an Act is presented and where you might find the information sought. For the purpose of this exercise obtain a copy of the Social Security Act ("the Act") and use it to refer to when reading through the content below.

## SHORT & LONG TITLE

Each Act has a short title and a long title. We are most familiar with the short title which is the name given to the Act by way of reference and the year it became law, for example, Social Security Act 1964. The short title is almost always set out in the first section of the Act.

The long title is a brief description of what the Act is designed or intended to do in shorthand. It is also set out in the first section of the Act usually above the short title. Please locate the long title in the Social Security Act 1964.

## INTERPRETATION

The interpretation section is usually contained in the second section in any Act. In this respect the Social Security Act is different in that Section 2 provides for the Act to be administered in the Department of Work and Income, by the Chief Executive.

Section 3 of the Act contains the interpretation section. This provides the definitions of key words used in the Act. Some examples are:



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"Applicant", in relation to any benefit, means a person by whom or on whose behalf an application is made for the benefit; and, where the context so requires, includes a beneficiary;

"Application" means an application for a benefit; and includes an application, or a signed declaration or statement indicating eligibility, for the renewal of a benefit.

"Beneficiary" means a person who has been granted a benefit; and includes a person in respect of whom a benefit or part of a benefit has been granted.

"Benefit" is then defined in some details as to its meaning.

"Income" is another word that has been defined at some length so that those administering the Act and those affected by any decisions made in regard to it know what is included. The definition begins with a general statement as to what constitutes income and then proceeds to list specific items included in that general definition and to specifically exclude other items not intended to be included as income.

Whenever these words are used in the Act you should read the Section 3 definition to discover what the word or phrase means. Usually you will not have to go any further than Section 3 to ascertain what a word means but there are exceptions to this.

A phrase or word may have a different definition contained in another part of the same Act. For example, we have already looked at the definition of "applicant" contained in Section 3. However Section 27B of the Act which sets out entitlement for Domestic Purposes benefit for solo parents contains its own definition of "applicant" which is quite different from that contained in Section 3.

Another exception is where you may have to cross reference to other pieces of legislation to ascertain the meaning of a word or phrase, for example, under the definition of income tax in Section 3 you are referred to the Income Tax Act 1976. You would then have to look up the Income Tax Act 1976 to ascertain the meaning of income tax.

Other useful definitions can be found in Section 3 of the Social Security Act 1964.

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**ANALYSIS**

The next key point in the Act is the Analysis. This is an index of the content of the Act and makes it easy to locate the information you want.

You will note that the Act is divided into four parts. Each Part has a number and title. Part 1 is headed "Monetary Benefits." All entitlements to benefit are contained in this Part.

Each Part is divided into tidy subdivisions covering specific topics. Again refer to your Act, an example in Part 1 might be "Domestic Purposes Benefit."

Each subdivision is divided into numbered sections. Each section can be subdivided again into subsections (numbers), paragraphs (letters) and subparagraphs (numbers in Roman numerals).

**OBJECTS & PRINCIPLES**

Increasingly, Acts may contain particular sections which spell out certain matters which either attempt to carefully delineate what the Act is designed to achieve (Objects) and for matters to be taken into account when exercising powers under the Act (Principles).

In newer legislation, Objects and Principles are almost always found near the beginning of an Act. Because of its age the Social Security Act is not set out this way but you should be aware of the existence of Objects and Principles as they are contained in related legislation that impact on your work, for example, the Official Information Act 1982.

The purpose or object of the Official Information Act 1982 is contained in Section 4 of that Act. Section 4 states that:

The purposes of this Act are, consistently with the principle of the Executive Government's responsibility to Parliament,—

(a) to increase progressively the availability of official information to the people of New Zealand in order—

(i) to enable their more effective participation in the making and administration of laws and policies; and

(ii) to promote the accountability of Ministers of the Crown and officials,—

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and thereby to enhance respect for the law and to promote the good government of New Zealand:

(b) to provide for proper access by each person to official information relating to that person;

(c) to protect official information to the extent consistent with the public interest and the preservation of personal privacy.

The Principle which governs the Official Information Act is contained in Section 5. This principle is that the information shall be made available unless there is a good reason for withholding it. The provisions of the Official Information Act and Privacy Act 1993 will be considered in more detail in a subsequent unit.

### **SCHEDULES**

The Schedules to an Act will contain detail which is easier to deal with in a Schedule than in the main body of the Act, for example Schedule 3 of the Social Security Act 1964 sets out rates of Widows' Benefit.

They will also often contain amendments to other Acts that have been altered or repealed by the Act in question.

These Schedules will be referred to in the particular sections of the Act to which they relate as in Section 24 of the Act which states that the rate of widow's benefit payable shall be the appropriate rate specified in Schedule 3.

### **TRANSITIONAL PROVISIONS**

In most Acts provisions are needed to deal with the situation of existing orders, proceedings etc already commenced when new or amending legislation is brought into force. The question that this raises is whether these orders or proceedings should be dealt with under the existing law or the new Act.

Provisions for such situations are always found near the end of the Act and are called the Transitional Provisions. The current Act was preceded by the Social Security Act 1938. When our present Act was introduced the Legislature needed to ensure that any proceedings taken earlier, including recovery of any fine, were still enforceable and that all regulations, orders, warrants and other acts of authority originating under the Social Security Act 1938 would remain in force. This is encapsulated in Section 135 of the Act under the heading "Repeals and Savings".

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**ROYAL ASSENT**

The Royal Assent is usually the date when an Act comes into force. That date is set out in the front page of an Act. It is contained in Section 1 of the Social Security Act 1964. Sometimes an Act has a different date of commencement to the Royal Assent due to the need to have a lead in period.

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**NEXT UNIT - UNIT L2: The Acts Administered by the  
Ministry**

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## LEGISLATION & CASE LAW MODULE

### *Units*

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## Unit L2: The Acts Administered by the Ministry

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### Objectives

By the end of this unit you will:

- Have a brief understanding of the Ministry
- Be able to explain the Ministry's response to fraud

## The Acts Administered by the Ministry

### FOUNDATION OF THE DEPARTMENT

The Department of Social Welfare was established in 1971 under the Department of Social Welfare Act 1971, and divided into three agencies in 1992, New Zealand Income Support Service, Children and Young Persons Service and the Social Policy Agency.

In October 1998 New Zealand Income Support Service merged with New Zealand Employment Service to form the Department of Work and Income.

In January 1999 StudyLink took over the administration of student allowances and a year later they took over the administration of student loans. While the Ministry is responsible for granting and paying student allowances and loans, Inland Revenue are responsible for the collecting of student loans.

StudyLink became part of the Ministry of Social Development in October 2002. Among other roles, the Ministry is charged with the responsibility for the administration of payments authorized under the Social Security Act 1964, the Education Act 1989 and other funding programmes.

Currently, the Ministry of Social Development includes the Ministry of Youth Development, Family and Community Services, Senior Services, StudyLink, the Office of Disability Issues, Work and Income, Child, Youth and Family.

#### History of the Ministry of Social Development

There's an interesting history behind our name, Ministry of Social Development (MSD). Previously a charity from private institutions was the only assistance available to those in need. New Zealand's publicly funded social services only began in 1898 with the Old Age Pensions Act, establishing a single, narrowly focused Old Age Pensions Department which granted 6 pence per week to men and women over 65. Many New Zealanders were excluded on the grounds of race, mental health or "moral character".

In the area of employment, we began by granting the "dole" to the unemployed but later adopted the more inclusive term, "income support".

This changing terminology reflects changing attitudes to social services. The term "Pensions", which acknowledged society's responsibility to the elderly was discarded in favour of "social security" which better described the development of New Zealand's social services as a safety net for people in need, regardless of age.

One century later, we have a whole-of-government approach, emphasising the well-being of communities as well as individuals, and the prevention of social problems across many different government departments. "Social welfare",

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adopted because it described a goal of well-being in individuals and society, has given way to "social development", a broader term which recognises the desire to improve society and help people to help themselves.

1898	Private charity (no government support)	became	Old Age Pensions Department
1909	Pensions	moved to	Post and Telegraph Department
1913	Pensions	became	Pensions Department
1939	Pensions and Employment Division from Department of Labour	became	Social Security Department (SSD) in Social Security Commission
1972	SSD and Child Welfare from Department of Education	became	Department of Social Welfare (DSW)
1998	Housing Policy from Ministry of Housing	moved to	Social Policy Agency within DSW
1998	Income Support and NZ Employment Service and Community Employment Group and Local Employment Co-ordination	became	Department of Work and Income (WINZ)
1999	Social Policy Agency from DSW and Corporate Office from DSW and new Purchasing and Monitoring Group	became	Ministry of Social Policy (MSP)
1999	Children, Young Persons and their Families Agency (CYPFA)	became	Department of Child, Youth and Family Services (CYFS)
2001	Housing Policy from MSP	moved to	Housing New Zealand Corporation
2001	Ministry of Social Policy and WINZ	became	Ministry of Social Development (includes Work and Income)
2006	Child, Youth and Family	merged with	Ministry of Social Development



## HISTORY AND STRUCTURE OF BENEFIT FRAUD

The Report of the Ministerial review into Benefit Fraud and Abuse led to the establishment of the benefit fraud teams within the Department of Social Welfare in 1987.

Since then changes have been made to the structure of those fraud teams and to the wider Ministry to better respond to benefit fraud and abuse.

For more information on the history of fraud teams within the Ministry, see:

<http://doogie/business-groups/helping-clients/ssis/what-we-do/integrity-services/nfiu/our-history/msd-timeline-fraud-and-abuse.html>

## FRAUD RISK WORKFLOW MODEL

Integrity Services uses a Fraud Risk Workflow Model to manage a range of integrity activities for detecting, investigating and sanctioning benefit fraud and abuse. The Fraud Risk Workflow Model helps us to manage benefit fraud risks and benefit fraud investigations by:

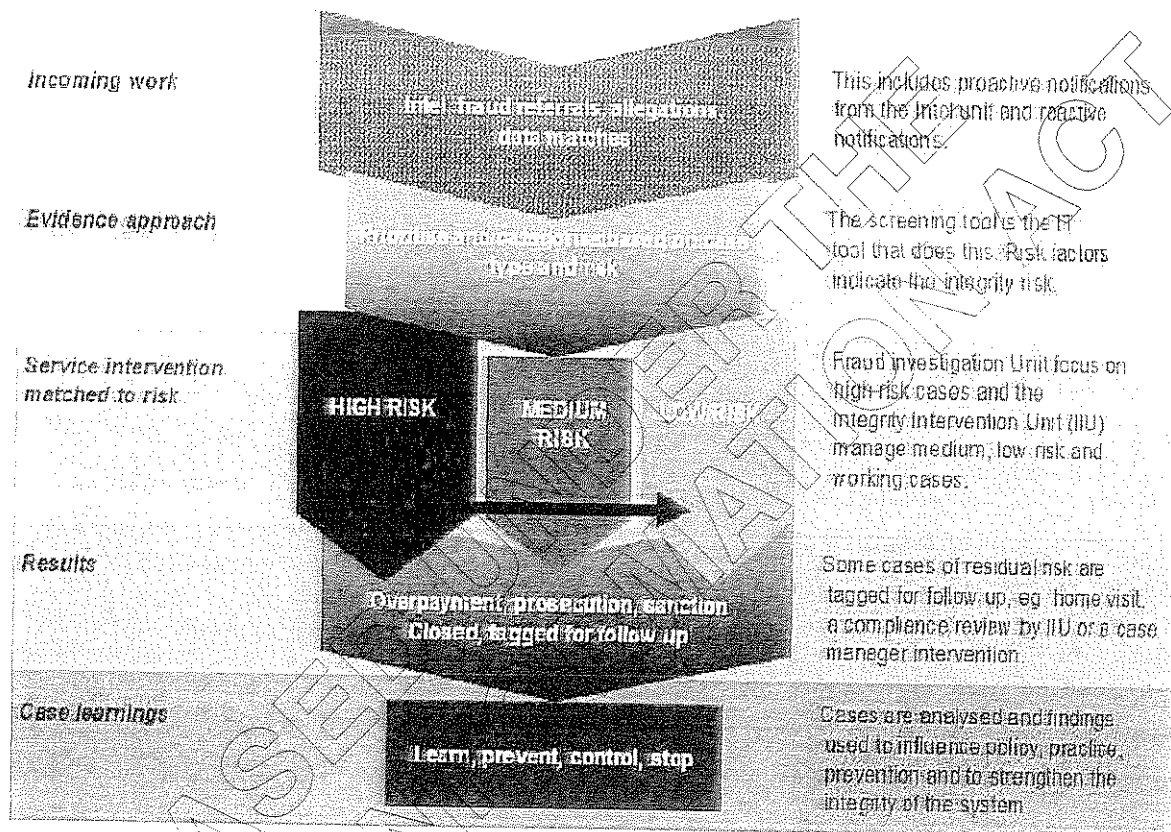
- providing a structured approach for investigating benefit fraud and abuse
- assessing client fraud risk (high, medium and low)
- managing our work efficiently and responding to possible fraud quickly

By using the model we can:

- identify the likely fraud risk level of each case
- identify the best way to respond to the fraud risk

A pictorial view of how the Fraud Risk Workflow Model works follows:

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A central screening point has been developed to assess all suspicions and allegations of fraud within the Integrity Intervention Unit.

You can find more information in relation to this topic on the MAP website at:  
[http://doogles.ssi.govt.nz/map/fraud\\_investigation/fraud\\_investigation-01.htm](http://doogles.ssi.govt.nz/map/fraud_investigation/fraud_investigation-01.htm)

**ACTS WE WORK WITHIN**

The Ministry is charged with administering funds with certain Acts and are also required to operate with other Acts. For example we administer the Social Security Act and the Education Act, however we must also abide by other Acts such as the Privacy Act and the Public Finance Act.

Fraud staff will work extensively within the following Acts:

- Social Security Act 1964
- Education Act 1989

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- Crimes Act 1961
- Summary Proceedings Act 1957
- Evidence Act 2006
- Privacy Act 1993

The module training will assist in you being able to commence operating as a fraud staff member and learning the entirety of these Acts will come with experience.

### **OUR AUTHORITY AND DELEGATION**

Under the Social Security Act the Chief Executive of the Ministry of Social Development administers the benefit system, acting under "the general direction and control of the Minister" (Social Development and Employment) - section 5 of the Act. The Chief Executive's powers, functions and discretions can be delegated under the Act.

The Minister may direct the Chief Executive in writing to comply with general or special directions - such as the Ministerial Directive. This has the effect of reducing the extent of discretion that may otherwise be available under the Act.

Part 25 of the Education Act specifies the administration of the Student Allowance scheme. The Minister of the Crown refers the responsibility to the Ministry and the Chief Executive of such Ministry to be responsible for the administration of that part of the Education Act.

### **POLICY AND LEGISLATION**

The Ministry also operates by way of reference to internal policy, which contain departmental instructions and guidelines as to how the Acts should be administered.

Sometimes, it may seem as though the policy and the Act can disagree - for example the grant of Special Needs Grant and the exercise of discretion in their grant. The Act is always the more authoritative, but because the Act is couched in more general terms, the manuals are more often helpful in particular fact situations. If there is direct conflict, the Act should be followed rather than policy.

#### **MAP**

<http://google/map/home/map.htm>

#### **LEGISLATION**

<http://legislation.govt.nz/>

#### **DOOGLE**

<http://doogle/>

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**NEXT UNIT - UNIT L3: Investigative Powers and  
Information Gathering**

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# INVESTIGATION UNIT TRAINING PACKAGE

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## LEGISLATION & CASE LAW MODULE

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## Unit L3: Investigative Powers and Information Gathering

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### Objectives

By the end of this unit you will understand:

- what our investigation powers are
- what our information gathering powers are

## INVESTIGATION POWERS

When you are investigating suspected benefit fraud you are doing so using powers conferred by section 81 and 12(1A) of the Social Security Act 1964, which are set out below:

### 81 Review of benefits

- (1) The chief executive may from time to time review any benefit in order to ascertain—
  - (a) whether the beneficiary remains entitled to receive it; or
  - (b) whether the beneficiary may not be, or may not have been, entitled to receive that benefit or the rate of benefit that is or was payable to the beneficiary—

and for that purpose may require the beneficiary or his or her spouse or partner to provide any information or to answer any relevant question orally or in writing, and in the manner specified by the chief executive. If the beneficiary or his or her spouse or partner fails to comply with such a requirement within such reasonable period as the chief executive specifies, the chief executive may suspend, terminate, or vary the rate of benefit from such date as the chief executive determines.

- (2) If, after reviewing a benefit under subsection (1), the chief executive is satisfied that the beneficiary is no longer or was not entitled to receive the benefit or is or was entitled to receive the benefit at a different rate, the chief executive may suspend, terminate, or vary the rate of the benefit from such date as the chief executive reasonably determines.
- (3) If, after reviewing a benefit under subsection (1), the chief executive considers the beneficiary is more appropriately entitled to receive some other benefit, the chief executive may, in his or her discretion, cancel the benefit the beneficiary was receiving and grant that other benefit commencing from the date of cancellation.

### 12 Investigation of claims and grant of benefits

- (1) Every claim for a benefit shall be investigated by the chief executive or by an officer of the Department acting with the authority of the chief executive, and all benefits shall (subject to any delegation of the chief executive's powers under this Act) be granted by the chief executive.

(1AA) If he or she thinks an investigation into an application for a benefit of kind A is unlikely to be completed quickly (for example, because of the need to obtain further medical evidence), the chief executive may grant the applicant a benefit of kind B to which the applicant is entitled, on the basis that a benefit of kind A will be granted retroactively if it becomes apparent that the applicant is

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entitled to a benefit of kind A; and in that case, if (when the investigation has been completed) it becomes apparent that the applicant is in fact entitled to a benefit of kind A, the chief executive may—

- (a) grant the applicant a benefit of kind A commencing on the date on which it would have commenced if the investigation had been completed before the benefit of kind B was granted; and
- (b) terminate the benefit of kind B on that date.

(1A) The chief executive or any officer of the Department acting with the authority of the chief executive may investigate the circumstances of any person who has been in receipt of a benefit as those circumstances existed immediately before the benefit was granted or during the period that the benefit was paid.

(2) It shall be the duty of every person (including the applicant) to answer all questions put to him by the chief executive or by any officer of the Department concerning any applicant for a benefit or any person who is or has been in receipt of a benefit or concerning any statements contained in any application for a benefit, or concerning the means, earning capacity, and economic circumstances of any person, for the purposes of section 46 or section 91 of the Family Proceedings Act 1980, or of any person who is or may be liable to maintain any applicant for a benefit or any beneficiary, or any dependant of such an applicant or of a beneficiary.

