

The complexities of 'relationship' in the welfare system and the consequences for children

A Child Poverty Action Group Background Paper

Susan St John

Catriona MacLennan

Hannah Anderson

Rebecca Fountain

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Child Poverty Action Group (CPAG) is an independent charity working to eliminate child poverty in New Zealand through research, education and advocacy. CPAG believes that New Zealand's high rate of child poverty is not the result of economic necessity, but is due to policy neglect and a flawed ideological emphasis on economic incentives. Through research, CPAG highlights the position of tens of thousands of New Zealand children, and promotes public policies that address the underlying causes of the poverty they live in.

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The complexities of relationship in the welfare system and the consequences for children

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Child Poverty Action Group Inc.

PO Box 5611

Wellesley St

Auckland 1141, New Zealand.

www.cpag.org.nz

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Preface

Child Poverty Action Group is pleased to publish this much needed report. Despite the recent focus on 'vulnerable children' in New Zealand, many current policies themselves have had harmful effects on the already most disadvantaged children. In particular, under the guise of 'welfare reform', punitive policies have been implemented without considering the impact on the children in the most precarious of low income families. CPAG has been particularly dismayed by the use of sanctions that reduce benefits when there are children (Wynd 2013; Wynd 2014). This report, however, focuses on a more systemic issue: the traditional reliance on using the presence or absence of a relationship in the nature of marriage to determine entitlement in the welfare system.

Ambiguities and anomalies posed by the use of relationship status arise differently in different parts of New Zealand's social policies and practices. Overall, the report finds not just that there are worrying impacts on children in cases where 'relationship fraud' is alleged, but that the treatment of marital status more generally is inconsistent and iniquitous. It has been a contributing factor to increased income poverty, and to gender inequality.

A sole mother may be deemed by Work and Income to be in a relationship in the nature of marriage even when that relationship has provided little or no financial support, and/or the relationship is unstable. Such a relationship makes her ineligible for Sole Parent Support (SPS) and may make her liable for penalties and repayment. In some cases of so called 'relationship fraud', she may be prosecuted and face both imprisonment and a lifetime of repayment for allegedly unlawful payments.

Determining whether or not a relationship in the nature of marriage exists is not a clear-cut exercise, yet it has far reaching ramifications. A subjective judgment of all of a mother's circumstances, as well as those of her alleged partner, is required. A degree of surveillance may be involved that is far from open and transparent. For Work and Income to deem that a relationship is in the nature of marriage, it is required to have the two key characteristics of emotional commitment and financial interdependence. The application of this test is unsatisfactory and contentious. More fundamentally, current law fails to acknowledge that women have a right to be considered as individuals, independent of their male acquaintances or relationships.

A sole mother investigated for 'relationship fraud' faces a process that can be protracted and intimidating for both them and their children, and that affords them few rights or protections. When mothers serve custodial sentences, they become separated from their children, wider family and whanau, disrupting their children's lives and causing on-going distress. Mothers may then emerge from prison with large debts that are not cancelled even when repayments cause extreme hardship. In large part, the media fails to investigate and report these cases with insight and empathy. The harm to children from both their separation from a primary caregiver, and her subsequent debt and diminished income, has been largely invisible.

Under current policy, beneficiaries who owe debt to Work and Income may be treated much more harshly than those who evade tax, even when, in the latter case, the amounts involved are much higher. This report finds that mothers convicted of 'relationship fraud' are treated more severely than is possibly warranted, with little recourse or appeal. Recent new legislation to make partners also accountable acknowledges that the focus on the sole parent's offending alone can be most unjust. However, the likely unintended effects and complex legal implications of this legislation make it a step further in the wrong direction.

This report briefly outlines the case law history, the significance of the recommendations of the *Ruka* case, and the landmark Joychild report. There are a large number of cases held by CPAG on file, all reflecting different circumstances and complexities. Any recent cases discussed are anonymised to prevent recriminalizing the individuals concerned. One of the purposes of this report is to provide a base document to encourage qualitative research into the lived experiences of those who go through this investigative process and its impact on their children, and further monitoring of the statistics and outcomes.

In confronting these issues it is noted that so called 'relationship fraud' is in a very different category from fraudulent activity such as using multiple names to access benefits, or deliberately accessing a benefit while in full-time work. Child Poverty Action Group does not condone actual fraud. When a 'married couple' profess to be living separately in order to gain higher benefits, it is clearly a breach of the law. It may, however, reflect that the couple rate of benefit is grossly insufficient for them and their children. The way relationship status is used in the welfare system and parts of the tax system demands fresh thinking.