(3) Every person commits an offence who demands or accepts from any applicant or from any other person any fee or other consideration for procuring or endeavouring to procure the grant of a benefit.

When you are investigating suspected Student Allowance and Student Loan fraud, you are doing so, using powers conferred by section 307 of the Education Act 1989, which are set below.

#### **Section 307(4) - General power to investigate**

"The Secretary (or any person authorised for the purpose by the Secretary) may investigate the circumstances at any time of any recipient so far as they may relate to the recipient's entitlement at any time—

- (a) To a statutory allowance or student loan; or
- (b) To be paid a statutory allowance at a particular rate or any amount of a student loan."

### **COLLECTION OF INFORMATION POWERS**

When investigating suspected benefit or student fraud there is a variety of ways in which information can be gathered. Each method of collection is



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specific and therefore care must be taken when collecting information. Using the wrong method of collection of information can lead to it becoming inadmissible or result in breaches of the Privacy Act.

The common methods that are available to collect information are:

- Section 12 of the Social Security Act
- Section 11 of the Social Security Act
- Section 81 of the Social Security Act
- Section 307 of the Education Act
- Any publicly held information
- The Ministry's computer system and client documentation

Other methods available for investigators to use are using the provision of section 29(1)(c) of the Privacy Act or by executing a search warrant with the Police using section 198 of the Summary Proceedings Act.

### **Section 12**

The Act provides the authority for officers to investigate claims for benefit pursuant to Section 12 of the Act. The officer may investigate the client's circumstances that existed immediately prior to the grant of benefit or during the period the benefit was paid.

This section allows officers to interview clients or any other person who has knowledge of their circumstances. Questions can also be asked of any person as to the means, earning capacity and economic circumstances of any person so that a report can be provided to the court under the Family Proceedings Act 1980 in respect of maintenance proceedings.

### **Duty to answer questions**

The section places a duty on the person being interviewed to answer all questions put to them concerning any application for benefit or any person who is or has been in receipt of a benefit or concerning any statement contained in an application for benefit.

While there is a duty for every person to answer an officer's questions there is no statutory power to enforce this if they fail to do so.

### **Delegation**

This power to investigate pursuant to section 12 of the Act is given to the Chief Executive or an officer acting with the Chief Executive's authority. This authority is achieved by way of delegation. The delegation can be made to a specific person or a specified class of persons or the holder/s of a specified office.

These delegations can be revoked but will not take effect until communicated to the officer/s concerned.

## **Admissibility of statements obtained under Section 12**

Most interviews conducted with clients are done so under the provisions of Section 12 and 81. Questions sometimes arise as to the admissibility of statements taken under this authority by a person accused of committing an offence because of the 'duty' imposed on every person to answer the Ministry's questions.

The duty to answer questions is in conflict with an accused person's right to silence under the Common Law (including the District Court Rules, which apply to Police officers only) and the New Zealand Bill of Rights Act 1990.

Case law has determined that the obligation imposed by the New Zealand Bill of Rights Act on enforcement officers (such as the right to consult a solicitor) do not apply to the Ministry – as Ministry Investigators do not have the power to arrest and detain an accused person.

However in order for a statement made by an accused person to be admissible in criminal proceedings against that person, the statement must have been made voluntarily and obtained fairly. To satisfy this requirement, the Ministry has formulated a 'caution' which should be read to clients when being interviewed about suspected criminal matters.

### **Caution**

The caution to be used by the Ministry is set out below. (Other modules of this training package explain when it is appropriate to use the 'caution').

*"We have received information regarding your benefit entitlement and I would like to talk to you about it.*

*You are not being detained and you are free to leave OR you can ask me to leave at any time.*

*You do not have to answer my questions however anything you do say may be written down and used in evidence."*

### **Section 11**

Section 11 relates to the Chief Executive's *power to obtain information and identifies certain offences in relation to that power.*

Section 11(1) requires any person to provide the Ministry with such information as the Chief Executive requires to or to furnish information or documents in the custody of or under the control of that person, and to allow copies of or extracts from any such document to be made or taken.

The information requested must be for a purpose set out in Section 11(2). This section outlines that, among other things, the purpose must be to determine a persons entitlement to benefit, that is being claimed for or the rate in which a client could have or can receive a benefit.

The request for such information must be in writing and the Code specifically refers to this as a 'Section 11 Notice'.

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Every Section 11 notice requires the person to provide this without charge and to produce the information within a specified time (no less than 5 working days).

In September 1997 the Social Security Act 1964 was amended by adding two new Sections; 11B and 11C. These sections provide a Code of Conduct that applies to the use of powers to obtain information under Section 11 of the Act.

Section 11B of the Act requires the Chief Executive to issue this Code after consultation with the Privacy Commissioner and to publish it in a form that is accessible to the public. Copies can be obtained free of charge from any office of the Ministry of Social Development or from the MSD website [www.msd.govt.nz](http://www.msd.govt.nz) (locate this document now).

Following the introduction of the new Sections of the Act the first Code of Conduct was issued in December 1997. This has been revised and replaced from time to time with the most recent and applicable Code was last renewed on 23 May 2005.

### **Information collecting powers**

The Ministry of Social Development collects personal information. Sometimes the information is collected directly from the client on application forms or during interviews. Occasionally it is collected by using statutory powers.

Where the Ministry is given special statutory powers to obtain information, these powers override the Privacy Act. Section 11 of the Act permits authorised staff to require any person to provide information or documents for any of the purposes set out in section 11(2) of the Act.

This Code deals only with the exercise of powers to obtain information under section 11(1). It does not affect the rights that officers have, to request information under Section 12 and Section 81 of the Act (discussed in this Unit).

### **Reasons for a code of conduct**

Parliament has recognised that the powers given to Ministry of Social Development to compulsorily obtain information can be intrusive and should be balanced with a Code that governs the way in which those powers are to be exercised.

### **The "Code"**

When seeking private information about a client or the other person the Code requires the Ministry to;

- first request the information or document from the client or that other person
- give the client or the other person a reasonable time to provide the information or documents

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specific and therefore care must be taken when collecting information. Using the wrong method of collection of information can lead to it becoming inadmissible or result in breaches of the Privacy Act.

The common methods that are available to collect information are:

- Section 12 of the Social Security Act
- Section 11 of the Social Security Act
- Section 81 of the Social Security Act
- Section 307 of the Education Act
- Any publicly held information
- The Ministry's computer system and client documentation

Other methods available for investigators to use are using the provision of section 29(1)(c) of the Privacy Act or by executing a search warrant with the Police using section 198 of the Summary Proceedings Act.

### **Section 12**

The Act provides the authority for officers to investigate claims for benefit pursuant to Section 12 of the Act. The officer may investigate the client's circumstances that existed immediately prior to the grant of benefit or during the period the benefit was paid.

This section allows officers to interview clients or any other person who has knowledge of their circumstances. Questions can also be asked of any person as to the means, earning capacity and economic circumstances of any person so that a report can be provided to the court under the Family Proceedings Act 1980 in respect of maintenance proceedings.

### **Duty to answer questions**

The section places a duty on the person being interviewed to answer all questions put to them concerning any application for benefit or any person who is or has been in receipt of a benefit or concerning any statement contained in an application for benefit.

While there is a duty for every person to answer an officer's questions there is no statutory power to enforce this if they fail to do so.

### **Delegation**

This power to investigate pursuant to section 12 of the Act is given to the Chief Executive or an officer acting with the Chief Executive's authority. This authority is achieved by way of delegation. The delegation can be made to a specific person or a specified class of persons or the holder/s of a specified office.

These delegations can be revoked but will not take effect until communicated to the officer/s concerned.

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- give the client or the other person a reasonable time to provide the information or documents

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This request is often referred to as a preliminary request. The client or the other party must be notified of time frame given and the request must comply with privacy principle 3 of the Privacy Act 1993.

A Section 11 notice may be issued directly to the source when the client or other party, refuse to provide the information or they fail to do so within the reasonable time frame given.

There are exceptions where an officer may not be required to issue a preliminary prior to requesting the information directly from to source.

Where there is a reasonable cause to believe that compliance with this part of the Code would prejudice the maintenance of the law the Ministry may request the information or documents directly from the source in the form of a Section 11 notice.

### **Prejudice to the maintenance of the law**

Prejudice the maintenance of the law includes an action that would, or would be likely, to:

- a) prejudice –
  - i) the prevention, detection, investigation, prosecution or punishment of an offence; or
  - ii) the imposition of a pecuniary penalty; or
- b) result in the beneficiary leaving New Zealand with intent to defeat an investigation into his or her entitlement to a benefit; or
- c) result in the beneficiary destroying or otherwise tampering with relevant evidence; or
- d) prevent the officer from giving a preliminary request because officer knows that the person does not reside at the address held by the Ministry and cannot be contacted through that address; or
- e) in a case where a prosecution has been commenced against a beneficiary, involve the beneficiary incriminating himself or herself.

### **The "Notice"**

A notice requiring any person to provide information or produce documentation must;

- a) be in writing; and
- b) advise of the existence of this Code and notify the person to whom the notice is given how that person can view or obtain a copy
- c) specify that the notice is given under section 11 of the Act; and
- d) specify the information or documents sought; and

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- e) specify the date by or period within which the recipient must provide the required information or documents and the manner of production; and
- f) notify the recipient of their right to complain to the Privacy Commissioner that the notice breaches the Code; and

### **Privilege and limitations**

The ability to obtain information under Section 11(1) does not require a person to produce any information or document that would be privileged in a Court of Law on the ground of self-incrimination. Privilege in this context means that the person will not be compelled to disclose matters whether in his/her evidence or by producing documents that would incriminate them in the commission of an offence.

Subsection (5)-(7) of Section 11 allow for legal professional privilege. This means that confidential communications between a party of their legal advisor is protected from disclosure in evidence in any civil or criminal proceeding. This privilege does not extend to solicitors trust accounts and the information contained therein.

The question of privilege can be brought before a District Court Judge and any claim of privilege can be tested there. There is a Direction issued by the Director-General that the Ministry is precluded from prosecuting for an offence where the person concerned has refused to supply or to produce information or documents basing that refusal on privilege of the type available for witnesses in a Court of law, for example, a communication made between a lawyer and client.

The Guidelines to the Code of Conduct outlines further limitations on what may be requested from specified groups. These include the employment sector, education sector and medical professional sector.

Obtain a copy of the Guidelines to the Code of Conduct and familiarise yourself with these.

### **Offences**

There are two offences contained in Section 11(3). First, it is an offence for a person to refuse or fail without reasonable excuse to comply with a notice under Section 11 to the extent that the person is capable of complying with it.

The second offence arises where a person "knowingly or recklessly furnishes information that is false or misleading in any material particular" in purported compliance with a notice, or attempts to do so.

The penalty for such an offence is a fine not exceeding \$2,000.00.

### **Section 81**

As outlined above this section provides investigation powers, it also provides information collection powers.

*may require the beneficiary or his or her spouse or partner to provide any information or to answer any relevant question orally or in writing*

As mentioned in section 12 sometimes the collection of this information can cause admissibility issues and again a caution should be administered.

### **Section 307**

The two subsections of section 307 of the Education Act 1989 provide the powers available to an Investigator to collect information in relation to suspected student fraud.

#### **Section 307(3) – Power to require Student to Supply Documents**

"The Secretary (or any person authorised for the purpose by the Secretary) may, by written notice to any recipient, require the recipient to do all or any of the following things:

- (a) Produce to the Secretary (or authorised person) any papers, documents, records, or other things, relevant to the recipient's entitlement at any time—
  - i) To a statutory allowance or student loan; or
  - (ii) To be paid a statutory allowance at a particular rate or any amount of a student loan, that are in the person's possession or under the person's control;
- (b) Allow copies of any such papers, documents, or records to be made;
- (c) Give the Secretary (or authorised person) any information or particulars relevant to the recipient's entitlement at any time—
  - (i) To a statutory allowance or student loan; or
  - (ii) To be paid a statutory allowance at a particular rate or any amount of a student loan that is required by the Secretary (or the authorised person)".

#### **Section 307(4) - Power to investigate student fraud**

"The Secretary (or any person authorised for the purpose by the Secretary) may investigate the circumstances at any time of any recipient so far as they may relate to the recipient's entitlement at any time —

- (a) to a statutory allowance or student loan; or
- (b) to be paid a statutory allowance at a particular rate or any amount of a student loan."



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**Section 307(5) - Duty to answer questions**

"A person (whether or not a recipient) who is asked questions during an investigation under subsection (4) must answer the questions."

**Education Act and the Social Security Act**

These statutes provide the same concept for obtaining information but there are slight variances that need to be considered when conducting any investigations.

It is not uncommon for a student to transfer between an allowance/loan to an Unemployment Benefit – Student Hardship, when these cases become the subject of an investigation more care would need to be given when planning an enquiry. This is to ensure that the correct statutes are used for the given period that each type of assistance was paid for.

For more information on how to investigate student fraud, please refer to the Student Fraud Guidelines on:

<http://doogie.ssi.govt.nz/resources/helping-clients/policies-standards/integrity/nfi/legal/investigating-suspected-student-allowance-and-student-loan-fraud.html>

**PUBLIC INFORMATION**

In New Zealand there are many records held that are public records. Examples of these are birth records, land property ownership, electoral roll, white and yellow pages, car registration and anything recorded in the media.

A newer form of information held in social network sites (which have not been locked) can provide some valuable information for an investigation.

**MINISTRY'S COMPUTER SYSTEM - SECURITY ACT**

As mentioned above the Ministry collects vast amounts of information from clients. Not only do you need this information to prove a charge of fraud it can also provide leads such as landlords names and addresses.

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**NEXT UNIT - UNIT L4: Obligations, Reviews and Debt**

RELEASED UNDER THE  
OFFICIAL INFORMATION ACT

# INVESTIGATION UNIT TRAINING PACKAGE

(L)

## LEGISLATION & CASE LAW MODULE

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MODULE 1: LEGISLATION & CASE LAW  
Unit L4: Obligations, Reviews and Debt

**Unit L4: Obligations, Reviews and Debt**

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**Objectives**

**By the end of this unit you will:**

- understand why clients are obliged to tell us about changes of circumstances that affect their benefit
  - understand debt/overpayments
- understand how debts/overpayments are recovered

## Obligations, Reviews and Debt

### CLIENT OBLIGATIONS

#### ***Section 80A of the Social Security Act 1964***

Section 80A of the Social Security Act 1964 requires the client to immediately advise the Ministry of any change in their circumstances which may affect their right to receive a benefit or the rate in which they receive it.

The requirement of compliance with this section places an onus on the client to advise of their change in circumstances and is often referred to the 'client's obligations'.

#### ***Section 307 of the Education Act 1989***

Sections 307(1) and 307(6) of the Education Act 1989 places the same responsibility on students to advise the Ministry as soon as practicable of any changes in their circumstances that would materially affect their entitlement to a student allowance or loan and/or to the rate of which the allowance or loan is being paid.

#### ***Change in circumstances***

This section is of relevance to investigations under both the Social Security Act and the Education Act. It applies to both benefit fraud and student fraud. When prosecuting a person it will be necessary to determine that the client knew that their change in circumstances would affect their entitlement to or the rate in which they are being paid a benefit, allowance or loan to successfully conclude a prosecution.

It is usual that these circumstances will be obvious to a client e.g. when a client commences full-time employment or when a client has a change of address.

Sometimes it is less clear. For example, a client may not understand that receiving and spending an inheritance could affect the rate of payment of their benefit.

The Social Security Appeal Authority decided that an appellant receiving a Domestic Purposes Benefit satisfied the requirements of the section when she notified the Ministry only after she exceeded the exemption for earnings, rather than when she commenced employment itself, as commencing employment did not, of itself, affect the rate of benefit.

This section does not provide either an offence or a penalty, therefore no prosecution can be started using this section alone. However, the client's knowledge of their obligations is a requisite for proving an offence.

### ***Section 80 of the Social Security Act 1964***

Section 80 is an extremely complex section which provides very regulatory dates in which various benefits can commence from. It is administered in conjunction with Section 80BA and this part of the Act imposes certain stand-downs on clients based on certain circumstances.

The general rule under this section is that benefits commence on the later of the date upon which the applicant is entitled to receive a benefit or the date the application for it is received.

Section 80AA provides an exception to the date in which benefits can be granted if the Ministry has in some way at an earlier time acted in error.

Section 80 and the manner in which the Ministry's applies this has been tested in the High Court. There the present leading case law does not allow the Ministry to replace one benefit with another in a retrospective manner. (refer to Retrospective Rate Substitution section of this Unit).

## **REVIEWS OF BENEFITS AND ALLOWANCES**

### ***Section 81 of the Social Security Act 1964***

Section 81 of the Social Security Act 1964 allows the Chief Executive to review any benefit from time to time for the purpose of determining whether a client remains entitled to it, may not have remained entitled to it and/or the rate in which the benefit was paid.

Like Section 12 of the Social Security Act 1964 this section also provides an authority to obtain information from the client by requiring them to answer questions or provide information in the manner specified by the Chief Executive.

Section 81(2) and 81(3) gives provision for the Chief Executive to suspend, terminate or vary the rate of payment from a date determined by the Chief Executive once it has proven that the client was no longer entitled to receive it.

### ***Retrospective rate substitution***

Upon a completion of any investigation a decision about previous benefit entitlement would be made. Generally the decisions are done in accordance with Section 81(2) and 81(3) of the Social Security Act 1964.

Careful consideration needs to be given when making these decisions to ensure that guiding principles of Section 80 and Section 81 are not compromised.

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A leading High Court decision; *Department of Work and Income – v- Moody* further outlines (among other issues) how the Ministry needs to determine a client's previous entitlement to benefit when retrospectively reviewing entitlement.

This case confirms that the Ministry can not substitute one benefit with another when making a decision about entitlement in a retrospective manner.

For example the Ministry could not go back in time and substitute an Unemployment Benefit for the cancelled Domestic Purposes Benefit once it had been proven that a client did not have a dependant child in their care. However if Accommodation Supplement was received by the client during the period of the review then the rate of payment needs to be adjusted retrospectively as this rate change does not contravene Section 80 of the Act.

The correct application of this part of the Act can be complex and assistance should be sought from Managers, Advisors and Legal Services when required.

***Section 307AAA of the Education Act 1989***

Section 307AAA of this Act allows the Ministry to suspend payment of student allowance has failed or refused to comply with a requirement to produce any document, papers or record.

**DEBT, PENALTY AND RECOVERY**

Both Acts have provision for recovery of debt to the Crown. If a person remains entitled to a benefit or allowance after a debt has been established then the Ministry will recover this by offsetting an amount from their benefit each week.