This is not an easy area to research. Child Poverty Action Group is grateful to the team of authors who have worked to expose some worrying features of current policy, but Child Poverty Action Group takes overall responsibility for the messages the report contains. In particular we acknowledge the principal authors, Susan St John, Catriona MacLennan, Hannah Anderson and Rebecca Fountain. CPAG is grateful to Anne Else for editing and to Lisa Marriott, Gerry Cotterell, Janfrie Wakim, M. Claire Dale, Alison Cleland, Michael O'Brien, Michael Fletcher, Sue Bradford, Emily Keddell, Julie Timmins, Brian Easton, Maire Dwyer, Paul Blair and Tony McGurk and many others for their input and comments.

Child Poverty Action Group also thanks the sponsors of this work, the Hostel of the Holy Name Trust, without which it could not have been completed. We hope the recommendations of this report are widely discussed and urge that they are taken seriously as an important step in moving towards a welfare system that better meets the needs of families and children in the 21st century.

Co-Convenors of Child Poverty Action Group

Janfrie Wakim

Alan Johnson

1. Introduction

When a traditional way of doing things is deeply entrenched in social structures and values, it can be quite confronting to propose an alternative based on different principles. Yet when existing institutional practices are harmful, especially to children, a fundamental rethink is needed. The issue to be discussed here is whether marital or relationship status as a defining characteristic for benefit entitlements best serves the wellbeing of our families in the 21st century.

To set the scene, Section 2 discusses some of the broader issues for society that arise from the differing use of the marital unit in social policies, including NZ Superannuation, ACC and the tax system. A brief historical summary of the use of the concept of 'relationship' in New Zealand since the 19th century is provided in Appendix A.

'Relationship fraud' and what it means has always been a fraught and contentious topic. Section 3 examines the Ministry of Social Development's definition of marital (conjugal) status and relationship fraud, and Section 4 reflects on the consequences for children affected by the Ministry's decisions. Using the lens of children's rights, New Zealand can be seen to be in breach of its obligations to ensure that all children have an adequate standard of living. This section also reveals the lack of consistent data, reporting, and accountability in terms of effects on children. Section 5 describes how the harsh penalties imposed, including jail sentences, often appear disproportionate when compared with penalties for 'white collar fraud'. The way the media portrays 'relationship fraud' prosecutions often reinforces negative stereotypes and is also explored in Section 5.

Section 6 outlines some of the background to the treatment of relationship fraud in New Zealand, including explaining the importance of the *Ruka* case and the Joychild review of that case. It notes the marked lack of reporting around the actions and motivations of the Ministry's fraud unit, and the disregard of the Joychild recommendations around the culture, processes, and behaviour towards beneficiaries.

In March 2013 the Ministry of Social Development discussed the introduction of new measures to address relationship fraud (New Zealand Parliament 2013). Section 7 discusses the implications of the Social Security (Fraud Measures and Debt Recovery) Amendment Act 2014, which extends the liability to include the spouse or partner of a woman convicted of relationship fraud.

The report concludes in Section 8 with a plea for an overhaul of the social security framework to align it better with 21st century conditions. What would a principled reframing of welfare look like?

Rather than taking the current punitive approach to those struggling the most, the Ministry of Social Development's goals and laws need to be better aligned with the interests of a more equal society. This may be the time for some new thinking to align the different parts of the welfare state and the tax system more closely and more appropriately for the social and economic environment of the 21st century. Section 8 proposes recommendations that would support, rather than marginalise, women and children in poverty. They require the focus to shift from what a sole parent is not entitled to, to what she and her children need in order to thrive.

2. Relationships in New Zealand welfare and tax policy

Although there has been much controversy and debate regarding social welfare policy in New Zealand, policies and practices have developed piecemeal, with no major overhaul or examination of fundamental principles since 1938. However, the current government has promised a rewrite of the 1964 Social Security Act, which has become laden with amendments and complexities.

Today the welfare system still reflects traditional thinking around the role of women and their dependence on a partner. This in turn requires that a particular view is taken of what qualifies as a relationship, so that policy may determine when the dependence occurs. Since the early 1990s, welfare reform has emphasised the role of paid work for parents as the route out of poverty, and fiscal sustainability issues have reinforced rather than reformed the use of the couple as the assessment unit.

Relationships for individuals are often complex and volatile over time and society has become more accepting of different living patterns. Relationships that are sanctioned by formal marriage or civil union may be the easiest to identify, while other arrangements are often difficult to assess as to whether or not they are 'de facto', or equivalent to marriage. Co-habitation may or may not be a defining feature of 'marriage', and it may or may not determine when 'unmarried' people can be regarded as in a relationship. This matters from an equity point of view when social policies treat individuals differently depending on their marital (relationship) status.

This report focuses on those individuals who have children and are receiving benefit support. In particular, we explore the impact that being deemed to be in a relationship can have upon them and their family, along with the implications their 'relationship status' has in terms of the financial support available to them.

To set the scene, this section outlines the current treatment of relationships in the tax and welfare system in New Zealand. The treatment of welfare beneficiaries is placed within the context of the treatment of others, in order to contrast existing policy and fully comprehend the ramifications of opposing approaches.

Tax system

The New Zealand tax system is founded firmly on the premise that it is the individual who pays tax, not an aggregated unit such as the couple or household. Thus a married person is taxed without regard to whether they are in a relationship or not. Personal income is the basis, not joint income, thus avoiding arguments over whether a relationship exists. New Zealand does not have a special tax rebate for a 'dependent' spouse, nor does it require joint income tax filing. Simplicity in this and other aspects is one of the reasons the OECD has regarded the NZ tax system so highly.

After the radical reforms undertaken in the 1980s, the NZ tax system has long been regarded as one of the most efficient within the OECD. (OECD 2007)

Benefit system

Benefits and taxes can be thought of as the opposite side of the same coin. Taxes are levied on capacity to pay, as measured by income, while benefits are granted on the basis of incapacity to pay, or lack of income. There is a disjunction between the marriage-neutral treatment of the individual in the tax system and the marital unit basis in the welfare benefit system.

In the welfare system it is assumed that a couple can live more cheaply than two singles (economies of scale); consequently, the couple rate of the Jobseeker Support provided to support the unemployed and/or temporarily unwell, and the Supported Living Payment provided to support the severely incapacitated, is less than twice the single or 'individual' rate of these benefits (see Table 1).

For example, the net rate of the Supported Living Payment, for a single person, is \$261 per week, but \$218 per person for those deemed to be in a relationship equal to marriage, a difference of \$43 or 16%.

There is no attempt to incorporate a living arrangements criterion in these benefits, with, for example, a different rate for singles sharing accommodation. Accommodation costs can be subsidised by an Accommodation Supplement that also differs in amounts by relationship-based criteria, as well as being income and asset tested on a joint basis.¹

The tax credits for children are a separate issue, as discussed below. The Sole Parent Support rate of \$299 per week is higher than the single person rate of the Jobseekers Support (\$209), to reflect that a sole parent is not in the same situation as an unencumbered single person. If the sole parent is disabled, they may qualify for \$343 of Supported Living Payment. This is an adult payment, with children's needs assumed to be met by the child-related Family Tax Credit.

Table 1. Single and married rates of common welfare benefits 1 April 2014 (WINZ website)

Benefit	Marital status	Net weekly	Annual net
Sole Parent Support	Single	\$299.45	\$15,571
Jobseekers	Single	\$209.06	\$10,871
	Married each	\$174.21	\$9,059
Supported Living Payment	Single	\$261.31	\$13,588
	Married each	\$217.75	\$11,323
	Sole parent	\$343.27	\$17,850
NZ Superannuation	Single living alone	\$366.94	\$19,081
	Single sharing	\$338.71	\$17,613
	Married each	\$282.26	\$14,677

Couples receiving Jobseeker Support or Supported Living Payment benefits do not receive any extra allowance for children in the married benefit rate; they are treated the same and paid the same low weekly rate whether they have children or not. While they get the Family Tax Credit for their children, the financial position of couples with children can be very precarious indeed. It may appear that if the couple separated they might be better off. For example, the weekly jobseeker rate for a married couple is only \$348 net, compared with Sole Parent Support (SPS) of \$299 for one parent and single Jobseeker Support of \$209 for the other, giving a total of \$508 net per week.

¹ <http://www.workandincome.govt.nz/individuals/brochures/need-extra-help-with-costs.html#Accommodationcosts>

Moreover the treatment of extra earned income is very punitive for couples struggling on the benefit. For any income over \$80 earned by either partner, there is a loss of 35 cents in the dollar from each of the two married rates. The \$80 exemption is exactly the same for the couple as for the single person, and this is manifestly unjust. The harsh abatement for income over \$80 a week can mean an effective marginal tax rate of over 80% once tax and ACC is accounted for.

About 50,000 children in beneficiary families live in two parent households, and their poverty situation is likely to be even worse than for the children of sole parents on a benefit (O'Brien and St John 2014). The effective marginal tax rate problem acts as a major disincentive for couples to declare occasional work for fear of benefit reduction. It is understandable that some couples may consider notional separation, so that they and their children can survive. This action, however, risks them losing weekly income, having their benefit cut entirely, or facing harsh penalties, long term debt and possible prosecution. Actual separation is unlikely to be a rational solution. If parents are genuinely living apart, the additional accommodation costs, child support payments and living costs may negate any financial advantage.