If payments have been cancelled the recovery of that overpayment will be referred to the Ministry's Collections Unit.

The Collections Unit has the ability to deduct money from bank accounts and wages.

Should your investigation result in large overpayment and the client has substantial asset you could consider referring this to the New Zealand Police asset recovery team.

***Recovery of overpaid benefit or allowance***

It is likely that, if a person has received a benefit, allowance or loan to which they were not entitled or in excess of the amount to which they were entitled, a debt will be established.

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A debt and its recovery can be in respect of any benefit advance, special assistance or any other monies that represents a debt in terms of Section 85(A) of the Social Security Act and 307B of the Education Act.

It is inappropriate to recover overpaid monies whilst the decision is the subject of a review or appeal under both Sections 10A and 12J of the Social Security Act and 304 and 305 of the Education Act.

Recovery under these circumstances should only occur if the client agrees to continue recovery of the overpayment.

***Section 86 of the Social Security Act 1964***

This section is a wide ranging part of the Act, which present different features of debt recovery. The section provides for the Ministry to recover an overpayment. It also allows the Ministry to impose a monetary penalty if the client has obtained benefit by way of fraud.

This section also provides provision to write off any debt that has been caused because the Ministry has made an error (refer to Provisional Write off section of this unit). The Ministry must have considered whether the debt should be provisional written off before it commences or seeks recovery of that debt.

***Section 307B of the Education Act 1989***

This section allows the Ministry to recovery any student allowance by deduction from any future allowance. It also provides an opportunity to recover any student allowance debt from any future benefit payments.

Student Loan is just that a loan, the recovery of these loans are managed by the Department of Inland Revenue, however if the loan becomes a debt because they were not entitled to section 307B provides that the Ministry can recovery this from any future allowance or benefit.

**MORE INFORMATION ABOUT DEBT AMOUNTS AND RECOVERY**

As mentioned above section 86 has provisions to impose a penalty and apply decisions as to whether a debt should be provisionally written off. Case law has also provided some guidelines that need to be applied when considering recovery of debt.



### ***Recovery and Prosecution***

So far we have outlined debt in terms of the Social Security and Education Act. Any debt established under these Acts is a debt to the Crown however they are what is referred to as civil debt.

Once you have determined to refer a matter of fraud to the District Court recovery of an overpayment should continue to be sought even where criminal proceedings have been initiated by the Ministry due to suspected fraud. Generally the Ministry will not seek a reparation order through the Criminal Judiciary as we will rely on the recovery powers set out in the Acts.

Reparation orders are restrictive. The weekly amount ordered and the period in which it is imposed often means that the entire debt is not recovered. It also requires both the Ministry of Justice and our Ministry to administer recovery of the same debt.

In the District Court the matter of the level of debt incurred by way of fraud generally is only relevant to the District Court Judge when determining what sentence he/she may impose if the client is convicted of the fraud.

Leading case law IOANE requires the Ministry to calculate what a net loss to the Ministry would be if the client had told the truth (This process is in the opposite of Retrospective Rate Substitution).

IOANE is a manual assessment only for sentencing purposes and the Ministry will continue to seek recovery of the full overpayment.

The Ministry will continue to seek recovery of any debt to the Crown regardless of any sentence that may be imposed by the District Courts in a prosecution case.

### ***Overpayment***

The amount of the actual and recoverable overpayment has been the subject of varying law changes and case law decisions. Through case law the amount to be recovered will be established as follows:

- the net amount of benefit ie, after deduction of tax (*see Department of Social Welfare v Allan (1993) 10 CRNZ 307*)
- the net amount of benefit in excess after retrospective rate substitution has been assessed.
- the net amount of benefit paid in excess after considering whether the overpayment should be written off pursuant to Section 86(9A) of the Act

### ***Penalties***

Where the overpayment was obtained by the customer as a result of fraud, a penalty of up to 3 times the amount of the excess payment can be imposed.

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The criteria for the imposition of such penalty are set out in s.86 (2A) of the Act and provide that a penalty can be imposed:

- after notice of such imposition of a penalty is given to the client and the client has exhausted any right of review of that decision to impose a penalty
- if the client has not been prosecuted

The criteria for deciding whether fraud has been established against the client are effectively the same as Section.127 of the Act.

Because of the serious nature of both the penalty and the allegation of fraud, the necessary burden of proof is the onus of the Ministry. The required level of proof must be persuasive enough to confirm that on the balance of probabilities the client committed fraud.

### ***Provisional debt write-offs***

On 26 September 2002 Parliament amended the Act in relation to Section 86(9A) and introduced Section 86(9B). These sections require the Ministry to apply a provisional write off test to all review actions that result in an overpayment being established.

Before a debt can be provisionally written off, all of the following criteria must be satisfied:

- was caused wholly or partly by an **error** to which the debtor did not intentionally contribute to
- the debtor received the money in good faith
- changed his or her position in the belief that he or she was entitled to that sum and would not have to pay or repay that sum to the chief executive;
- it would be inequitable in all the circumstances to require a repayment.

Section 86(9B) outlines what constitutes an office error. This section must be administered in conjunction with Section 86(9A).

All the above criteria have had a wealth of case law in their interpretation and, generally, a common sense approach to *each* criterion is likely to result in a proper decision. If there are any difficulties, please approach Legal Services.

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**NEXT UNIT - UNIT L5: Offences**

# INVESTIGATION UNIT TRAINING PACKAGE

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## LEGISLATION & CASE LAW MODULE

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Unit L2	<i>The Acts Administered by the Ministry</i>
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**Unit L5: OFFENCES**

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**Objectives**

**By the end of this unit you will be able to:**

- identify what sanction you could impose
- identify offences
- define the legal terms involved

## Offences

### Introduction

Through out all of the phases of your investigation the aim of proving whether a client was entitled to payment and whether they had committed an offence was paramount.

Once you have determined that a client has been overpaid, that if they have obtained that payment by way of fraud you would need to determine what sanction you will impose.

The Ministry sanctions fraud by way of:

- issuing a warning letter
- imposing a monetary penalty or
- referring the case for prosecution

The Ministry's policy guidelines will assist you in imposing the appropriate sanction and can be found at:

[http://doogie.ssi.govt.nz/map/fraud\\_investigation/fraud\\_investigation-29.htm](http://doogie.ssi.govt.nz/map/fraud_investigation/fraud_investigation-29.htm)

Before imposing any of these sanctions you must first confirm that an offence has been committed.

Most common frauds that you will come across as a Fraud Investigator for the Ministry will be:

- Section 127 of the Social Security Act
- Section 307AA of the Education Act
- Section 240 of the Crimes Act
- Section 228 and 229 of the Crimes Act
- Section 256 of the Crimes Act
- Section 66 of the Crimes Act

There are other possible offences and charges in the Crimes Act that could be committed such as altering a document or using an altered document but these do not occur very often.

If your decision is to impose a sanction that refers the case for prosecution then further consideration as the type of charges you will lay would need to be considered.

Most fraud offences can be classified by dividing them into two component parts;

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- **Actus Reus** (the physical act or omission and the surrounding circumstance)
- **Mens Rea** (a guilty mind or the mental elements)

These two elements make the offence complete and as an investigator, your investigation **must** establish these two components.

As explained in Obligations, Reviews and Debt module it is important that you establish that the client knew and understood their obligations as this will assist in proving that the client had a guilty mind.

To establish the commission of an offence, all offences require each ingredient to be proven. Ingredients are simply words or phrases that are written into statute which, together, create an offence. These words or phrases later form the basis of the 'charge' when an offender is prosecuted.

Ingredients of offences can be likened to baking a cake. If one ingredient is missing the cake turns out a failure. Likewise with an offence, if an ingredient is not proven, the offender will not be convicted.

### **Section 127 of the Social Security Act 1964**

*Section 127 States:*

"Every person who makes any statement knowing it to be false in any material particular, or who willfully does or omits to do or say anything for the purpose of misleading or attempting to mislead any officer concerned in the administration of this Act or any person whomsoever, for the purpose of receiving or continuing to receive (for himself or for any other person), or which results in himself or any other person receiving or continuing to receive -

- a) any benefit under this Act or the Social Welfare (Transitional Provisions) Act 1990; or
  - b) any exemption from any obligation under this Act; or
  - c) any payment from the Crown Bank Account in accordance with this Act; or
  - d) any entitlement card issued under regulations made pursuant to section 132A of this Act; or
  - e) a more favourable means assessment than he or she would otherwise have been entitled to under section 69F of this Act
- commits an offence and shall be liable on summary conviction to imprisonment for a term not exceeding 12 months or to be a fine not exceeding \$5,000.00, or to both imprisonment and a fine."

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**Offences**

Under section 127 it is an offence for any person knowingly to make a false statement, or willfully to do or say anything or omit to do or say anything for the purpose of misleading or attempting to mislead anyone.

The purpose or result of that act or omission must be for the receipt or continued receipt by any person of any benefit, exemption or payment under the Act or of obtaining any entitlement card or more favourable means assessment.

The offence carries a penalty of imprisonment for a term not exceeding 12 months and/or a fine not exceeding \$5,000.00.

**Ingredients of Section 127 of the Social Security Act 1964**

Section 127 sets out two separate offences:

- a) the making of a false statement in any material particular
- b) wilfully omitting to do or say anything for the purpose of receiving any benefit.

To establish the commission of an offence, all offences require each ingredient to be proven. Ingredients are simply words or phrases that are written into statute which, together, create an offence. These words or phrases later form the basis of the 'charge' when an offender is prosecuted.

Ingredients of offences, can be likened to baking a cake. If one ingredient is missing the cake turns out a failure. Likewise with an offence, if an ingredient is not proven, the offender will not be convicted.

The ingredients contained in S127 are:

- person (The accused) (1)
- makes any statement knowing it to be false in any material particular (2)
- wilfully says or does (2a)
- wilfully omits to say or do anything (2b)
- purpose of misleading (3)
- attempting to mislead (3a)
- purpose of receiving (4)
- continuing to receive (4a)
- any benefit under the Social Security Act 1964 (5)

Ensuring the suspects identity is crucial, in all investigations. Certain cases, for example multiple benefits, would require the investigator to be 100% certain of the suspect's true identity.

## Section 307AA of the Education Act 1989

*Section 307AA of the Education Act states:*

- (1) A person commits an offence against this Act, and is liable on summary conviction to a fine not exceeding \$2,000, who, in response to a requirement under subsection (3) or a question asked under subsection (5) of section 307, knowingly—
  - (a) makes a false or misleading statement; or
  - (b) makes a statement from which any material matter has been omitted; or
  - (c) provides any false or misleading paper, document, or record; or
  - (d) provides a paper, document, or record from which any material matter has been omitted.
- (2) A recipient or non-recipient commits an offence against this Act and is liable on summary conviction to a fine not exceeding \$2,000 who refuses to comply with section 307(5).
- (2A) A recipient commits an offence and is liable on summary conviction to imprisonment for a term not exceeding 12 months or a fine not exceeding \$5,000 if he or she, for the purpose of receiving or continuing to receive a statutory allowance or student loan, or a statutory allowance at a particular rate or any amount of a student loan, other than that to which he or she is entitled,—
  - (a) knowingly makes a false or misleading statement in an application for a statutory allowance or student loan; or
  - (b) knowingly makes a false or misleading statement in a notification of a change in the recipient's circumstances that materially affects his or her entitlement at any time—
    - (i) to a statutory allowance or student loan; or
    - (ii) to be paid a statutory allowance at a particular rate or a particular amount of a student loan; or
  - (c) wilfully fails to comply with section 307(6).
- (3) Despite section 14 of the Summary Proceedings Act 1957, an information for an offence against this section may be laid at any time within 12 months after the offence was brought to the Ministry's attention.

### ***Ingredients of Section 307AA of the Education Act 1989***

(Knowingly providing false or misleading information)

To establish that someone is guilty of knowingly providing false or misleading information when required or answered a question when asked the following things have to be confirmed:



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- That the student was in receipt of Student Allowance or Student Loan
  - That the student worked / had income / was in a relationship etc.
  - That the student knew of the obligation to advise of the work / income / relationship etc.
- AND
- That the student made a false / misleading statement in a form or interview
- OR
- That the student made a statement, from which a material matter, was omitted
- OR
- That the student provided a false or misleading paper / document / record,
- OR
- That the student provided a paper / document / record, from which a material matter was omitted.

**Omission – Section 307AA(2A)**

To establish that someone is guilty of a wilful failure to provide information the following things have to be confirmed:

- That the student was in receipt of Student Allowance / student loan / student allowance at a rate / amount of student loan
  - That the student worked / had income / was in a relationship etc.
  - That the Chief Executive of the Ministry of Social Development or Institution has not been notified
  - That the student knew of the obligation to advise of the work / income / relationship etc.
  - That the student did not advise for the purpose of receiving / continuing to receive a student allowance / student loan / student allowance at a rate / amount of student loan other than that to which s/he was entitled
  - That the student did receive a student allowance / student loan / student allowance at a rate / amount of student loan other than that to which s/he was entitled
- AND
- that the student was working (or employed) for Employer Ltd

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OR

- that the student s/he was receiving income exceeding the amount of the income limit

OR

- that the student was working (or employed) for Employer Ltd

OR

- that the student or their spouse were receiving income exceeding the amount of the income limit

### Definition of terms

Makes:

As soon as a person signs a statement, application, renewal etc, they are deemed to have made the contents of those documents their statement.

*Smith v Police [1985] BCL1183*

Statement:

The word statement is sufficiently wide to cover any form of representation, whether written or oral.

*Police v McNaughton [1970] NZLR 889, 891*

Knowing it to be false:

An investigator needs to prove the suspects true circumstances, in order to show that the information given to the Ministry was false.

ie:

*If a suspect states that they are a solo parent, the investigator needs to gather evidence to prove the falsity of the statement.*

Material Particular:

Something that is material particular is something that goes to the root of the offence.

eg:

*A rent book supporting an application for Special Benefit, is a document that goes directly to the grant, of a Special Benefit and therefore if false, statement in a material particular.*

would be a

wilful omission:

a wilful omission in this context means a deliberate failure to tell the Ministry about something which the person concerned knows should be the subject of advice to the Ministry. In that instance it would normally be a reasonable inference that the person's purpose was to mislead. The crucial question is whether the customer was aware of the need to inform the Ministry of the matter in question.

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Latham v Department of Social Welfare (unreported  
High Court AP 311/93)

It is critical to ascertain as an investigator, that the suspect had sufficient knowledge of the entitlement criteria, for the benefit they were receiving.

Once this is established, it follows that any false statement in a material particular made by the suspect, would be for the purpose of misleading.

If the Ministry was not misled, due to the suspect's false statements, the suspect could still be charged with attempting to mislead an officer of the Ministry.

An investigator needs to show that the false statements made by a suspect were for the purpose of receiving/continuing to receive a benefit under the Social Security Act.

A charge relating to *receiving* would generally be used on applications for benefits. Conversely, a charge relating to *continuing to receive* would relate to applications for renewal, resumption or continuation of benefits.

This ingredient can best be proven by questioning the suspect

eg: *What do you think would happen to your benefit if you returned your renewal?*

*Why did you apply for Unemployment benefit? etc*

The word "benefit" in this section, relates to benefits paid under the Social Security Act.

Proving that the suspect actually received the money can best be achieved by:

a) Questioning the suspect:

eg: *Did you receive benefit payments into your account for the period...?*

*Did you draw money from that account during the period...?*

or if the response above is in the negative, then:

b) Utilising the Ministry's computer records, and/or

c) Obtaining the customers bank statements

### Timeframes

Both the Social Security Act and Education Act charges must be laid within 12 months of the facts alleged in the information have been brought to the notice of an officer of the Ministry. It has been interpreted to mean that time will generally run from the time when the officer has sufficient information of the

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likelihood of the commission of an offence to justify an investigation of the matter.

Time would not necessarily run from the receipt by the officer of an allegation of the commission of an offence. *Russell v Wirihana* [1986] BCL 1777. This may not be the case if the allegation provided very detailed information of the alleged offending. The date which the allegation was received is generally the best guide to use when conducting an investigation.

### Section 240 of the Crimes Act 1961

#### Obtaining by deception or causing loss by deception

- (1) Every one is guilty of obtaining by deception or causing loss by deception who, by any deception and without claim of right,—
  - (a) obtains ownership or possession of, or control over, any property, or any privilege, service, pecuniary advantage, benefit, or valuable consideration, directly or indirectly; or
  - (b) in incurring any debt or liability, obtains credit; or
  - (c) induces or causes any other person to deliver over, execute, make, accept, endorse, destroy, or alter any document or thing capable of being used to derive a pecuniary advantage; or
  - (d) causes loss to any other person.

(2) In this section, *deception* means—

- (a) a false representation, whether oral, documentary, or by conduct, where the person making the representation intends to deceive any other person and—
  - (i) knows that it is false in a material particular; or
  - (ii) is reckless as to whether it is false in a material particular; or
- (b) an omission to disclose a material particular, with intent to deceive any person, in circumstances where there is a duty to disclose it; or
- (c) a fraudulent device, trick, or stratagem used with intent to deceive any person.

## Section 228 and 229A of the Crimes Act 1961

These sections have identical ingredients to prove. Section 229A was repealed on 1 October 2003 and 228 introduced.

Many of the Ministry's investigations and prosecution cases span over a number of years and if you are prosecuting a case where a client has used a document prior to 1 October 2003 you would lay a charge under section 229A.

### Dishonestly taking or using document

- Every one is liable to imprisonment for a term not exceeding 7 years who, with intent to obtain any property, service, pecuniary advantage, or valuable consideration,—
  - (a) dishonestly and without claim of right, takes or obtains any document; or
  - (b) dishonestly and without claim of right, uses or attempts to use any document.

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**NEXT UNIT - UNIT L6: Reviews and Appeals**

RELEASED UNDER THE  
OFFICIAL INFORMATION ACT

# INVESTIGATION UNIT TRAINING PACKAGE

(L)

## LEGISLATION AND CASE LAW MODULE

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Unit L2	<i>The Acts Administered by the Ministry</i>
Unit L3	<i>Investigative Powers and Information Gathering</i>
Unit L4	<i>Obligations, Reviews and Debt</i>
Unit L5	<i>Offences</i>
<b>Unit L6</b>	<b><i>Reviews and Appeals</i></b>
Unit L7	<i>Conjugal Status</i>
Unit L8	<i>Official Information and Privacy Act</i>
Unit L9	<i>Other Relevant Acts</i>
Unit L10	<i>Case Law Policies and Precedents</i>

## Unit L6: REVIEWS & APPEALS

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### Objectives

By the end of this unit you will be able to:

- understand the route of a review of decision
- be aware of what decisions can be reviewed/appealed
- be familiar with the review and appeal process



## Reviews & Appeals

### *Introduction*

People may apply to have a decision made by Ministry staff reviewed if they disagree with it.