Superannuation and ACC

Just as the tax system is based upon an individual as the unit, so are many parts of the welfare state. New Zealand Superannuation (NZS) and earnings-related Accident Compensation are based on individual entitlement. This means that the amount paid to the individual is not affected by the *income* of a partner and is taxed at the individual's tax rate, so that it is marriage neutral in that sense.²

Nevertheless different rates of NZ Superannuation are paid according to both relationship status and living arrangements. The three rates are single living alone, single sharing and married (as shown in Table 1). The distinction is not insignificant. While 60% of those over 65 are married or in a relationship in the nature of marriage, 40% are single, either living alone or single sharing (Retirement Policy and Research Centre 2014). The presumption is that married superannuitants are better-off simply because they are 'married' and can therefore be paid less than two single people sharing. There is no rate for single sharing in the standard welfare benefits described above.

Potentially, two superannuitants who live alone could have a joint income of \$8,808 per annum more than if they were classified as being 'married', which may not hinge on whether or not they live together (i.e. co-habit). Those who are living alone receive \$1468 more per year than if they were sharing with another single; but the combined pension for two people who are 'single sharing', is \$5,872 more than the combined pension for a 'married' couple.

Accident Compensation Earnings replacement is paid to the accident victim regardless of the marital status of that person, or the earnings of their partner. This is in sharp contrast to the way in which sickness and invalid benefits are paid to those who are incapacitated for reasons other than an accident, whether at work or home. In the case of a fatality, there may be an ACC payment to a 'spouse', requiring a decision to be made as to who qualifies as the dependent spouse.

2 Anomalously, a 'married' superannuitant may be affected by Section 70 of the Social Security Act as explained in Retirement Policy and Research Centre (2013). Overseas Pensions Forum: Justice Delayed? Auckland, Retirement Policy and Research Centre, Department of Economics, the University of Auckland. <http://www.business.auckland.ac.nz/en/about/our-research/bs-research-institutes-and-centres/retirement-policy-and-research-centre-rprc/publications-28/PensionBriefing.html>

Tax credits

The Working for Families tax credits for children is part of the tax/benefit interface, and does not fit well either as part of the individually-based tax system or as part of benefits that depend on 'relationship status' (see O'Brien and St John 2014). Such tax credits are administered by the Inland Revenue Department; but instead of being determined by individual income, tax credits are determined by the total joint income of the 'couple', and are reduced for extra income earned by either above joint household income of \$36,300. Currently the loss is 21.5 cents for each extra dollar earned.

The Family Tax Credit is a per week, per child, payment to the caregiver, regardless of benefit status, but it is income-tested against joint incomes for 'married' parents. Unfortunately a significant part of Working for Families, the In Work Tax Credit, requires that a sole parent is employed for 20 hours a week of paid work and a couple is employed for 30 hours a week. Neither partner may be receiving a welfare benefit or student allowance.

Many women receive the full package of Working for Families tax credits, including the In Work Tax Credit, while at home looking after children, because of their partner's work effort. A woman in this situation is also held responsible for any overpayment that might come about if her partner earns more than was anticipated. Perversely, the Inland Revenue Department which administers the scheme may save money on the In Work Tax Credit if it can prove that the mother is not in a relationship.

*The IRD and Work & Income definitions of what constitutes a relationship are inconsistent, with Work & Income keen to say there is a relationship if there is evidence of financial support. Work & Income peers into the bedrooms of the poor to see if the sole parent is co-habiting and therefore not entitled to a benefit. On the other hand, the IRD, even less qualified in social matters, peers into the bedrooms of the poor to see if she is **not** co-habiting, so that she can be denied the IWTC for her children. Families can receive a torrent of letters from different parts of the IRD and Work & Income and become confused and anxious, especially when overpayments of WFF are alleged, accompanied by demands for interest payments on debts accrued. (O'Brien and St John 2014)*

While the In Work Tax Credit (worth \$60 or more a week) can be paid to a mother while she is in a relationship, even if she is not in paid work, providing her partner is in paid work for 30 or more hours, if they split up it is a different matter. Even if they remain independent from the benefit system and he continues to support her full-time care-giving role, she loses entitlement to the IWTC and is liable for repaying any so-defined 'overpayment'. The work-based [il]logic appears to be that, because she is living on her own, she should now be capable of working 20 hours a week outside the home. There is no regard for the needs of the young child, nor respect for the considerable unpaid work of fulfilling her primary duty of care. She may consider a sole parent benefit her only alternative.

The Minimum Family Tax Credit is an income top-up for families that is the same for both a single and a couple household. A single mother can get it if she is working 20 hours and off-benefit. However, if she is working 20 hours, but in a relationship with a person who is not working, they do not qualify for this top-up, because for a couple 30 hours of paid work is required. When a couple does qualify, the Minimum Family Tax Credit is reduced dollar for dollar for any extra income from increased hours worked or higher rates of pay earned by either partner. Thus there are some really complex issues

around the use of relationship status for this top-up payment. Its increased use under the 'work first' approach of government is of concern, as discussed in O'Brien and St John (2014).

Miscellaneous provisions

Paid Parental leave, paid for 14 weeks to a mother of a new-born if work-based criteria are met, is an individual taxable entitlement; while it is paid for by the taxpayer, it does not vary with relationship status. The intent of this payment, as Inland Revenue explains,³ is to 'go towards the loss of income that working mothers experience when they take parental leave from work to care for a new baby'. The gross amount of this payment made over 14 weeks is \$7056.

On the other hand, the Parental Tax Credit, a small payment for those with a new-born who do not get Paid Parental Leave, depends on joint income and being off-benefit. About 15,000 new-borns do not qualify for either payment (St John and Familton 2011; O'Brien and St John 2014).

Student allowances are also dependent on relationship status, but in ways that are clearly associated with the need for the state to save money. If students are under 24 and there is no child involved, relationship status is ignored and the parental income test is applied. Over 24 years of age, the parental income test does not apply, but allowances become income-tested on joint income for those who have a partner. Studylink provides a very extensive set of criteria to determine whether partnership exists.⁴

Summary

Different parts of the system are based on different ideas of what a relationship is and whether the partner's income should be taken into account. The result of that confusion can leave the focus on what a woman is *not* entitled to, rather than what she and her children need to survive.

Statistics show a very high rate of child poverty in beneficiary families (see Section 4). This is serious in its own right, as children are affected adversely by the inadequate income of the sole parent or couple. It becomes quite draconian when they are further penalized by harsh relationship fraud accusations leading to financial penalties or even imprisonment.

3 <http://www.ird.govt.nz/yoursituation-ind/parents/parents-paid-parental-leave.html?id=201405MegaMenu>

4 <http://www.studylink.govt.nz/about-studylink/glossary/de-facto-relationship.html>

3. 'Relationship fraud' in the benefit system

Defining what is meant by 'relationship'

When assessing entitlement to income assistance, Work and Income considers a person to be in a relationship if they are: married or in a civil union with someone of the same or opposite sex, or in a de facto relationship with someone of the same or opposite sex (Work and Income 2014).

Disputes arise around what constitutes a 'de facto relationship' with differing statements leading to confusion. For example, note the circularity of the following explanation:

People are considered to be part of a couple when they are in a relationship with another adult and where there is a degree of companionship in which they are committed to each other emotionally for the foreseeable future and financially interdependent on each other. This includes couples who are married or in a civil union and couples who are living in a de facto relationship. (Ministry of Social Development 2013)

It is interesting to consider whether these definitions work for those over 65. Older unmarried people may have a variety of relationships that might be very difficult to classify fairly. For instance, two older people may have an emotional commitment to each other, but whether they live together or not, they may retain financial independence. In contrast two sisters may live together, own property together, and enjoy both emotional commitment and financial interdependence (for example, they may leave assets to each other in their wills), yet New Zealand society is not ready to classify them as 'de-facto married'. Higher economies of scale cannot always be assumed for two people who live in the same house just because they are married: for example, some 'married' superannuitants may choose not to share a bedroom. Distinguishing between living together as if 'married', or simply as 'sharing', or living apart but married, may be impossible to do fairly, yet substantial sums are potentially involved.

While current policy appears to encompass superannuitants (Ministry of Social Development 2013), there is no targeted advertising campaign, no harassment of older people and no considerable effort at governmental level to represent superannuitants as acting unlawfully, or to enforce tougher penalties on this part of the population. No peering into their bedrooms!⁵ One can imagine the outrage from this section of the population if relationship status declarations were enforced for all single superannuitants in the same way as they are in the welfare system.

For those on welfare benefits, the Social Security Act (1964) allows discretion in the determination of whether two people are in a relationship in the nature of marriage and whether recoverable overpayment or fraud has occurred. The chief executive may:

(a) regard as single any applicant or beneficiary who is married or in a civil union but is living apart from his or her spouse or partner:

(b) regard as married any 2 people who, not being legally married or in a civil union, have entered into a relationship in the nature of marriage – and may determine a

5 In fact a small segment of married superannuitants are affected when their New Zealand Superannuation is reduced because their spouse has an overseas state pension that is greater than their New Zealand Superannuation. Those affected are typically very angry and vocal but lack the numbers to exert enough political pressure to get change Dale, M. C. and S. St John (2012). "New Zealand's Overseas Pensions Policy: Enduring Anomalies and Inequities." Policy Quarterly 8(2): 54-63.

date on which they shall be regarded as having commenced to live apart or a date on which they shall be regarded as having entered into such a relationship, as the case may be, and may then in the chief executive's discretion grant a benefit, refuse to grant a benefit, or terminate, reduce, or increase any benefit already granted, from that date accordingly⁶.