### *Social Security Act 1964*

A review of decision is an opportunity for:

- the applicant to advise that they disagree with a specific decision made
- the Ministry to ensure that legislation has been applied correctly, this includes the appropriate exercise of discretion

An applicant can apply in writing for a Review of Decision (this may be in a letter, email or an application form) where they have received formal notification of (and do not agree with) a decision which has been made under the provisions listed in section 12J of the Social Security Act. This includes decisions made under:

- the Social Security Act 1964
- a programme under section 124(1)(d) of the Social Security Act 1964
- part I of the Social Welfare (Transitional Provisions) Act 1990 or Part 6 of the War Pensions Act 1954
- part Y of the New Zealand Superannuation and Retirement Income Act 2001
- the Family Benefits (Home Ownership) Act 1964 or
- regulations in force under section 132A or section 155 of the Social Security Act 1964.

The Ministry records and monitors the progress and outcomes of all reviews lodged. Currently these are recorded in a computer system named 'HIYA'.

### *Applications for review*

Section 10A of the Social Security Act 1964 allows a client to apply for a review of certain decisions made within the Social Security Act. The section also confirms that an application for a review must be received in writing, 10A (1A) and within three months 10A (1b) (a) of the client being notified of the decision that was made.

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Section 10A (1B) (b) does allow for a review to still be considered if it has been received outside the allowable three month timeframe. However the Benefit Review Committee must first confirm that the applicant has good reason for their delay in applying. Only once a Committee has agreed that there is a good reason for the delay can they consider the substantive issue of the review being sought.

The Report to the Benefits Review Committee should be completed on the out of time issue only. The committee must consider whether there is good reason for the delay. If the committee finds that there were no good reasons for the delay, the committee should decline to hear an application for review more than 3 months after notification of the decision. It should not consider the substantive issue. The applicant does not have the right of appeal to the Social Security Appeal Authority if a committee determines that there are no grounds for the decision to be reviewed outside of the three month timeframe.

### ***Internal review***

The first stage in the process is to re-examine the decision being reviewed. It is important that any new information provided by the applicant is taken into account at this point. If the result of that review is to uphold the original decision in whole or in part the matter must then be referred to the Benefit Review Committee ("the Committee"). A report to the Committee is prepared this can be by the original decision maker or report writer.

### ***When you do not have to complete the internal review template***

If you find that the original decision made was clearly incorrect it may be unnecessary for you to complete the Internal Review template. A discussion with your manager or another senior staff member may be sufficient. Ensure that any decisions made are documented on the applicant's file, in HIYA-ROD and in CMS, UCVII. HIYA should always be updated to reflect the decision and fully noted.

### ***Report to the BRC***

The report is a crucial document in the BRC process as it tells the story to the Benefits Review Committee who are not familiar with the events of the case. It may also help clarify matters for the applicant so that, although they may not agree, they may understand why the particular decision was made. The report is also to ensure that the process is open and the applicant knows fully how the Ministry came to the decision.

There is more information on doogle page to help you with writing a constructive and thorough report.

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<http://doogie.ssi.govt.nz/resources/helping-staff/procedures-manuals/review-decisions/report-writers.html>

There will be "experts" in your region or business unit that have undergone the report writing training. Utilise the knowledge of these experts to assist you when you are writing your report alternatively the Client Advocacy and Review team can assist:

[MSD\\_Review\\_of\\_Decision\\_Team@msd.govt.nz](mailto:MSD_Review_of_Decision_Team@msd.govt.nz)

There are sample reports available on doogie, those can be located via the following link

<http://doogie.ssi.govt.nz/resources/helping-staff/procedures-manuals/review-decisions/report-writers.html>

Once the report has been prepared and had a thoroughly rigorous Quality Assurance check it is submitted to the Benefit Review Coordinator who will contact the Applicant to arrange a suitable venue, time and date to hear the case. The Ministry, the applicant, their Advocate, Lawyer or support people are invited to attend the hearing.

### **Constitution of Committee**

Section 10A sets up review committees which are known as Benefit Review Committees.

The Benefits Review Committee is made up of three members. Two members are from the Ministry of Social Development and the third member is a community representative. The Social Security Act 1964 (10A (7)) sets out that the committee contains:

- Two staff members. The staff members must have had no prior involvement with the decision being reviewed. This prohibition includes such activities as signed off correspondence. This includes computer-generated letters with electronic signatures of Service Centre Managers.
- A community representative appointed by the Minister to represent community interest, and who is resident, or closely associated with the region.

All three members of the panel must be present at the hearing to make a decision.

The applicant can object to any member being part of the Benefits Review Committee, by stating the reasons for his or her objection. If grounds are found for disqualification, or there is an issue with a particular panel member that will

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interfere with the process of natural justice, that panel member is usually replaced. The applicant would usually discuss this with the Benefits Review Co-ordinator.

### **Disqualification**

No member of the Benefits Review Committee can hear a case if he or she:

- Has a direct financial or personal interest in the outcome;
- Has had any prior involvement in the case;
- Has some personal connection with the applicant, presenter or witness(es) – apart from working relationships;
- Has a personal prejudice for or against a person(s) involved in the case;
- Has pre-decided the case and come to it with a closed mind.

If any of these criteria apply the BRC member (including community representatives) must disqualify him or herself from the hearing.

It is important that panel members consider any small contact with the applicant when considering disqualification. This may cause difficulties in service centres in isolated areas; however it is important that the integrity of the BRC process is maintained.

### **Jurisdiction - can the BRC review the decision?**

The BRC cannot review a decision (i.e. the BRC does not have jurisdiction) if:

- it is not a decision listed in section 12J of the Social Security Act
- the matter has been heard previously by the BRC or by another judicial body
- the review is outside the three month review period and the committee considers there is not a good reason for delay

### **What can't be reviewed under section 12J?**

A client has no right of appeal to the Appeal Authority (and therefore no right to apply for a Review of Decision):

- for any decision made on medical grounds for Supported Living Payment (health condition, injury or disability), Jobseeker Support (health condition, injury or disability), Child Disability Allowance or Veterans Pension
- for any decision made (on medical grounds or on grounds relating to capacity to work) to require a Jobseeker Support (health condition, injury or disability) client to be subject to, or continue to be, subject to part-time work obligations under section 88F and section 88H of the Social Security Act 1964

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- for any decision to decline or revoke a deferral on medical grounds of Jobseeker Support
- for any decision that the client did not have a good and sufficient reason for failing their drug test obligations, as they are not addicted to or dependant on controlled drugs
- where the application for benefit has lapsed under section 11D of the Social Security Act 1964
- for any decision that has been made on defining job seeker activities

Other areas have a restricted right of appeal only. For example in the case of Residential Care Subsidy applications only the decision relating to income and asset testing can be reviewed. Eligibility for funding or the conditions of funding are decisions not able to be reviewed. Nor is the decision to grant or decline a Residential Care Subsidy Loan.

There are separate appeal provisions for decisions made on medical grounds. More information on medical appeals can be found at the following link:

[http://doodle/map/income support/main benefits/supported living payment/changes and reviews - supported living payment/reviews and appeals supported living payment-08.htm](http://doodle/map/income%20support/main%20benefits/supported%20living%20payment/changes%20and%20reviews%20-%20supported%20living%20payment/reviews%20and%20appeals%20supported%20living%20payment-08.htm)

Other decisions made by the Ministry that are not listed in section 12J and cannot be reviewed include those made in relation to:

- Employment Assistance programmes
- Student Allowance and Student Loans under the Education Act 1989
- Service Complaints.

It follows that there is no right of review to the Benefits Review Committee under these grounds.

### **Reviews and prosecution**

Frequently clients can apply for a review of decision that is also being referred for prosecution action. As mentioned previously the decision made to prosecute a client is not able to be considered by Committee the substantive issue of whether the overpayment is correct can be considered.

The Ministry should not seek adjournments in relation to any review process on the basis of awaiting an outcome of any District Court action. However the applicant may do so. It may be imperative to them to request an adjournment so that they can freely submit their arguments to a Committee with out the fear of further self-incrimination.

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If the applicant does not seek an adjournment and the review hearing is heard before any outcome of the criminal proceedings the Ministry should give the 'caution' to the client at the commencement of the review hearing. This could then allow any admissions or confessions to be called upon for the criminal proceedings and would be admissible evidence in the District Court.

More information on Res Judicata and BRC hearings can be found on the following doogle link.

<http://doogle.ssi.govt.nz/business-groups/helping-staff/corporate-governance/what-we-do/review-decisions/coordinators.html#NFIUResJudicatalettertemplates6>

### ***Procedure on review***

Where the internal review outcome is not favourable or only favourable in part for the applicant, the decision must go before the Benefits Review Committee without any further request from the applicant.

Where the internal review fully overturns the Ministry's decision the issue will generally be resolved. However the applicant may still want to go to the BRC. This is their right and it can occur even though there may be no issue for the BRC to consider.

Where a decision is to go to the BRC for a hearing a Report to the Benefits Review Committee needs to be completed. The information from the internal review will generally form part of the Report to the Benefits Review Committee. (The template for this report is available in HIYA)

Just because the matter has been referred to the BRC, this does not prevent the matter being re-looked at if new information is provided.

The committee must act independently of the Ministry and make a decision within the law. The committee will look at the relevant Law and Policy and how this should be applied in the particular situation and whether the decision was fair and reasonable in line with the relevant Law and Policy.

The Benefits Review Committee can set its own process. The Social Security Act 1964 does not set out a hearing procedure. The BRC needs to clearly state the process for the hearing to each person present at the hearing. The process adopted must be fair and reasonable.

It is essential that the committee's decision reflects the relevant law, and is reached in a fair way. This means that the committee should:

- Check to ensure that the applicable legislation from the time of the original decision is being applied;

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- Identify and understand the requirements of the legislation. For example, when considering whether to recover a debt under s86 (9A) of the Act. The committee should understand what each of the specific requirements in s86 (9A) of the Act mean. For example, considering whether the debt was the result of an error made by the Ministry;
- Consider all the options available to the applicant. For example, the committee should consider not just whether a debt was properly established, but whether that debt should be written off, or not recovered under the provisions of the Act;
- Fully explain the legal constraints and requirements to the applicant and ask the applicant to comment on how he or she meets each specific requirement;
- Decide whether the applicant meets which if any, of the specific legislative provisions you are dealing with. Avoid concentrating on one issue. Look at the case in a holistic way;
- If necessary, use prior Social Security Appeal Authority decisions to assist in deciding a particular case. However, such decisions must be considered carefully. If they are made solely on an Applicant's particular circumstances then you must compare the Applicant's circumstances with those of the appellants.
- Apply rulings by the High Court on interpretation of the law which are binding and must be applied to the facts of the particular case where the facts of the case cannot be distinguished from the facts in the High Court case. If you are unsure of the extent of the application of the ruling to the case you should then consider seeking legal submissions.
- Act within the law.

It is important that panel members understand the difference between law and policy. The function of the BRC primarily is to check the law has been correctly applied. Policy is the Ministry's interpretation of the law and how it should be applied.

### ***Constitution of the Social Security Appeal Authority***

The SSAA is an independent tribunal established under section 12A of the Social Security Act to decide appeals on benefit entitlement. The Ministry of Justice administers the SSAA. Members are appointed by the Governor-General on the recommendation of the Minister.

Decisions of the Authority are referred to by the case number and the year the notice of appeal was filed, for example SSAA decision 73/95 is a decision of the Authority that relates to an appeal filed in 1995. The reference will also state whether the case is reported or unreported.

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**Decisions that can be appealed**

The categories of the decisions that can be appealed to the Authority are set out earlier. The relevant section is S.12J of the Act.

**12J Right of appeal**

- (1) Any applicant or beneficiary affected may appeal to the Appeal Authority against any decision or determination of the chief executive under—
- (a) any of the provisions of Part 1, Part 2 or Part 4; or
  - (b) section 124(1)(d); or
  - (c) Part 1 of the Social Welfare (Transitional Provisions) Act 1990 or Part 6 of the War Pensions Act 1954; or
  - (ca) Part 1 of the New Zealand Superannuation and Retirement Income Act 2001; or
  - (d) the Family Benefits (Home Ownership) Act 1964; or
  - (e) any regulations in force under section 132A or section 155— that has been confirmed or varied by a benefits review committee under section 10A, or that was made by the chief executive other than pursuant to a delegation.
- (1A) An applicant or beneficiary or other person may appeal to the Appeal Authority against a decision—
- (a) that was made in relation to that person by the chief executive under the power conferred by section 19D(1)(a) of the Social Welfare (Transitional Provisions) Act 1990; and
  - (b) that has been confirmed or varied by a benefits review committee under section 10A or that was made by the chief executive other than pursuant to a delegation.
- (1B) Subsection (1) applies to a person in respect of whom a decision or determination is made under Part 4 or under regulations made under section 155 as if the person were a beneficiary.
- (2) The Appeal Authority shall not have the authority to hear and determine any appeal on medical grounds or on grounds relating to incapacity, or capacity for work against any decision or determination of the chief executive in respect of—
- (a) an invalid's benefit; or
  - (b) a child disability allowance under section 39A of this Act; or
  - (c) *Repealed by s.7 (2) of the Housing Restructuring (Income-Related Rents) Amendment Act 2000.*
  - (d) a veteran's pension under section 70 of the War Pensions Act 1954; or
  - (e) a sickness benefit.
- (3) *Repealed by s.4 (2) of the Social Security Amendment Act 2001.*
- (4) Despite subsection (1), the Appeal Authority does not have the authority to hear and determine any appeal against any decision or determination made by the chief executive under section 110 (defining job seeker development activities).

**Procedures on appeal**

Clients can seek a review of any decision regarding their entitlement to a benefit (except some medical decisions that are heard by an independent Medical Review Board).



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Unit L6: REVIEWS & APPEALS

If a client is unhappy with a decision made by Work and Income, Integrity Services or Senior Services they can ask for that decision to be reviewed internally.

If unsatisfied with the outcome of an internal review, the client can ask for the decision to go before a Benefits Review Committee (BRC). If the BRC upholds the original decision, the client then has the right to appeal that decision to the Social Security Appeal Authority (SSAA), an independent tribunal administered by the Ministry of Justice.

When the SSAA receives an appeal, it asks the Ministry to prepare a report detailing the matters considered in reaching the decision. Appeals officers complete these reports on behalf of the office which made the original decision.

In the course of preparing the Ministry's case, appeals officers contact frontline staff for more information, or to recommend some action be taken. Appeals officers also represent the Ministry at SSAA hearings.

### ***Student Allowance Appeal Authority (SAAA)***

Students can seek a review of any decision regarding their entitlement to a student allowance. Some decisions are reviewed internally and others go through a statutory review process.

If a student is unhappy with the outcome of a statutory review, they can appeal that decision to the Student Allowance Appeal Authority (SAAA), an independent tribunal administered by the Ministry of Justice.

When the SAAA receives an appeal, it asks the Ministry to prepare a report detailing the matters considered in reaching the decision. Appeals officers complete these reports on behalf of StudyLink, Data Match or Benefit Integrity Services.

In the course of preparing the Ministry's case, appeals officers contact frontline staff for more information, or to recommend some action be taken.

A student must write to the Ministry within three months of receiving notification of the original decision, to request a review of that decision. There is discretion to accept reviews lodged outside the normal three month time limit if it is considered that there was good reason for the delay.

### ***Types of student reviews***

There are two different types of reviews:

- an administrative review
- a statutory review

MODULE 1: LEGISLATION & CASE LAW  
Unit L6: REVIEWS & APPEALS

StudyLink determines which process your case will follow.

**Administrative review**

Your application can be considered for an administrative review if the decision is not covered under one of the categories described in Section 305(1)(a)-(g) of the Education Act 1989 and where, based on the Student Allowance Regulations 1998, StudyLink does not have the ability to make the decision in any other way.

For an administrative review there are no further appeal rights, however you can discuss the outcome of the administrative review with us if you disagree with the result.

**Statutory review**

Your application will be considered for a statutory review if the decision is covered under at least one of the categories described in Section 305(1)(a)-(g) of the Education Act 1989 where, based on the Student Allowance Regulations 1998, StudyLink has the ability to make the decision in some other way.

You can choose to have your decision reviewed:

- by the Secretary or
- before a Student Allowance Review Panel
- 

The Secretary is a person within StudyLink who has authority to make the decision on your Student Allowance review. The Secretary has had no prior involvement with your case.

A Student Allowance Review Panel is made up of the Secretary, a Ministry of Social Development advisor and an advisor from the New Zealand Union of Students' Association. The two advisors do not take part in the final decision making. They are there to provide advice to the Secretary, who makes the final decision.

If the Applicant chooses to have the decision reviewed before a Student Allowance Review Panel they can go along to the hearing and take someone for support.

The Review Panel will discuss the application whether or not the Applicant is at the hearing. This may be held at StudyLink Outreach site (or, if one isn't nearby, the local Work and Income Service Centre). The Panel will take a fresh look at the information and the Secretary will make a decision on the application (they'll take the Applicant's personal situation into account).

**Appeal to SSAA**

The applicant can appeal to the Student Allowance Appeal Authority. They'll need to do this within 21 days of the decision.

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Unit L6: REVIEWS & APPEALS

To lodge an appeal they must write to:

*The Secretary  
Ministry of Justice  
Student Allowance Appeal Authority  
Tribunals Unit  
Private Bag 32001  
Wellington 6146*

The Student Allowance Appeal Authority is independent from StudyLink.

***Further rights of appeal***

A right of appeal lies from the Authority to the High Court where either party is dissatisfied with any decision of either the Social Security Appeal Authority or the Student Allowance Appeal Authority on the basis that it was "erroneous in point of law". This basically means that the application of the law was wrong in the case. The appeal can only be a question of law not fact, for example, the appeal could be that the correct interpretation of a section of the Act was not applied.

The Chief Executive, Secretary and the applicant have the right to appeal on this basis.

The decisions of the Authority are also subject to judicial review. The application can again be brought by either party where the Authority has acted in a way which is unreasonable or unfair or breaches any of the rules of natural justice as discussed earlier.

If dissatisfied with the decision of the High Court either party may appeal to the Court of Appeal for a decision, from there Supreme Court.