A checklist helps the Ministry to assess the two main determinants of relationship status: emotional commitment and financial interdependence. Both these factors must be deemed to be present in order for the Ministry to confirm that the relationship is in the nature of marriage. A great deal may hinge on relationship definitions for a sole parent who may believe that their relationship is not in the nature of a marriage. To help distinguish the nature of a de facto relationship, Work and Income (2014) suggests that the beneficiary 'thinks about these issues':

- *You live together at the same address most of the time.*
- *You live separately but stay overnight at each other's place a few nights a week.*
- *You share responsibilities, for example bringing up children (if any).*
- *You socialise and holiday together.*
- *You share money, bank accounts or credit cards.*
- *You share household bills.*
- *You have a sexual relationship.*
- *People think of you as a couple.*
- *You give each other emotional support and companionship.*
- *Your partner would be willing to support you financially if you couldn't support yourself.*

Inevitably there is a degree of judgement and the factors may be open to wide interpretation or weighted differently by different investigators. In suspected overpayment/fraud cases, when the officers of the Ministry of Social Development judge that a relationship exists, they must also decide when the relationship began, the excess paid and how much is therefore to be repaid. All of these decisions can appear subjective and yet much is at stake.

In cases of domestic violence, discussed further below in the landmark *Ruka* case, staff are expected to consider:

in every case whether or not the necessary ingredients of emotional commitment and financial interdependence are present. If there is violence in the relationship they also have to consider to what extent that violence affects the relationship's fundamental characteristics. (Hughes 2001)

In 2013 a 'Relationship Status Verification' procedure was introduced.⁷ This requires a Sole Parent Support applicant to get a non-family member to supply information on the applicant's relationship

⁶ Section 63 (b) of the Social Security Act 1964

⁷ <http://www.workandincome.govt.nz/documents/forms/relationship-status-verification-form.pdf>

status' (the applicant can refuse but that would appear unwise). With no guidance except a website referral, the form asks the person completing it to 'tell us in your own words what the applicant's relationship status is'. There is no information that a relationship in the nature of marriage requires both financial and emotional interdependence; yet the form makes it clear that the person filling it in may face prosecution, fines or imprisonment if they provide false information. Those who are worried about the information they are being asked to provide can contact the fraud allegation line with the protection of anonymity.

These procedures may be intimidating to the sole parent, who may not even be told what information the informant has supplied. When relationships ebb and flow over time, it is hard to see the value of this procedure, but it may inhibit a sole parent from making an application in the first place.

What is relationship fraud?

A small number of people commit welfare fraud by deliberately misrepresenting their circumstances or failing in their obligation to inform MSD of changes in their circumstances in order to get money to which they are not entitled. (Ministry of Social Development 2013 p3)

This report focuses on the grey area of so called 'relationship fraud', where decisions have been harsh and the penalties imposed highly questionable. According to the Ministry, 'relationship fraud' is one of the two most common ways in which 'benefit fraud' is committed. These two ways are described as follows:

1. Failing to declare employment and wages received (often by continuing on a benefit after starting work).

2. Failing to declare a relationship (particularly if the relationship starts or resumes, while at least one partner is receiving a single or sole parent rate of benefit).

(Ministry Social Development 2013)

But the line between an overpayment and fraud can be blurred. Overpayments may be the result of error on the part of Work and Income, or a misunderstanding by the beneficiary. Fraud may be alleged when a person who claims to be single, or a sole parent, and receives a benefit or housing or other hardship assistance on this basis, is in fact married, or in a relationship deemed to be in the nature of marriage. The possibility of these overpayments in the benefit system arises from differences in net rates, as shown in Table 1. It may also arise if a joint income test should have applied.

In spite of political rhetoric, in the context of overall alleged benefit overpayment, the proportion relating to successfully prosecuted **relationship fraud** is small. The figures for 2011/12 show that out of 10,735 cases investigated, only 2,139 cases of overpayment were established. Of these, 714 out of 742 were successfully prosecuted in the courts for fraud, with an outstanding debt of \$23.4m.

Table 2 shows that relationship fraud comprises 28% of prosecuted fraud cases, or 208 people, largely female sole parents.

Table 2 Prosecuted fraud by type 2011/12. (MSD 2013)

Type	Number	Percent
Working	399	53.8
Relationship	208	28.0
Child out of care	34	4.6
Multiple benefits	18	2.4
Accommodation	13	1.8
False Documents	3	0.4
Student	3	0.4
Other	64	8.6
Total	742	100

The quantity of debt assessed as obtained by 'mis-representing' marital status may appear large in some cases, but is a function of the extended period of time over which the alleged misdemeanour occurred. It is unclear whether the alleged outstanding amounts take adequate account of what other benefits may have been payable in the period. Given the complexity of the calculations, beneficiaries need, but do not get, an independent check of the sums to be repaid by qualified and experienced welfare advisors.