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**NEXT UNIT - UNIT L7: Conjugal Status**

RELEASED UNDER THE  
OFFICIAL INFORMATION ACT

# INVESTIGATION UNIT TRAINING PACKAGE

(L)

## RELATIONSHIP DEBT SHARING

### LEGISLATION & CASE LAW MODULE

#### *Units*

Unit L1	Making and Accessing Legislation
Unit L2	The Acts Administered by the Ministry
Unit L3	Investigative Powers and Information Gathering
Unit L4	Obligations, Reviews and Debt
Unit L5	Offences
Unit L6	Reviews and Appeals
Unit L7	Conjugal Status
<b>Unit L (7a)</b>	<b>(Relationship Debt Sharing)</b>
Unit L8	Official Information and Privacy Acts
Unit L9	Other Relevant Acts
Unit L10	Case Law Policies and Precedents

MODULE 1: LEGISLATION & CASE LAW  
Unit L7a: RELATIONSHIP DEBT SHARING

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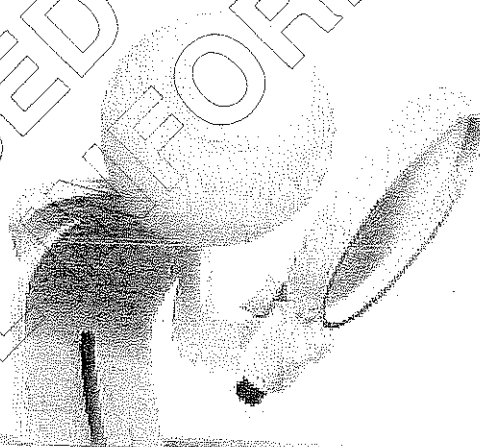
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MODULE 1: LEGISLATION & CASE LAW  
Unit L7a: RELATIONSHIP DEBT SHARING

## Objectives

**By the end of this unit you will be able to:**

- recognise & assess a situation where you can consider applying the relationship debt sharing legislation
- understand the law when deciding if a spouse or partner will be liable for a shared relationship debt
  - understand how relationships debts are shared
- understand the law when deciding a spouse or partner has committed an offence
- understand that partners and spouses have review rights if they liable



## **Introduction**

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From 7 July 2014, new relationship debt sharing provisions were introduced by the Social Security (Fraud Measures and Debt Recovery) Amendment Act 2014, which amends the Social Security Act 1964.

The Amendment Act is part of a package of reforms designed to prevent, detect and punish welfare fraud. It makes the welfare system fairer by making undeclared partners, as well as beneficiaries, accountable for dishonest behaviour in certain circumstances.

### **Who does this affect?**

For the purposes of this training document the term 'partner' includes any person deemed to be in a relationship with another adult. This includes a couple who are in a married, civil union or de facto relationship.

You should note that there has been no change to the current policy or practice in determining a relationship.

### **Undeclared partners**

The primary intent of the Amendment Act is to make the welfare system fairer in cases involving undeclared partners. Historically, in the vast majority of cases, only the beneficiary is held accountable for the debt and/or prosecuted.

From 7 July 2014, in cases where there is a declared relationship, fraudulent debt will continue to be apportioned 50/50 as per existing practice.

## **New Provisions of the Amendment Act 2014**

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The Amendment Act 2014 brought three new provisions into force and amendments to others. The new provisions include:

- Section 83AA: shared debt liability for declared partners
- Section 86AA: shared debt liability for undeclared partners, and
- Section 127A: a new offence specific to partners.



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Unit L7a: RELATIONSHIP DEBT SHARING

**Section 83AA – declared partner shared debt liability**

This provision introduces a new concept of shared debt for declared partners. This means that in cases where you can prove that the partner (B) knew, or ought to have known about the other partner's (A) fraud, we can hold both parties jointly and severally liable for repaying the debt.

**Legislation: Section 83AA**

**"83AA Apportionment of benefit between spouses or partners: one is liable for proportion other obtained by fraud if that one knew, or ought to have known, about other's fraud**

- "(1) This section applies to the following situation:
  - "(a) a benefit is apportioned under section 83(1) or (2) between spouses or partners so that—
    - "(i) one proportion of the benefit (**proportion A**) is paid to one spouse or partner (**A**); and
    - "(ii) another proportion of the benefit (**proportion B**) is paid to the other spouse or partner (**B**); and
    - "(iii) the person entitled to the benefit, for the purposes of section 83(1) and (2), is either A or B; and
  - "(b) some or all of proportion A is—
    - "(i) an amount in excess of the amount to which A is by law entitled or to which A has no entitlement; and
    - "(ii) an amount obtained by fraud by A; and
    - "(iii) a debt referred to in section 85A due to the Crown, and subject to recovery under section 86(1), from A; and
  - "(c) some or all of proportion B either is, or is not,—
    - "(i) an amount in excess of the amount to which B is by law entitled or to which B has no entitlement; and
    - "(ii) an amount obtained by fraud by B; and
    - "(iii) a debt referred to in section 85A due to the Crown, and subject to recovery under section 86(1), from B; and
  - "(d) B either knew, or ought to have known (even if B did not know), of the fraud by A.

"(2) In the situation to which this section applies, B is jointly and severally liable for A's debt referred to in subsection (1)(b), and that amount is a debt referred to in section 85A due to the Crown, and subject to recovery under section 86(1), from B.

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"(3) This section does not limit or affect any civil or criminal liability under any other law—

- "(a) of A for, or in respect of, the debt referred to in subsection (1)(b); or
- "(b) of B for, or in respect of, the debt referred to in subsection (1)(c).

"(4) An amount is obtained by fraud by a person (whether A or B) for the purposes of this section if the person—

- "(a) obtained that amount by fraud (and, for the purposes of this paragraph, **fraud** means that the person—
  - "(i) made any statement knowing it to be false in any material particular; or
  - "(ii) knowingly said or did anything or omitted to do or say anything for the purpose of misleading any officer concerned in the administration of this Act); or
- "(b) is convicted of a specified offence (as defined in section 127A(5)) in respect of obtaining that amount.

"(5) Subsection (4) does not limit—

- "(a) the generality of the references in subsection (1) to fraud; or
- "(b) the operation of section 49 (conviction as evidence in criminal proceedings)

***What does this mean?***

The primary intent of the Amendment Act is to make the welfare system fairer by holding undeclared partners accountable for dishonest behaviour.

From 7 July 2014, in cases involving a declared relationship, you should continue to apportion fraudulent debt 50/50 as per existing practice.

**Section 86AA – undeclared partner shared debt liability**

This provision introduces a new concept of shared debt for undeclared partners. This means that in cases where we can prove that the undeclared partner (B) knew, or ought to have known about the other partner's (A) fraud, we can hold both parties jointly and severally liable for repaying the debt.

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Unit L7a: RELATIONSHIP DEBT SHARING

**Legislation: Section 86AA**

**"86AA Recovery from spouse or partner of unapportioned excess amount beneficiary obtained by fraud**

- "(1) **Beneficiary**, in this section, means a person—
  - "(a) who has obtained any payment, or received any credit or advance, referred to in section 85A in excess of the amount to which he or she was entitled or to which he or she has no entitlement; and
  - "(b) who, in the chief executive's opinion, obtained that payment or credit or advance in excess by fraud.
- "(2) An amount is obtained by fraud by a person for the purposes of subsection (1) if the person—
  - "(a) obtained that amount by fraud (and, for the purposes of this paragraph, **fraud** means that the person—
    - "(i) made any statement knowing it to be false in any material particular; or
    - "(ii) knowingly said or did anything or omitted to do or say anything for the purpose of misleading any officer concerned in the administration of this Act); or
  - "(b) is convicted of a specified offence (as defined in section 127A(5)) in respect of obtaining that amount.
- "(3) Subsection (1) does not limit—
  - "(a) the generality of the references in subsection (1) to fraud; or
  - "(b) the operation of section 49 (conviction as evidence in criminal proceedings) of the Evidence Act 2006.
- "(4) Subsection (5) does not apply to the beneficiary's spouse or partner unless none of the amount in excess has been apportioned to him or her under section 83(1) or (2) and, in the chief executive's opinion, the spouse or partner—
  - "(a) knowingly benefited directly or indirectly from the beneficiary's fraud; or
  - "(b) ought to have known (even if the spouse or partner did not know) that the spouse or partner was benefiting directly or indirectly from the beneficiary's fraud.
- "(5) The amount in excess that the beneficiary obtained by the beneficiary's fraud is a debt due to the Crown under section 85A(e) or (f), and subject to recovery under section 86(1), from the spouse or partner.

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"(6) Subsection (5) enables recovery from the spouse or partner on the basis that he or she is jointly and severally liable, and therefore does not limit or affect—

- "(a) recovery under sections 85A(e) or (f) and 86(1) from the beneficiary of the excess amount recoverable under subsection (5) from the beneficiary's spouse or partner; or
- "(b) any other civil or criminal liability of the beneficiary, under any other laws, in respect of that excess amount.

"(7) Section 86(2) and this section apply, in accordance with section 124(2A), to a payment to which section 124(2) applies—

- "(a) as if it were made by way of benefit under Parts 1A to 1P; and
- "(b) as if the person to whom the payment was made were a beneficiary entitled to a benefit of the amount determined under section 124(2A)(b)."

**What is 'joint and several' liability?**

This is where two or more people are each liable for 100% of a debt. The debt is not split or apportioned and repayment may be sought from any one of the parties, or from any and all of the parties, in various amounts until the debt is paid in full. In other words, if any of the parties do not have enough money to pay, the other parties must make up the difference.

For example, if one partner dies or becomes insolvent, the other partner will be responsible for the remaining debt balance.

**What does 'knowingly benefited' mean?**

Knowingly benefiting involves actual knowledge. This is where the partner knows, for a fact, that first, their beneficiary partner is receiving payments in excess of their entitlements, and second, they are benefiting from it.

**For example;**

The beneficiary (A) receives a sole parent benefit, with two children and enters into a relationship with (B), who is the father of the younger child. The partner (B) is aware that (A) receives a sole parent benefit when they first meet, but leaves it up to (A) to sort out the benefit. The partner (B) has received a single benefit in the past, prior to meeting (A), but now works full time on minimum wage. The partner (B) pays an amount for housekeeping each fortnight to help pay the bills, but (A) is responsible for managing the finances.

**evidence**

- statement from the beneficiary (A) that the partner (B) was aware of the benefit when they first met

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**shows**

- statement from the partner (B) admitting relationship; awareness of (A)'s benefit when they first met, but belief that (A) had sorted this out; and that (A) pays for the rent and power; that (B) contributes money for food; that (B) received child support letters from IR, but didn't understand them and threw them away.
- Tenancy agreement showing rent amount of \$350
- Copies of household bills (phone, power, SkyTV)
- person (A) bank statements showing benefit payments and regular payments for rent, phone, power, food
- person (B) bank statements showing fortnightly cash withdrawals of \$150
- the partner (B) knew that (A) was receiving payments from Work and Income and was entitled to them now they were in a relationship
- the partner (B) knew the money from wages alone wasn't enough to cover the household expenses
- the partner (B) was reckless in knowing that the beneficiary (A) may still be receiving benefit payments in order to cover the deficiency between the household income and expenses.

**What does 'ought to have known' mean?**

This is a common expression of the legal concept called constructive knowledge. It is knowledge that a person would have had if he or she had made inquiries that a reasonable and honest person would have made in the same circumstances.

In other words, debt can be recovered from a partner who did not actually know they were benefiting from fraudulent payments, but evidence we have points to the fact they were aware of the possibility or risk that they were benefiting.

**For example:**

The beneficiary (A) looks after a toddler full time and receives a sole parent benefit. The partner (B) works full time and pays \$200 each week towards expenses and has a \$10,000 hire purchase for car. The beneficiary (A) pays all the household bills, including the weekly HP payments of from a separate bank account.

**evidence**

- statement from the beneficiary (A) that the partner (B) knew he or she was receiving a benefit.
- hire purchase agreement for car in name of (B)
- bank account statements of (A) and (B)
- monthly household bills (phone, power etc.)
- copies of letters from Work and Income to (A)
- the partner (B) was aware the beneficiary was initially receiving benefit

**shows**

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- payments.
- the monthly expenses exceed the amount the partner (B) provides each month (\$1,200)
- a reasonable and honest person in these circumstances would question where the extra money was coming from.

**Burden of proof: Section 83AA**

You should ensure that sufficient evidence is obtained to prove to the required civil level of 'balance of probabilities'.

Where this is met, and the evidence proves the partner (B) knew or ought to have known about the beneficiary's (A) fraud, you can establish a shared debt.

**Section 127A – New Offence for partners**

This provision introduces a new offence specific to partners. This means it is an offence for the partner of a beneficiary (B) to knowingly benefit, or be reckless as to whether they are benefiting, from their partners (A) benefit fraud.

The offence carries a penalty of imprisonment for a term not exceeding 12 months and/or a fine not exceeding \$5,000.

**Legislation: Section 127A**

**"127A Offences: spouse or partner benefiting from excess amount knowing, or being reckless about whether, it is obtained by beneficiary's fraud"**

- "(1) A person (the **spouse or partner**) commits an offence who—
  - "(a) is a spouse or partner of a person (the **beneficiary**) who obtains an excess amount by fraud; and
  - "(b) benefits directly or indirectly from the amount or a part of it knowing that, or being reckless about whether, the amount or part is an amount or part—
    - "(i) in excess of the amount to which the beneficiary is by law entitled or to which the beneficiary has no entitlement; and
    - "(ii) obtained by the beneficiary by fraud.
- "(2) Subsection (1)(b) applies to the amount or part even if the spouse or partner—
  - "(a) does not benefit from it knowingly; and
  - "(b) does not know at all or exactly its value; and

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- "(c) does not know, or (as the case requires) is not reckless about, the precise way in which it was obtained by the beneficiary by fraud.

"(3) The beneficiary obtains an excess amount for the purposes of subsection (1) if the beneficiary obtains any payment, or receives any credit or advance, referred to in section 85A in excess of the amount to which the beneficiary is by law entitled or to which the beneficiary has no entitlement.

"(4) The excess amount is obtained by the beneficiary by fraud for the purposes of subsection (1) if—

- "(a) the beneficiary obtained that amount by fraud (as defined in sections 83AA(4)(a) and 86AA(2)(a)); or
- "(b) the beneficiary is convicted of a specified offence in respect of obtaining that amount.

"(5) **Specified offence**, in subsection (4)(b), means an offence against section 127 (offences: false statements, misleading, or attempting to mislead, to receive or continue to receive benefits) of this Act, or an offence against all or any of the following provisions of the Crimes Act 1961:

- "(a) section 228 (dishonestly taking or using document);
- "(b) sections 240 and 241 (obtaining by deception or causing loss by deception);
- "(c) section 256(1) and (2) (forgery);
- "(d) section 257 (using forged documents);
- "(e) section 258 (altering, concealing, destroying, or reproducing documents with intent to deceive);
- "(f) section 259 (using altered or reproduced document with intent to deceive).

"(6) Subsections (4) and (5) do not limit—

- "(a) the generality of the references in subsection (1) to fraud; or
- "(b) the operation of section 49 (conviction as evidence in criminal proceedings) of the Evidence Act 2006.

"(7) A person who commits an offence under subsection (1) is liable on conviction to a penalty that is either or both:

- "(a) imprisonment for a term not exceeding 12 months;

"(b) a fine not exceeding \$5,000."

**What does 'reckless' mean?**

Reckless knowledge involves a person who deliberately fails to give any thought to whether their partner is committing fraud because they suspect that if they did, they would find that their partner was, or may be, committing fraud.

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A court will establish reckless knowledge by looking at what the partner does, after becoming aware of the possibility that their beneficiary partner is committing fraud.

If a partner inquires and forms a belief that fraud is being committed, but stays silent and benefits from their partner's fraud, that person could be said to have reckless knowledge.

If a partner inquires and forms a belief that fraud is not being committed, regardless of how reasonable that belief is, then they cannot be held liable for the relationship debt. This is because they genuinely believe it to be true (Derry v Peek).

If a partner does not make any enquiries, or turn their mind to whether their partner is committing fraud, because they truly believe their partner is not committing fraud (the wilfully blind spouse) then they are unlikely to be found to have reckless knowledge.

A person would be found to be reckless where they know that it is a risk that money is being received from welfare fraud and they proceed regardless.

For example:

The beneficiary (A) receives a sole parent benefit, with two children and enters into a relationship with (B), who is the father of the younger child. The partner (B) is aware that (A) receives a sole parent benefit when they first meet, but leaves it up to (A) to sort out the benefit. The partner (B) has received a single benefit in the past, prior to meeting (A), but now works full time on minimum wage. The partner (B) pays an amount for housekeeping each fortnight to help pay the bills, but (A) is responsible for managing the finances.

- **evidence**
  - statement from the beneficiary (A) that the partner (B) was aware of the benefit when they first met
  - statement from the partner (B) admitting relationship; awareness of (A)'s benefit when they first met, but belief that (A) had sorted this out; and that (A) pays for the rent and power; that (B) contributes money for food; that (B) received child support letters from IR, but didn't understand them and threw them away.
  - Tenancy agreement showing rent amount of \$350
  - Copies of household bills (phone, power, SkyTV)
  - person (A) bank statements showing benefit payments and regular payments for rent, phone, power, food
  - person (B) bank statements showing fortnightly cash withdrawals of \$150
- **shows**
  - the partner (B) knew that (A) was receiving payments from Work and



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- Income and was entitled to them now they were in a relationship.
- the partner (B) knew the money from wages alone wasn't enough to cover the household expenses
  - the partner (B) was reckless in knowing that the beneficiary (A) may still be receiving benefit payments in order to cover the deficiency between the household income and expenses.

### Ingredients of Section 127A offence

The ingredients of the new offence are:

1. Person A (the beneficiary) received welfare payments in excess of entitlement (proof of receipt of excess)
2. Person A (the beneficiary) committed fraud (proof of false statement or omission to mislead an officer, or proof of beneficiary being convicted of a specified offence)
3. Person B was the partner of the beneficiary (A) (proof of relationship)
4. Person B (the partner) directly or indirectly benefited from some part of the welfare payments received in excess (proof of benefiting as part of an economic unit)
5. Person B (the partner) knew or was reckless that the amount received in excess was obtained by false statement or misleading omission (proof of partner's knowledge to required level of reckless knowledge)

To establish the commission of an offence, you must be able to prove each of the ingredients. More information on the ingredients of an offence is covered in 'Investigation Training Unit L5 Offences'.

### Burden of proof: Section 127A

You should ensure that sufficient evidence is obtained to prove to the required criminal level of 'beyond reasonable doubt'.

Where this is met, and the evidence proves the partner (B) knew or was reckless about the beneficiary's (A) fraud, you can establish a shared debt and prosecute.

## **Timeframes**

From 7 July 2014, the limitation period for laying charges against partners for category one and two offences under the Social Security Act 1964 will apply. For partners, the 12 months begins from when we are first aware that the partner knows about the fraud.

You should be aware that in some cases, the timeframe for the partner may be different from the timeframe for the beneficiary.

For example:

- If an allegation or file suspicion states that they think the partner (B) knows the beneficiary (A) is committing fraud then the timeframe for A and B will be the same.
- If a file suspicion or allegation does not provide any information about the partner being aware of the fraud, then the timeframe will be from when you first suspect the partner's knowledge during the investigation.

## **Monetary penalties**

From 7 July 2014, you must note that a monetary penalty (sanction) should not be confused with relationship debt sharing.

A monetary penalty can only be imposed on the beneficiary (A), not the partner (B), and is not a shared amount.

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**Definition of terms**

Term	Definition
Allegation	An assertion of wrongdoing
Evidence	Any type of proof which tends to establish or disprove a fact material to the case. It includes, but is not limited to, witness statements, documents and electronic and audio records
False statement	A statement made to the Ministry by someone knowing it to be false for the purpose of receiving or continuing to receive payments.
Fraud	Where a person receives money to which they are not entitled as a result of their false statement or omission.
Jointly and severally	Being jointly and severally liable means both parties will be liable for a 100% of a debt. Each is responsible for the full amount of the debt until it is repaid.
Knowingly benefited	This involves actual knowledge. For example, where a person knows for a fact that: <ol style="list-style-type: none"> <li>1. their spouse or partner is receiving payments in excess of their entitlements, and</li> <li>2. that they are benefiting from those payments</li> </ol>
Ought to have known	This is the legal concept of 'constructive knowledge'. It is knowledge that a person would have <i>actually</i> had if he or she had made inquiries that a reasonable and honest person would have made.
Partner	The Ministry considers a person to be part of a couple when they are in a relationship with another adult. This includes a couple who are in a married, civil union or de facto relationship.
Reckless	Reckless knowledge involves any person who deliberately fails to give any thought to whether their spouse or partner is committing fraud because they suspect that if they did, they would find out that fraud is indeed happening.
Wilful omission	A deliberate failure to tell the Ministry about something that the

MODULE 1: LEGISLATION & CASE LAW  
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Term	Definition
	person knows should be the subject of advice.

**CONGRATULATIONS!!**

You have now finished the **Relationship Debt Sharing Module**

**NEXT MODULE:  
OFFICIAL INFORMATION AND PRIVACY ACTS**

RELEASED UNDER THE OFFICIAL INFORMATION ACT

# INVESTIGATION UNIT TRAINING PACKAGE

(L)

## LEGISLATION AND CASE LAW MODULE

### Units

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## Unit L8: OFFICIAL INFORMATION AND PRIVACY ACT

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### Objectives

By the end of this unit you will be able to:

- be able to understand the relationship between the OIA & Privacy Act
- be aware of the Privacy Principles
- be able to action a request in accordance with the Acts
- be familiar with the withholding provisions of each Act

## OFFICIAL INFORMATION & PRIVACY ACT

### INTRODUCTION - OFFICIAL INFORMATION ACT

The Official Information Act 1982 came into force on 1 July 1983. The Privacy Act came into force on 1 July 1993.

This legislation was passed in response to concerns regarding the rapid advances in technology which provided information networks. Freedom of information and protection of privacy had also become human rights issues. Also, there have been increasingly strong incentives to exploit personal information which has created a need for control of information travel.

Individuals have an interest in ensuring that information about them is accurate and relevant, accessed by those with authority and not communicated beyond those who need to know. The right of individuals to access and correct personal data is a most important privacy safeguard.

Working for the Ministry means that you will be required to be familiar with both Acts in your work.

Historically officers only had to be aware of the Official Information Act (OIA) as this Act dealt with all information held by public sector agencies whether the information held was official or personal. The Privacy Act (PA) now deals with personal information held by public sector agencies and agencies in the private sector. The Privacy Act gives individuals rights with respect to their own information and imposes obligations on the Ministry to ensure good handling of this information. The provisions relating to personal information that had been contained in the OIA have now been incorporated in the PA. The OIA now only deals with requests for official information and information requested by someone who is not the subject of that information.

#### **Description**

A description of what the OIA is all about is contained in the 'Long Title' which explains that the Act is to:

- make official information more freely available
- provide for proper access by each person to official information relating to that person

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- to protect official information to the extent consistent with the public interest and the preservation of personal privacy
- to establish procedures for the achievement of those purposes
- to repeal the Official Secrets Act 1951

Section 5 of the OIA enshrines the principle of availability. This is that the information shall be made available unless there are good grounds for withholding.

### **MEANING OF OFFICIAL INFORMATION**

The OIA defines the term "official information" which includes:

- any information held by a Ministry, or a Minister of the Crown in his or her official capacity, or an organisation
- any information held outside New Zealand by any branch or post of a Ministry, or any organisation

Before the introduction of the Privacy Act this definition also included a definition of personal information which was "any information about an identifiable person" as the Act dealt with both.

This has now been incorporated into the Privacy Act which governs personal information, and is defined as "information about an identifiable individual." This is a very wide definition and includes any information that identifies a particular person.

### **MAKING A REQUEST UNDER THE OIA**

Section 12 of the OIA governs the making of requests for official information.

Any person being a New Zealand citizen, a permanent resident of New Zealand or a body corporate can make a request for official information.

Such a request can be stated as being urgent and the applicant must state the reasons for the urgency, otherwise, you have 20 working days from the receipt of the request to comply with the request or to provide reasons declining it.

The Ministry has a duty to give reasonable assistance to applicants making official information requests especially where the request has been made to the wrong Ministry or in the wrong form.



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The request need not be in writing and can be made verbally.

The requester may specify what form that they wish to receive the information in ie, by inspection, providing copies of or summaries/paraphrasing.

On actioning a request any folios which contain information to be withheld from disclosure should be noted and the reasons for the withholding of that information should be specified. Reasons must be given to the requester as to why the Ministry is refusing to disclose the information and the requester must be told of his/her right to complain to the Ombudsman about that refusal.

The OIA gives protection to those who make information available in terms of the Act providing that they do so in good faith. No civil or criminal proceedings can be brought against that person.

***Information that can be made available***

Any official information including:

- documents
- publications setting out functions of public sector agencies
- any document or manual containing guidelines, rules, principles in respect of decision making by public sector agencies. This would include the Ministry's Manuals
- finding of facts in respect of, and reasons for any decision and a reference to the information on which the findings were based

***Information that can be withheld***

Section 6 of the Official Information Act provides conclusive reasons for withholding official information if the making available of that information would be likely:

- to prejudice the maintenance of the law, including the prevention, investigation and detection of offences, and the right to a fair trial
- to endanger the safety of any person

In addition to the above, there are other conclusive grounds contained with section 6 of the OIA.

Section 9 of the OIA provides other reasons for withholding official information. These include:

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- the protection of the privacy of natural persons, including that of a deceased natural person
- the protection of information which is subject to an obligation of confidence or where the making available of the information would be likely to prejudice the supply of similar information and it is in the public interest that such information should continue to be supplied, or would be likely otherwise to damage the public interest
- to maintain the effective conduct of public affairs by protecting officers and employees from improper pressure or harassment and allowing the free and frank expressions of opinions between members of an organisation
- to maintain legal professional privilege (between solicitor and client)
- to prevent disclosure or use of official information for improper gain or improper advantage

However, the grounds contained within section 9 are subject to a "public interest" test. These grounds may apply in a given situation *unless* the public interest in disclosure outweighs the reasons for withholding. This requires a 2-stage test:

*Does the withholding ground apply? AND*

*Would the public interest outweigh the application of this withholding ground?*

## **INTRODUCTION - PRIVACY ACT**

The Privacy Act ("the Act") came into force on 1 July 1993 and its main purpose is to promote and protect individual privacy. The Act makes some fundamental changes to the way in which the Ministry is required to deal with personal information. This includes the way that the Ministry collects, stores, uses and discloses personal information. Personal information is defined in the Act as "information about an identifiable individual".

The Act applies to every person, in his or her individual capacity, as well as to the public and private sector organisations that (with rare exceptions) are all caught within the definition of "agency" as defined in Section 2 of the Act. The Act has major implications for the Ministry especially with respect to the personal information collected and used in the investigation of clients.

Personal information may be collected only for a lawful purpose connected with the function and activity of the agency and only if necessary for that purpose. Such information must, as a general rule, be collected directly from the person concerned, and the person must be told why the information is needed and what will happen to it. All individuals have the right to see the information collected about them and to seek correction if they consider that the information is wrong. If the information is believed to be correct the agency is not required to change it; however, the individual is entitled to have a copy of the request for correction and their version of events placed on the file so that it is accessed at the same time as the information deemed to be incorrect.

The Act has established 12 Information Privacy Principles that set out the "rules" for collecting, storing using and disclosing personal information. Some of these principles have exceptions to them.

It also provides for the appointment of a Privacy Commissioner and empowers the Commissioner to investigate complaints of interference with privacy.

Further, the Act enables Codes of Practice to be issued covering specific agencies. The codes can impose a higher or lower standard of duty than those set out in the Privacy Principles, for example, the Health Information Privacy Code.

## **PRIVACY ACT PRINCIPLES**

The 12 principles contained in the Act governing the collection, storage, use and disclosure of personal information are as follows. Each will be considered in turn in more detail:

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- |              |   |
|--------------|---|
| Principle 1  | Purpose of collection of personal information                     |
| Principle 2  | Source of personal information                                    |
| Principle 3  | Collection of information from subject                            |
| Principle 4  | Manner of collection of personal information                      |
| Principle 5  | Storage and security of personal information                      |
| Principle 6  | Access to personal information                                    |
| Principle 7  | Correction of personal information                                |
| Principle 8  | Accuracy etc, of personal information to be checked before use    |
| Principle 9  | Agency not to keep personal information for longer than necessary |
| Principle 10 | Limits on use of personal information                             |
| Principle 11 | Limits on disclosure of personal information                      |
| Principle 12 | Unique identifiers  |

**PURPOSE OF COLLECTION**

**Principle 1 of the Act states:**

*Purpose of collection of personal information*

"Personal information shall not be collected by any agency unless -

- (a) The information is collected for a lawful purpose connected with a function or activity of the agency; and
- (b) The collection of the information is necessary for that purpose"

In short, the collection of personal information must be necessary for the purpose for which it is collected, and that purpose must always be relevant to the function or activity of the agency.

This principle was enacted to prevent the indiscriminate collection of personal data.

When collecting information the questions that you need to ask are:

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- (a) What is the function/ activity of the Ministry?
- (b) Is the information being collected for the fulfilment of the function/activity of the agency?
- (c) Is the information being sought necessary for that function/activity?

If the answer to the two last questions is "no", it will be necessary to consider whether the collection of the information complies with this principle.

**Principle 2 of the Act states:**

*Source of personal information*

- "(1) Where an agency collects personal information, the agency shall collect the information directly from the individual concerned.
- (2) It is not necessary for an agency to comply with sub clause (1) of this principle if the agency believes, on reasonable grounds, -
  - (a) That the information is publicly available information; or
  - (b) That the individual concerned authorises collection of the information from someone else; or
  - (c) That non-compliance would not prejudice the interests of the individual concerned; or
  - (d) That non-compliance is necessary -
    - (i) to avoid prejudice to the maintenance of the law by any public sector agency, including the prevention, detection, investigation, prosecution, and punishment of offences; or
    - (ii) for the enforcement of a law imposing a pecuniary penalty; or
    - (iii) for the protection of the public revenue; or
    - (iv) for the conduct of proceedings before any court or Tribunal (being proceedings that have been commenced or are reasonably in contemplation); or
  - (e) That compliance would prejudice the purposes of the collection; or

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- (f) That compliance is not reasonably practicable in the circumstances of the particular case; or
- (g) That the information:
  - (i) will not be used in a form in which the individual concerned is identified; or
  - (ii) will be used for statistical or research purposes and will not be published in a form that could reasonably be expected to identify the individual concerned; or
- (h) That the collection of the information is in accordance with an authority granted under section 54 of this Act."

This Principle provides that, with certain exceptions, information about an individual must be collected directly from that individual. To invoke the exceptions to P2 you must believe on reasonable grounds that:

- the information is publicly available
- the individual concerned authorises collection from someone else
- non-compliance would not prejudice the interests of the individual
- that non-compliance is necessary to invoke exceptions (d)(i)-(iv)
- that compliance would prejudice the purposes of collection
- that compliance is not reasonably practicable in the circumstances
- that the information is non-identifying or will be used for research/statistical purposes
- that the collection is authorised by the Privacy Commissioner

The general rule is that personal information should be collected directly from the individual concerned unless one of the stated exceptions apply.

**Principle 3 of the Act states:**

*Collection of information from subject*

- "(1) Where an agency collects personal information directly from the individual concerned, the agency shall take such steps (if any) as are in the circumstances reasonable to ensure that the individual concerned is aware of -

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- (a) the fact that the information is being collected; and
  - (b) the purpose for which the information is being collected; and
  - (c) the intended recipients of the information; and
  - (d) the name and address of -
    - (i) the agency that is collecting the information; and
    - (ii) the agency will hold the information; and
  - (e) if the collection of the information is authorised or required by or under law -
    - (i) the particular law by or under which the collection of the information is so authorised or required; and
    - (ii) whether or not the supply of the information by that individual is voluntary or mandatory; and
  - (f) the consequences (if any) for that individual if all or any part of the requested information is not provided; and
  - (g) the rights of access to, and correction of, personal information provided by these principles
- (2) The steps referred to in sub clause (1) of this principle shall be taken before the information is collected or, if that is not practicable, as soon as practicable after the information is collected.
- (3) An agency is not required to take the steps referred to in sub clause (1) of this principle in relation to the collection of information from an individual if that agency has taken those steps in relation to the collection, from that individual, of the same information or information of the same kind, on a recent previous occasion.
- (4) It is not necessary for an agency to comply with sub clause (1) of this principle if the agency believes, on reasonable grounds -
- (a) that non-compliance is authorised by the individual concerned; or
  - (b) that non-compliance would not prejudice the interests of the individual concerned; or
  - (c) that non-compliance is necessary -

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- (i) to avoid prejudice to the maintenance of the law by any public sector agency, including the prevention, detection, investigation, prosecution, and punishment of offences; or
- (ii) for the enforcement of a law imposing a pecuniary penalty; or
- (iii) for the protection of the public revenue; or
- (iv) for the conduct of proceedings before any court or Tribunal (being proceedings that have been commenced or are reasonably in contemplation); or
- (d) that compliance would prejudice the purposes of the collection; or
- (e) that compliance is not reasonably practicable in the circumstances of the particular case; or
- (f) that the information -
  - (i) will not be used in a form in which the individual concerned is identified; or
  - (ii) will be used for statistical or research purposes and will not be published in a form that could reasonably be expected to identify the individual concerned."

*Collection of information from subject*

Where personal information is collected from the individual concerned reasonable steps must be taken by the Ministry to ensure that the individual is advised of, among other things, the purpose of the collection, what law authorises the collection, the intended recipients of the information and the individual's right to have access to and request correction of that information.

Unless an exception applies, the obligation is to be clear about the reasons for collection personal information from an individual, what will happen to it and to explain their rights with respect to it. The general rule is that there should be "no surprises" for the individual concerned in the way that their personal information is handled by the Ministry.

**Principle 4 of the Act states:**

*Manner of collection of personal information*

This principle provides that "personal information shall not be collected by an agency -



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- (a) by unlawful means; or
- (b) by means that, in the circumstances of the case -
  - (i) are unfair; or
  - (ii) intrude to an unreasonable extent upon the personal affairs of the individual concerned"

"Unlawful" means in breach of a statute or regulation. "Unfair" means could include misstating the purpose of collection or being overbearing or threatening.

**Principle 5 of the Act states:**

*Storage and security*

"An agency that holds personal information shall ensure -

- (a) that the information is protected, by such security safeguards as it is reasonable in the circumstances to take, against -
  - (i) loss, and
  - (ii) access, use, modification, or disclosure, except with the authority of the agency that holds the information, and
  - (iii) other misuse, and
- (b) that if it is necessary for the information to be given to a person in connection with the provision of a Ministry to the agency, everything reasonably within the power of the agency is done to prevent unauthorised use or unauthorised disclosure of the information."

Reasonable safeguards may include keeping paper files and computer passwords secure. This is important in light of the Ministry's open plan environment especially where work spaces are interspersed with public areas.

This Principle includes an implicit obligation to train staff so that they are clear about the Ministry's information handling policies and procedures. Principle 5 also governs how information is stored and destroyed. It requires the Ministry to consider any action that may impact on the information's security.

**Principle 6 of the Act states:**

*Access to personal information*

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- "(1) Where an agency holds personal information in such a way that it can readily be retrieved, the individual concerned shall be entitled -
- (a) to obtain from the agency confirmation of whether or not the agency holds such personal information; and
  - (b) to have access to that information
- (2) Where, in accordance with sub clause (1)(b) of this principle, an individual is given access to personal information, the individual shall be advised that, under Principle 7, the individual may request the correction of that information
- (3) The application of this principle is subject to the provisions of Parts IV and V of this Act"

This principle creates an "entitlement" to access to personal information. This entitlement can be enforced in a court of law where the information is held by a public sector agency (Section 11(1) Privacy Act).

Principle 6 is subject to the good reasons for refusing access to personal information contained in Part IV of the Act. These reasons will be covered in more detail below when discussing how to deal with a request for information.

Section 115 of the Act protects requesters and providers of personal information from legal liability arising from the provision of personal information in good faith pursuant to a request under Principle 6.

***Principle 7 of the Act states:***

*Correction of personal information*

- "(1) Where an agency holds personal information, the individual concerned shall be entitled -
- (a) to request correction of the information, and
  - (b) to request that there be attached to the information a statement of the correction sought but not made
- (2) An agency that holds personal information shall, if so requested by the individual concerned or on its own initiative, take such steps (if any) to correct that information as are, in the circumstances, reasonable to ensure that, having regard to the purposes for which the information may lawfully be used, the information is accurate, up to date, complete, and not misleading.

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- (3) Where an agency that holds personal information is not willing to correct that information in accordance with a request by the individual concerned, the agency shall, if so requested by the individual concerned, take such steps (if any) as are reasonable in the circumstances to attach to the information, in such a manner that it will always be read with the information, any statement provided by that individual of the correction sought.
- (4) Where the agency has taken steps under sub clause (2) or sub clause (3) of this principle, the agency shall, if reasonably practicable, inform each person or body or agency to whom the personal information has been disclosed of those steps.
- (5) Where an agency receives a request made pursuant to sub clause (1) of this principle, the agency shall inform the individual concerned of the action taken as a result of the request."

The effect of this section is that the Ministry is under no obligation to correct information it believes to be accurate, however must attach the individual's statement of correction. If the Ministry corrects any personal information at the request of an individual, it has an obligation to inform any other agency to which the information has been disclosed.