Relationship fraud comprised just under a third of all welfare fraud prosecutions in 2011/2012 and large sums of money were often involved. In 2010/2011 67 percent (41 cases out of 61) of those with overpayments of more than \$100,000 involved women in undeclared relationships. (Ministry of Social Development 2013)

The investigative process

An investigatory process can commence into any individual receiving government support at any time, and is based upon an 'intelligence-led approach' by the National Fraud Investigation Unit⁸.

[We] find benefit fraud in lots of different ways, including through members of the public, data matching with other government agencies, our own internal investigations and regular client entitlement reviews.⁹

Sole parents are warned on the Work and Income website¹⁰:

Have you told us everything?

When you receive income assistance, it's very important you tell us everything about your personal situation that might affect your entitlement, for instance if you're working or in a relationship. It's also important that you answer honestly questions we may ask about your personal situation.

If your situation changes in any way that may affect your entitlement, you must tell us straight away. If you don't tell us about these changes, you could be breaking the law.

8 <http://statisticalreport2010.msd.govt.nz/other+services/integrity+services/benefit+fraud+and+abuse+investigations>

9 <http://www.workandincome.govt.nz/individuals/brochures/how-to-avoid-benefit-fraud.html>

10 <http://www.workandincome.govt.nz/individuals/brochures/relationships-and-income-assistance.html#Haveyoutolduseverything>

This could result in you and your partner getting a fine, having a debt you both have to pay back, being prosecuted or imprisoned. Call us if there's anything you're uncertain about – we're happy to answer your questions.

In contrast to the criminal justice system in which one is innocent until proven guilty, once an investigation begins, the onus is upon the beneficiary to prove that they are not committing the alleged fraudulent behaviour. The Ministry is not obligated to inform a sole parent that they are being investigated; they may even contact an employer, and/or a bank to inform them a fraud investigation is taking place without the beneficiary being notified. Credit card statements and online activity of the sole parent and suspected partner may be scrutinised, and unannounced home visits made to check that the sole parent is still living alone. The Joychild Report listed just some of the 'evidence' that may be used to investigate an individual:

Often [investigations involve] obtaining documentation from a variety of sources such as enrolment forms, undertaker's records, bank records, hospital forms recording next of kin, hire purchase forms, loan applications and photographs. They will also be interviewing neighbours, family members and friends of the beneficiary before making a determination. (Joychild 2001)

External allegations do not need to occur in order for an investigation to commence, but the public are encouraged to report suspected 'fraud', and when they do an investigation is automatically triggered. Informants are requested to supply detailed information as detailed on the Work and Income website (2014): **Information that helps us when you report a suspected fraud.**¹¹ This includes:

Do they live with a partner but say they're living alone?

- *If you think they do then we'd like to know:*
- *the full name of their partner and any other names they're known by*
- *their partner's age and date of birth*
- *their partner's address*
- *whether their partner works and who employs them*
- *why you think that they're a couple*
- *how long they've been in a relationship*
- *whether they have had children together*
- *the names and ages of any children they have.*

Complications may arise from anonymous informants whose intention is not a sense of civic duty, but rather is fuelled by malicious motives. There are no official statistics available on the prevalence of allegations made by an abusive ex-partner or a vindictive family member. When an abusive ex-partner acts on his threat of 'dobbing' her in' to Work and Income, the Ministry of Social Development can appear to legitimise this threat by investigating the allegation. She may be subject to a lengthy and ongoing process of surveillance and intrusion into her life at a time when she is most vulnerable, even if the allegation is unfounded.

¹¹ <http://www.workandincome.govt.nz/about-work-and-income/contact-us/report-suspected-fraud/info-suspected-fraud-allegation.html>

When a mother has an abusive relationship, a Sole Parent Support benefit can represent the only means of security for her and her children. Her 'partner' may even force her to apply for it. Her failure to declare her relationship status is seen as an act of dishonesty on her part rather than an act of survival. The investigatory process may then become a process of double victimisation for her.

When an investigation establishes benefit overpayment, the Ministry will seek repayment, issue a written warning, and/or impose a monetary penalty of not more than three times the overpayment.¹² Further, when the guidelines are met, the Ministry may seek a criminal prosecution under either the Social Security Act or the Crimes Act (Ministry of Social Development 2013). In many cases, primary caregivers charged with fraud have served custodial sentences and become separated from their children, wider family and whanau, with all the associated disruption to their lives and the on-going distress of their children.

Ministry of Social Development staff have wide discretionary powers. As noted above, under the Social Security Act section 63(b), the Chief Executive of the Ministry may use their 'discretion' in determining whether a relationship in the nature of marriage exists and whether overpayments have been made. But that discretion is also delegated to officers of the Department, including frontline staff, who make the initial evaluation under the Department's conjugal status policy.