**Principle 8 of the Act states:**

*Accuracy etc, of information*

"An agency that holds personal information shall not use that information without taking such steps (if any) as are, in the circumstances, reasonable to ensure that, having regard to the purpose for which the information is proposed to be used, the information is accurate, up to date, complete, relevant, and not misleading."

Information about an individual must not be used without taking reasonable steps to ensure that it is accurate and up-to-date, complete, relevant and not misleading. This principle requires the Ministry to ensure that it is processing good quality information.

**Principle 9 of the Act states:**

*Keeping information*

"An agency that holds personal information shall not keep that information for longer than is required for the purposes for which the information may lawfully be used."

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The PA does not provide specific time limits for which to keep information, it states that an agency must set their own retention periods based on the reasons for having the information in the first place.

This principle is overridden by the Archives Act 1957 which sets out the Ministry's obligations with respect to keeping information for specific periods of time. You should also be aware of the Ministry's national policy on the retention and destruction of documents.

**Principle 10 of the Act states:**

*Limits on use of personal information*

"An agency that holds personal information that was obtained in connection with one purpose shall not use the information for any other purpose unless the agency believes, on reasonable grounds -

- (a) that the source of the information is a publicly available publication, or
- (b) that the use of the information for that other purpose is authorised by the individual concerned, or
- (c) that non-compliance is necessary -
  - (i) to avoid prejudice to the maintenance of the law by any public sector agency, including the prevention, detection, investigation, prosecution, and punishment of offences, or
  - (ii) for the enforcement of a law imposing a pecuniary penalty, or
  - (iii) for the protection of the public revenue; or
  - (iv) for the conduct of proceedings before any court or Tribunal (being proceedings that have been commenced or are reasonably in contemplation), or
- (d) that the use of the information for that other purpose is necessary to prevent or lessen a serious and imminent threat to -
  - (i) public health or public safety, or
  - (ii) the life or health of the individual concerned or another individual, or
- (e) that the purpose for which the information is used is directly related to the purpose in connection with which the information was obtained, or

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- (f) that the information
  - (i) is used in a form in which the individual concerned is not identified, or
  - (ii) is used for statistical or research purposes and will not be published in a form that could reasonably be expected to identify the individual concerned, or
- (g) that the use of the information is in accordance with an authority granted under section 54 of this Act."

The general rule is that the Ministry cannot use personal information for another purpose unless it believes on reasonable grounds that one of the above exceptions applies. In the event of a complaint to the Privacy Commissioner, the onus will be on the Ministry to prove that the exception relied upon was applicable in the circumstances.

**Principle 11 of the Act states:**

*Limits on disclosure*

"An agency that holds personal information shall not disclose the information to a person or body or agency unless the agency believes, on reasonable grounds -

- (a) that the disclosure of the information is one of the purposes in connection with which the information was obtained or is directly related to the purposes in connection with which the information was obtained, or
- (b) that the source of the information is a publicly available publication, or
- (c) that the disclosure is to the individual concerned, or
- (d) that the disclosure is authorised by the individual concerned, or
- (e) that non-compliance is necessary -
  - (i) to avoid prejudice to the maintenance of the law by any public sector agency, including the prevention, detection, investigation, prosecution, and punishment of offences, or
  - (ii) for the enforcement of a law imposing a pecuniary penalty, or
  - (iii) for the protection of the public revenue, or

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- (iv) for the conduct of proceedings before any court or Tribunal (being proceedings that have been commenced or are reasonably in contemplation); or
- (f) that the disclosure of the information is necessary to prevent or lessen a serious and imminent threat to -
  - (i) public health or public safety, or
  - (ii) the life or health of the individual concerned or another individual, or
- (g) that the disclosure of the information is necessary to facilitate the sale or other disposition of a business as a going concern, or
- (h) that the information -
  - (i) is to be used in a form which the individual concerned is not identified, or
  - (ii) is to be used for statistical or research purposes and will not be published in a form that could reasonably be expected to identify the individual concerned, or
- (i) that the disclosure of the information is in accordance with an authority granted under section 54 of this Act."

"Disclosure" means release outside the Ministry. This principle provides that personal information should not be disclosed to those outside the Ministry, except in certain circumstances. These exceptions are almost identical to those in Principle 10.

The general rule is that the Ministry cannot disclose personal information unless it believes on reasonable grounds that one of the above exceptions applies. In the event of a complaint to the Privacy Commissioner, the onus will be on the Ministry to prove that the exception relied upon was applicable in the circumstances.

**Principle 12 of the Act states:**

*Unique identifiers*

- "(1) An agency shall not assign a unique identifier to an individual unless the assignment of that identifiers necessary to enable the agency to carry out any one or more of its functions efficiently.

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- (2) An agency shall not assign to an individual a unique identifier that, to that agency's knowledge, has been assigned to that individual by another agency, unless those two agencies are associated persons within the meaning of subpart YB of the Income Tax Act 2007.
- (3) An agency that assigns unique identifiers to individuals shall take all reasonable steps to ensure that unique identifiers are assigned only to individuals whose identity is clearly established.
- (4) An agency shall not require an individual to disclose any unique identifier assigned to that individual unless the disclosure is for one of the purposes in connection with which that unique identifier was assigned or for a purpose that is directly related to one of those purposes."

A unique identifier is any identifier assigned to an individual for the purpose of uniquely identifying that individual, for example, a client's benefit customer number. This principle seeks to prevent agencies issuing identifiers that have been assigned by another organisation. The principle provides that no two unique identifiers can be the same, eg, Inland Revenue cannot use the same number for a client as Work and Income has assigned to that client.

### WHAT IS INFORMATION?

Neither the Official Information Act nor the Privacy Act defines the term "information". The Court of Appeal has stated that the ordinary dictionary meaning was intended which is, "that which informs, instructs, tells or makes aware."

Information includes, of course, documentation. Both Acts define "document" as including:

- any writing on any material
- any information on tape, computer etc, and any material generated from tape, computer etc, as a result
- any label or description
- any book, map, plan, graph or drawing
- any visual image such as film, photograph which can be reproduced

Documents are just one aspect of "information". In the High Court, information has been expressed as "not confined to the written word but embraces any

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knowledge however gained or held." Therefore, information could be anything which is stored in some way including unrecorded material in a person's memory.

### **Classification**

Where a variety of information is held by a Government Ministry any request for release of that information may involve either or both Acts.

When dealing with requests, it is important to correctly classify each piece of information in order to find out which of the Acts apply to it.

Classification depends on:

1. Who holds the information
2. What is information about
3. Who wants access to the information

#### *1. Who holds the information*

Government Departments (the public sector) hold both official and personal information. The Official Information Act does not apply to the private sector, only to public sector agencies. The Ministry holds both official and personal information about its clients.

#### *2. What is the information about*

Information about an identifiable person is personal information and is governed by the Privacy Act. Where the information is about a "corporate person" such as a company, society, trust, incorporate or corporate body, any request is to be dealt with under the Official Information Act.

#### *3. Who wants access to the information*

There is a right of access to personal information by the individual concerned subject to the provisions of the Privacy Act allowing it to be withheld. These provisions will be discussed in more detail below.

The "individual concerned" is the individual to whom the information relates. Under the Privacy Act, only the individual concerned (or someone acting with their authority) has the right of access to personal information held about them.

Where the information is personal but about someone other than the requester, and is held by the Ministry then release would have to be considered under the Official Information Act.



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Information about an individual held by the Ministry will be a combination of official and personal information but which legislation governs the release, or not, depends on who is requesting it. As a general rule, if it is requested by the individual concerned or a person acting with their authority, disclosure is to be determined under the Privacy Act. If it is by someone else, disclosure is to be determined under the Official Information Act.

### **DEALING WITH REQUESTS UNDER THE PRIVACY ACT**

#### **Receiving a Request**

The request does not need to be in writing and can be made orally. Officers must ensure that they give reasonable assistance to a person making a request.

Requests can only be made by:

- a New Zealand citizen
- a permanent resident in New Zealand
- a person who is in New Zealand

Requests can be made through a properly authorised agent pursuant to S45 of the Privacy Act. Where a person is acting on behalf of another, care should be taken to check the authorisation which generally should be in writing. Where a Member of Parliament or a solicitor advises that they are acting for the requester, usually no written authority is needed. Under this section you also need to be satisfied of the identity of the individual making the request and that any information intended for that individual is received by them or their agent only.

A decision on the request must be made within 20 working days and communicated to the requester.

A request can be refused if the information is not readily retrievable or the information does not exist or cannot be found. There is an expectation that a reasonable effort is made to locate or retrieve the information.

If the information is not held by the Ministry but by another agency or it is more closely connected with the functions of another agency then the request must be transferred to that agency no later than 10 working days after receiving the request. You must inform the requester of the transfer.

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**Withholding Provisions**

On actioning a request you need to be aware of the withholding provisions provided in Part 4 of the Privacy Act. Information requested can be withheld if there are good reasons for doing so. The good reasons include:

Section 27: Release would be likely to:

- prejudice national security or defence
- prejudice international communication in confidence
- prejudice maintenance of law
- endanger the safety of any individual

Section 28: Withholding is necessary to:

- protect trade secrets
- protect commercial position of the supplier of the information

Section 29: Withholding on the grounds of:

- the disclosure of the information would involve an unwarranted disclosure of the affairs of another individual or deceased individual
- protection of evaluative material supplied on a confidential basis (evaluative material is narrowly defined as covering, for example, job interviews and insurance material)
- protection of the physical or mental health of requester or rehabilitation or safe custody of requester
- protection of interests of person under 16 years
- legal professional privilege
- request being frivolous or vexatious or the information requested is trivial
- confidentiality by conditions placed upon material held in a library, museum or archive

If the Ministry seeks to withhold information from the individual making a request under Principle 6, the reasons for doing so must be conveyed to them. The individual concerned has the ability to have the Ministry's decision to withhold information, reviewed by the Privacy Commissioner. In this event, the

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Ministry will be required to show that the particular reason for withholding is valid.

Section 42 of the Act governs the way that the information can be supplied including inspection, copies, transcripts, extracts or orally. The information should normally be provided in the form preferred by the requester.

The Ministry is not allowed to charge for providing personal information, unlike the supply of information under the Official Information Act.

### **IMPACT ON SOCIAL SECURITY ACT**

#### ***Section 11 Social Security Act 1964***

Section 7 (1) of the Privacy Act provides that nothing in Principle 6 (access to personal information) or Principle 11 (limits on disclosure) detract from any provision that is contained in any enactment that authorises or requires personal information to be made available. In other words if another Act authorises or requires personal information to be made available, the Privacy Act does not apply.

This section allows us to continue to use section 11 of the Social Security Act to obtain personal information from any other person but the Ministry's Section 11 Code of Conduct **must** be used when using section 11. It sets out the rules where the Ministry is requesting information about any person relating to benefits or debts owed to the Crown.

#### ***Section 11A Social Security Act 1964***

This section provides the power for the Ministry to obtain information for matching purposes. This can relate to obtaining lists of employees from employers. Information matching guidelines are contained in Part X of the Act along with authorisation for information matching programmes. Section 11A subsection 6 incorporates these provisions and rules into the Social Security Act.

#### ***Section 12 Social Security Act 1964***

The duty imposed by subsection 2 on every person to answer all questions put to them by the Ministry would fall within Section 7 of the Privacy Act.

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**RESOURCES**

If you do run into difficulty when dealing with any aspect of the Official Information Act or Privacy Act, assistance can be obtained from:

- an Operations Manager
- a Senior Fraud Investigation Advisor
- a Fraud Investigation Manager
- Legal Services

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**NEXT UNIT - UNIT L9: Other Relevant Acts**

MODULE 1: LEGISLATION & CASE LAW  
Unit L9: Other Relevant Acts

# INVESTIGATION UNIT TRAINING PACKAGE

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## LEGISLATION AND CASE LAW MODULE

### *Units*

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Unit L2	The Acts Administered by the Ministry
Unit L3	Investigative Powers and Information Gathering
Unit L4	Obligations, Reviews and Debt
Unit L5	Offences
Unit L6	Reviews and Appeals
Unit L7	Conjugal Status
Unit L8	Official Information and Privacy Act
<b>Unit L9</b>	<b>Other Relevant Acts</b>
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## Unit L9: OTHER RELEVANT ACTS

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### Objectives

By the end of this unit you will:

- have a broad understanding of other Acts that might impact on an investigation

## Other Relevant Acts

### INTRODUCTION

While the main Acts under which the Ministry's National Fraud Investigation Unit administers is the Social Security Act and the Education Act, there are other Acts which have considerable importance. They are:

- Evidence Act 2006
- Privacy Act 1993
- Official Information Act 1982
- Crimes Act 1961
- Summary Proceedings Act 1957
- Interpretation Act 1991
- Criminal Proceeds (Recovery) Act 2009
- Sentencing Act 2002
- Public Records Act 2005
- New Zealand Bill of Rights Act 1990

The Evidence, Privacy and Official Information Acts are dealt with in greater detail in other modules.

### CRIMES ACT 1961

The Crimes Act 1961 came into force on 1 January 1962. It is divided into 14 Parts and applies to all offences for which the offender may be proceeded against and tried in New Zealand.

The main sections of the Crimes Act 1961 that are utilised by the Ministry's investigating officers are the ones that are generally referred to as dishonesty offences. They include but are not limited to s.240, s.229A, s.228 and s.246 of the Act which deals with obtaining by deception use of fraudulent documents and forgery. However, the Act also deals with other matters such as:

- conspiracy to commit offences
- parties to an offence
- procedures when persons are charged with indictable offences. Because the Ministry's prosecutions do not often result in indictable offences it will not be dealt with in detail here.

### ***Taking or Using Documents***

**Section 229A** of the Crimes Act 1961 contains provisions for the offence of taking or using a document with the intent to defraud for an offence committed prior to 1 October 2003. On 1 October 2003 a change in legislation introduced **Section 228** which is to be used when dealing with an offence or using a document that occurred after 1 October 2003.

The Ministry's investigations that result in prosecution are generally retrospective and it may be common that both s.229A and s.228 charges are laid.

#### **Section 229A**

Every one is liable to imprisonment for a term not exceeding 7 years who, with intent to defraud -

- a) Takes or obtains any document that is capable of being used to obtain any privilege, benefit, pecuniary advantage, or valuable consideration; or
- b) Uses or attempts to use any such document for the purpose of obtaining, for himself or any other person, any privilege, benefit, pecuniary advantage, or valuable consideration.

#### ***Ingredients of the Offence***

To prove that someone was taking or using a document with intent to defraud, you must prove the

- intent to defraud
- taking or obtaining of any document
- use or attempted use of any document
- capability of the document to obtain privilege, benefit, pecuniary advantage or valuable consideration
- purpose of using the document is to obtain privilege, benefit, pecuniary advantage or valuable consideration for the offender or any other person

#### ***Intent to Defraud***

It is vital to prove that the offender intended to defraud the victim. This intention (*mens rea*) must exist at the time that the offence is actually taking place (*actus reus*). Generally speaking, 'intention to defraud' means 'to do something dishonestly and knowingly'. Therefore, you need to show that the fraudulent act was:

- intentional
- deliberate
- dishonest



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A person is acting with deceit or deception when they make someone else believe that a thing which they know or believe is false is in fact true. You do not need to even prove that the victim sustained any actual economic or monetary loss, although such a loss would help you to prove the intent to defraud.

If the accused intends to defraud the victim at the time of the offence, there is no defence that they intended to pay the victim back in the future and would have been able to.

Unless intent to defraud can be inferred, it is up to the prosecution to prove that the accused intended to defraud their victim. If you can prove that something was obtained by a false representation, you usually have *prima facie* evidence of the intent to defraud.

However, where such evidence is adduced, the existence of an intent to defraud may be more clearly inferred. It is sufficient for the prosecution to show that the conduct of the defendant 'imperiled the economic interests of another.'

The intent to defraud must exist at the time of the taking or using of the document.

***Takes or Obtains***

These words retain their common meaning. For example, 'takes' would include someone taking cheques or other documents from letterboxes. 'Obtains' would include fraudulent obtaining or acquiring with consent, for example if you receive something which is mistakenly addressed to you but to which you have no right, and you use it anyway.

***Document***

In this situation, then, a document makes you aware of things that you would not otherwise know. This means that it does not matter what form the document takes, so long as it can be used to obtain a privilege, benefit, pecuniary advantage or valuable consideration. For example, under section 229A an EFTPOS machine could be a document.

***Privilege or Benefit***

Both of these words mean a 'special right or advantage' - for example, using another person's gym membership card so that you can use the gym facilities. Because neither term is qualified by the word 'pecuniary', the privilege or benefit does not need to be a financial one. Where the benefit or privilege does not involve money, there does not need to be financial loss or injury to the person who has been defrauded.

***Pecuniary***

'Pecuniary advantage' means a monetary or economic advantage. This might include, for example, gaining cash, credit or physical property.

***Valuable Consideration***

'Valuable compensation' means receiving compensation or a fee.

***Purpose of Obtaining***

In proceedings under section 229(A), the prosecution must prove that a document which could be used in one of the ways outlined above has been taken or obtained fraudulently. The prosecution must also establish that the offender has used or attempted to use the document fraudulently (section 299A(b)). Finally, the prosecution must prove that the offender's acts were for the purpose of obtaining the benefit for themselves or another person.

**Section 228**

Every one is liable to imprisonment for a term not exceeding 7 years who, with intent to obtain any property, service, pecuniary advantage, or valuable consideration, -

- a) dishonestly and without claim of right, takes or obtains any document; or
- b) dishonestly and without claim of right, uses or attempts to use any document.

***Ingredients of the Offence***

To prove that someone was taking or using a document dishonestly, you must prove the:

***Dishonestly***

similar to "intent to defraud" – the ordinary meaning of dishonest is "not honest" or "deceiving". To deceive means to deliberately mislead. To mislead means to give false information or lead into error

***Without claim of right***

in relation to any act, means a belief that the act is lawful, although that belief may be based on ignorance or mistake of fact or of any matter of law other than the enactment against which the offence is alleged to have been committed

***Intent to obtain pecuniary advantage***

same as s229A

***Takes or obtains a document***

same as S229A

***Uses or attempts to use document***

same as s229A.

***Obtaining by Deception or Causing Loss by Deception***

**Section 240** of the Crimes Act 1961 contains provisions for the offence of obtaining by deception any privilege, service, pecuniary advantage, benefit or valuable without claim of right. Deception in this section means false representation of a material and particular and can include oral statements, documentary statements and omissions.

**240 Obtaining by deception or causing loss by deception**

(1) Every one is guilty of obtaining by deception or causing loss by deception who, by any deception and without claim of right,—

(a) obtains ownership or possession of, or control over, any property, or any privilege, service, pecuniary advantage, benefit, or valuable consideration, directly or indirectly; or

(b) in incurring any debt or liability, obtains credit; or

(c) induces or causes any other person to deliver over, execute, make, accept, endorse, destroy, or alter any document or thing capable of being used to derive a pecuniary advantage; or

(d) causes loss to any other person.

(2) In this section, **deception** means—

(a) a false representation, whether oral, documentary, or by conduct, where the person making the representation intends to deceive any other person and—

▪ (i) knows that it is false in a material particular; or

▪ (ii) is reckless as to whether it is false in a material particular; or

(b) an omission to disclose a material particular, with intent to deceive any person, in circumstances where there is a duty to disclose it; or

(c) a fraudulent device, trick, or stratagem used with intent to deceive any person.

***Ingredients of the Offence***

To prove that someone was obtaining by deception, you must prove the:

- Pecuniary advantage
- Deception
- Without claim of right
- Deception (whether document or omission) was material and particular

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***Parties to an offence***

**Section 66** of the Crimes Act 1961 contains provisions to charge more than one person of an offence. This is where two or more people aid, encourages, abets, incites, counsels, or procures any person to commit an offence.

**66 Parties to offences**

- (1) Every one is a party to and guilty of an offence who—
- (a) actually commits the offence; or
  - (b) does or omits an act for the purpose of aiding any person to commit the offence; or
  - (c) abets any person in the commission of the offence; or
  - (d) incites, counsels, or procures any person to commit the offence.
- (2) Where 2 or more persons form a common intention to prosecute any unlawful purpose, and to assist each other therein, each of them is a party to every offence committed by any one of them in the prosecution of the common purpose if the commission of that offence was known to be a probable consequence of the prosecution of the common purpose.

***Ingredients of the Offence***

To prove that someone is a party to an offence you must prove that an offence is actually been committed and that a person: -

- does an act for the purpose of aiding another person
- omits an act for the purpose of aiding another person
- abets any person in the commission of an offence
- incites to commit an offence
- Counsels to commit an offence
- Procures a person to commit an offence

***SUMMARY PROCEEDINGS ACT***

This Act sets out how criminal proceedings are dealt with in District Court. This small introduction can only be a snapshot of what is contained in the Act, from a benefit fraud perspective.

- **Informations** - the Act sets out how, when and where informations can be laid against a defendant. Any person can lay an information for an offence. Information for the Ministry's prosecutions are laid by the Investigator who is the officer in charge of the case. After the information

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has been laid it should be filed as soon as practicable in the nearest District Court where the offending occurred.

- **Summons:-** the Ministry's informations are always by way of summons and upon becoming an investigator a request will be made to the District Court seeking authorisation for you the investigator to be able to serve summons on offenders. The Summary Proceedings Act outlines that a summons must be delivered to the offender personally or delivered to a member of his family living in the same home over the age of 18 years of age.
- **Warrants** - the Act further outlines under what circumstances a warrant to arrest can be issued.
- **Hearings** - the Act sets out the procedure required for the hearing of a usual benefit fraud case in the District Court by a Judge alone. Under s.66 of the Act, a defendant can elect trial by jury for a charge relating to benefit fraud under both the Social Security Act 1964, Education Act and the Crimes Act 1961. The Act also deals with the preliminary hearing procedure and committal proceedings for indictable offences where a jury trial has been elected.
- **Status Hearing :-** When a not guilty plea is entered, the defendant is remanded to a Status Hearing. Traditionally many cases set down for a defended hearing, do not proceed to hearing – either because the defendant changes his/her plea and/or the prosecution withdraw a charge/s faced by the defendant. This often results in allocated Court time not being utilised efficiently, with judges occasionally having no cases set down for hearing. The Status Hearing system was established to attempt to reduce the number of cases that are unnecessarily resolved by a late change of plea/ withdrawal of charge(s). A Status Hearing serves a number of purposes, (without the need to incur the time, effort and expense of a defended hearing):
  - for an indication of probable sentence to be given to the defendant,
  - to enable the strength of the prosecution case to be assessed by the Judge,
  - to enable the appropriateness of specific charges to the facts,
  - to enable a specific defence to be assessed by the Judge,
  - where a defended hearing is the only way to resolve matters, to ensure that the case is ready to proceed to hearing – agreement on facts not in issue (such as that the green leaf material taken from the defendant was cannabis), agreement on witnesses required to give evidence orally, estimated time required for the hearing.

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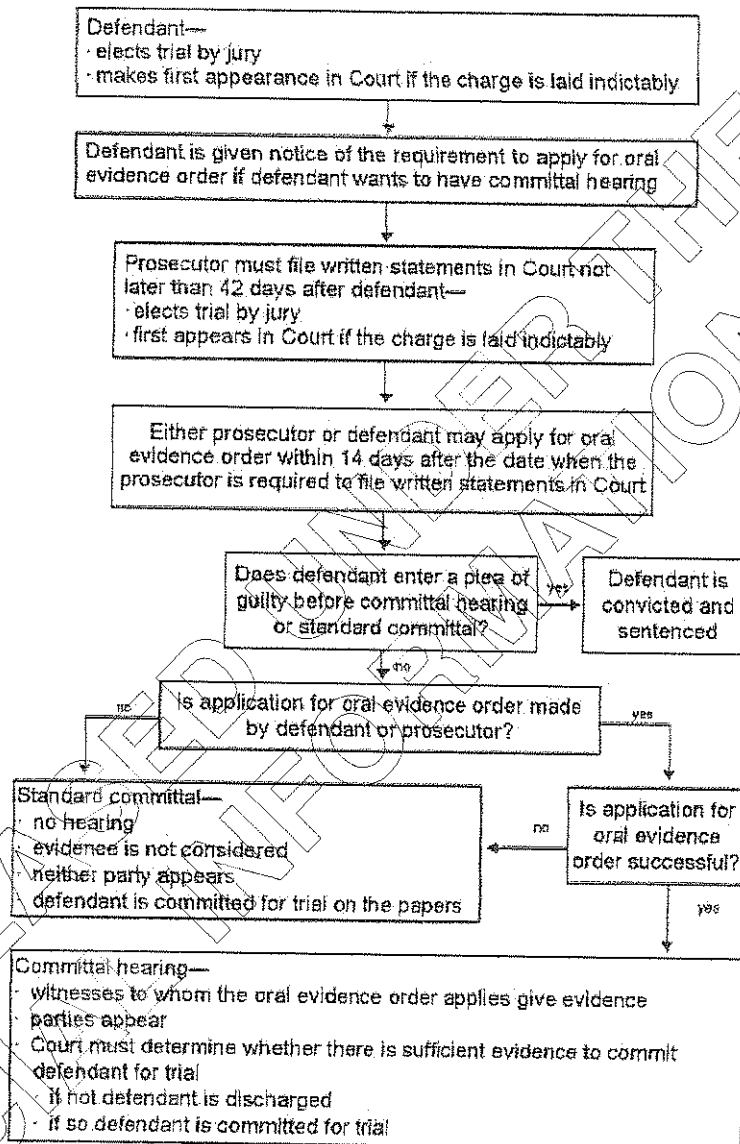
- **Committal Proceedings** : When a defendant elects trial by jury (which he may do if the offence is punishable by more than 3 months imprisonment) a standard committal procedure (which does not involve a hearing or consideration of the evidence) will commence. This procedure will examine written statements and the oral evidence that is going to be given by witnesses.

A general overview of the committal procedures set out below.

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**General overview of committal proceedings for offences to be tried on indictment**



Note: This general overview of committal proceedings is by way of indication only. Detailed rules set out in the Act determine how those proceedings are conducted.

[http://www.legislation.govt.nz/act/public/1957/0087/latest/DLM310743.html?search=ts act summary+proceedings+act resel&p=1&sr=1](http://www.legislation.govt.nz/act/public/1957/0087/latest/DLM310743.html?search=ts%20act%20summary+proceedings+act%20resel&p=1&sr=1)

## **INTERPRETATION ACT**

The purpose of the Interpretation Act is to provide principles and rules for the interpretation of legislation. The Act has six parts which outline principles, specific provisions and meaning of terms and expressions in legislation.

In 2005 New Zealand passed new law which allowed same sex couples to 'marry' in the form of commencing a Civil Union. In April 2005 section 29A of the Interpretation Act introduced a meaning of de facto relationships. This section outlines that a de facto relationship can be considered where a relationship exists between a man and woman, a man and man and a woman and woman.

[Refer to Unit L5 "Conjugal Status" for more information]

[http://www.legislation.govt.nz/act/public/1999/0085/latest/DLM31459.html?search=ts\\_act\\_interpretation+act\\_resel&p=1&sr=1](http://www.legislation.govt.nz/act/public/1999/0085/latest/DLM31459.html?search=ts_act_interpretation+act_resel&p=1&sr=1)

## **CRIMINAL PROCEEDS (RECOVERY) ACT**

The Criminal Proceeds (Recovery) Act was enacted to establish a regime for the forfeiture of property that has been directly or indirectly derived from significant criminal activity or what would represent the value of a person's unlawful derived income.

The purpose of this Act is to:

- Eliminate the changes for a person to profit from being involved in significant criminal activity
- Deter significant criminal activity
- Reduce the ability of criminals expanding criminal enterprise
- Deal with foreign restraining orders and forfeiture orders that arise in New Zealand

The Act provides for the Police to apply to the High Court for :

- A restraining order
- A civil forfeiture order
- An asset forfeiture order
- A profit forfeiture order
- A foreign restraining order
- A foreign forfeiture order

The Act has also gives Police further investigative powers allowing them to apply for a search and seizer warrant, for a production order or an examination order.



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Property or assets can be seized if they have been used as an instrument of crime or been obtained while conducting an offence that is described as a significant criminal activity.

Once property or assets are seized the custody and control of those are referred to the Official Assignee to protect and preserve the value of the seized items.

The Act defines significant criminal activity as an offence that would attract a sentence of more than five years imprisonment or receive benefit, proceeds or value in excess of \$30,000. It also confirms that the person undertaking such criminal activity does not need to have been convicted or acquitted of an offence.

An order requires the Police to prove on the balance of probabilities to a high court judge that the property or asset was used as an instrument of crime or an offence as defined as a significant criminal activity.

[http://www.legislation.govt.nz/act/public/2009/0008/latest/DLM1451001.html?search=ts\\_act\\_criminal+proceeds+recovery+act\\_resel&p=1&sr=1](http://www.legislation.govt.nz/act/public/2009/0008/latest/DLM1451001.html?search=ts_act_criminal+proceeds+recovery+act_resel&p=1&sr=1)

## **SENTENCING ACT**

The Sentencing Act primarily deals with the sentencing aspects of a benefit fraud case - both principles of sentencing and the sentences which can occur.

- **Principles of Sentencing**

The Sentencing Act provides that offenders shall not usually be imprisoned for property offences (including benefit fraud) unless "because of the special circumstances of the offence or the offender, any other sentence that could lawfully be imposed would be clearly inadequate or inappropriate."

The Act requires that an offender be kept in the community as far as that is practicable and consonant with promoting the safety of the community and that any sentence of imprisonment should be as short as possible, consonant with promoting the safety of the community.

Therefore, it is likely that to be imprisoned for benefit fraud will be at the higher end of offending to warrant imprisonment. In Auckland in 1995, it is likely that the fraud amount must be greater than \$30,000-\$40,000 to attract a possible sentence of imprisonment.

- **Types of Sentence**

There are many types of sentences that are possible. These are listed here, but dealt with in greater detail in another module.

- Discharge without conviction
- Conviction and discharge

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- Deferred sentence (ordered to come up for sentence if called upon)
- Fine
- Reparation
- Supervision
- Community Care
- Community Detention
- Community Work (which may include periodic detention)
- Imprisonment
- Home Detention
- Deferral for Home Detention

[http://www.legislation.govt.nz/act/public/2002/0009/latest/DLM135342.html?search=ts\\_act\\_sentencing+act\\_rese&p=1&sr=1](http://www.legislation.govt.nz/act/public/2002/0009/latest/DLM135342.html?search=ts_act_sentencing+act_rese&p=1&sr=1)

### **PUBLIC RECORDS ACT**

The Act establishes Archives New Zealand and provides the role of the Chief Archivist in developing and supporting government record keeping. It establishes that both Central and Local Government create and maintain accurate records of their affairs.

In order to abide by the principles of the Public Records Act, the Privacy Act and the Official Information Act the Ministry has business security policy and procedures surrounding security and safety of information held.

<http://doogie.ssi.govt.nz/resources/helping-staff/policies-standards/business-security/index.html>

<http://doogie.ssi.govt.nz/resources/helping-staff/policies-standards/business-security/info-security.html>

Investigators are equipped with portable audio recording devices to conduct witness and client interviews. There are additional instructions in relation to the security of audio recordings outlined in the 'Dictaphone Usage Policy'.

<http://isweb.ssi.govt.nz/dictaphone.asp>

### **NEW ZEALAND BILL OF RIGHTS ACT**

This Act provides that it is "to affirm, protect and promote human rights and fundamental freedom in New Zealand ..."

While it is not explicitly concerned with benefit fraud, this Act sets out general rights of all persons, including those arrested or detained under *any* enactment. This includes the right to information about the detention, the right to consult a solicitor and other similar rights. To be consistent with these rights, the Service

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should caution anyone questioned about a benefit fraud matter, with the Service Caution (Operations Grapevine 95/104). It is unlikely that an interviewed customer, for example, will be "in detention" as required under this Act, but the approach used should be consistent with.

[http://www.legislation.govt.nz/act/public/1990/0109/latest/DLM224792.html?search=ts\\_act\\_bill+of+rights+act\\_resel&p=1&sr=1](http://www.legislation.govt.nz/act/public/1990/0109/latest/DLM224792.html?search=ts_act_bill+of+rights+act_resel&p=1&sr=1)

### ***ELECTRONIC TRANSACTION ACT 2002***

This Act deals with matters concerning the legal effect of information that is in electronic form or that is communicated by electronic means.

[http://www.legislation.govt.nz/act/public/2002/0035/latest/DLM154185.html?search=ad\\_act\\_Electronic\\_aa\\_acur\\_r&p=1&sr=1](http://www.legislation.govt.nz/act/public/2002/0035/latest/DLM154185.html?search=ad_act_Electronic_aa_acur_r&p=1&sr=1)

### ***DISTRICT COURT RULES 2009***

District Court Rules 1992 was reviewed in 2009. The District Court Rules apply to civil matters that are held in the District Court.

The new District Court Rules underlining principal are to ensure that just, speedy and inexpensive proceedings are applied for civil matters.

The principles are to ensure all parties are treated equally and saving expenses. They determine that cases should be managed in ways that are proportionate to the importance of the case, the complexity, the amount of money involved and the financial position of each party involved.

<http://www.legislation.govt.nz/regulation/public/2009/0257/latest/DLM2300101.html>

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**NEXT UNIT - UNIT L10: Case Law Policies and Precedents**

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## Unit L10: CASE LAW POLICIES AND PRECEDENTS

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### Objectives

By the end of this unit you will be able to:

- discuss four principles underlying the need for welfare legislation
  - describe how the benefit system is administered
- understand the relationship between the law, policy and precedents

## Case Law Policies and Precedents

### INTRODUCTION

Case law allows the principles collected from previously determined hearings to be used to assist in the future determination of decisions or hearings. The principles themselves are not evidence but can be used to show how the available evidence can be drafted toward the required proof in the case under consideration.

This case law is determined by Judges and the Social Security Appeal Authority (for benefit administration) and some cases are then published. Lawyers and academics can use these principles in further cases or such cases can change the way the Ministry does its work, to take into account those changes in case law within its policy.

This can best be shown by example below.

### CASE LAW

Below is a list that is not exhaustive of common decisions now used as case law when administering benefit entitlement and/or initiating criminal proceedings; -

Full copies of these decisions are available to you. You will need to locate these now and become familiar with them.

RUKA	Defining a relationship in the nature of a marriage for benefit purposes
EXCELL	Conjugal status
THOMPSON	Conjugal status
BATT and RAY	Defining financial interdependence when considering a relationship in the nature of a marriage
AP 352/94	Conjugal status – 63(a) living apart
MANN	Appeal against sentence
NICHOLSON	Discharge of obligations
MOODY	Retrospective rate substitution
IOANE	Overpayment assessment for court purposes only

For more information on specific case law decisions see:

<http://doogie.ssi.govt.nz/resources/helping-clients/policies-standards/integrity/nfiu/legal/case-law-index.html>

### ***PRECEDENCE OF DECISIONS***

The Court of Appeal is likely to be the highest New Zealand Court which will consider issues relevant to Social Security Law. Decisions by the Court of Appeal are binding on lower courts.

The High Court is the court to which a District Court criminal decision or an Appeal Authority decision is appealed. A decision of the High Court is also binding on lower jurisdictions. Currently the Ministry's policy is to apply these binding decisions in policy or Appeal the decision.

District Court decisions may have persuasive effect, as might Appeal Authority decisions. However, they are not binding for decisions made by other judges in the District Court. Their persuasive effect often depends on their written argument and the standing of the individual judge or decision maker.

Other decisions in overseas Courts or by New Zealand Courts may have limited persuasive effect if they consider, for example, the wording adopted by the Social Security Act. These are less likely to have precedent value.

### ***POLICY***

Inevitably, government departments will have policy manuals, and the Ministry is no exception. The policy manuals are an attempt to write down guidelines for the administration of the benefit system that makes decision making by staff correct and consistent.

Just as inevitably, the policy manuals will not have thought of answers for every situation which will arise after the manuals have been written. As a result, there may be some tension between policy and the correct interpretation of law. The correct interpretation of the law is the appropriate course to adopt, as if not adopted will give rise to the Ministry losing its case either in the criminal court or before the Social Security Appeal Authority.

Often this tension between the two is difficult to pick and gives rise to cases such as High Court decision on Special Benefits (Ankers case). In that case the Ministry's policy, setting out criteria which had to be met before a Special Benefit could be granted, was challenged in the High Court. The Court held that section 61G, which gives discretion to grant a special benefit, could not be limited to the extent that the policy required. If there are any difficulties with this sort of tension in deciding, then contact Legal Services.



MODULE 1: LEGISLATION & CASE LAW  
Unit L10: CASE LAW POLICIES AND PRECEDENTS

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**CONGRATULATIONS!!**

You have now finished the **Legislation and Case Law Module**

**NEXT MODULE:  
INVESTIGATIONS**

RELEASED UNDER  
OFFICIAL INFORMATION ACT

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OFFICIAL INFORMATION ACT