If a beneficiary wishes to challenge a decision on alleged overpayments, the beneficiary must lodge a complaint with a Benefits Review Committee. The committee comprises three people, two of them Ministry of Social Development employees and one a community representative. The Benefits Review Committee process is accordingly not an independent process. Indeed, it is weighted in favour of the Ministry.

Beneficiaries cannot obtain legal aid to instruct lawyers to help them to prepare cases for the Benefits Review Committee. If the beneficiary is not satisfied with the decision of the Benefits Review Committee, he or she can appeal to the Social Security Appeal Authority and then to the High Court and beyond. Few overpayment decisions are taken through the legal process as they require money and time that the sole parent may not have.

Furthermore, beneficiaries are often too intimidated to challenge the decision that there is a debt/overpayment. They may not even understand how and why it has been established and how the debt was calculated. Officers may lead beneficiaries to understand that they are doing them a favour just establishing the debt and not prosecuting them for fraud or adding penalties, and if they challenge the debt, all that could change. Those who have had their benefit cut off randomly by officers in the past (with all the attendant strain and stresses of having to get it reinstated and going into deeper poverty and debt in the process) are fearful of upsetting the status quo by challenging the debt.

Formal prosecution is usually conducted in a District Court and the decision may be appealed to the High Court and then the Court of Appeal. The process can be very lengthy and expensive and lead to unwanted and intrusive media attention.

The scary world of relationships.

The possibility of prosecution and imprisonment may lead some women to fear entering any kind of relationship while receiving Sole Parent Support. Repartnering is a major reason why sole parents exit the benefit system and may provide a route out of poverty, but a sole mother may fear that beginning a relationship and testing whether her new partner will be stable and supportive may

¹² As permitted in section 86(2) Social Security Act

mean accusations of fraud and/or loss of an independent income. For a woman in an unstable and/or volatile and unsupportive relationship, accessing Sole Parent Support may be the only way she can protect her children. In a recent debate in Parliament on extending the law to cover partners (see section 7), the former Families Commissioner, Dr Rajen Prasad, described the predicament thus:

... if you are a person who is dependent on a benefit and have children, you virtually have no right to have relationships. ... If a person is a sole parent who has children and who is doing their best forms a friendship with somebody, they might see that person a few times a week, and then that may develop over a 4 or 5-month period into something a little bit more than that – maybe visits to the home. In another 3 or 4 months' time there may even be a night that that person might spend at the home of the person who is on a benefit. At what point does that become a relationship for which the other person – the person not on a benefit – is then responsible financially? At what point does that happen? This happens in the glare of public life. If you live in a neighbourhood that is hawkish about others, and if you have people who are hawkish about a particular person, then this creates an environment in which those bringing up our children in vulnerable environments, vulnerable situations, and who are dependent on limited State funding are really made more vulnerable by these kinds of provisions. (Hansard 18 March 2014).

In December 2013, in an item entitled 'House call plan to nab benefit fraud', Scoop reported:

Snoopers could soon be calling on solo parents to check whether they are still living alone, as part of the Government's clampdown on benefit fraudsters. The measure, if introduced, would mean every solo parent would receive a "home visit" 14 weeks after going on to a benefit to make sure they were not committing fraud.

Papers released under the Official Information Act show officials hope the visits can help to uncover parents who are no longer single but are still fraudulently claiming a benefit. With about 34,000 fresh solo-parent benefit applications a year, officials advised that contractors would need to be hired to handle the workload.¹³

13 <http://www.stuff.co.nz/national/politics/9467737/House-call-plan-to-nab-benefit-fraudsters>

4. Implications for children

The MSD data show that 260,000 children fall below the 60% contemporary household median income after housing costs poverty line (Perry 2014). Of these, 205,000 fall below the 50% poverty line and are likely to be in serious hardship. About 75% of the children in families on benefits are already poor, some in extreme hardship. It is therefore concerning that more attention is not paid to the impact of punitive welfare policy on these most vulnerable children.

There are a number of ways that children are potentially affected when a mother is subject to investigation for overpayments or 'fraud'. The first is the impact of penalties and repayments that diminish already inadequate incomes. This is likely to result in deprivation of some of the essential material support necessary for a child's physical and mental health and wellbeing; health care, education, healthy housing and nutritious food all cost money. Failure to have a healthy environment in a child's formative years is associated with sharply increased rates of preventable serious childhood diseases that often have lifelong effects (Turner and Asher 2014). When there is a lack of resources in the home, social alienation can occur, with serious developmental penalties for the child and for society.

The second is that children are likely to be affected by the stress caused by the invasive nature of relationship fraud investigations on their mothers, even if there is no 'guilty' verdict. The investigations can be covert. Such investigations add another layer of uncertainty and stress when a mother may already be under pressure to seek/maintain employment and carry out numerous work test obligations. Mothers may experience mental trauma, especially when she sees the process as highly invasive and arbitrarily unfair. Her depression and fatigue may have a long-term and severe effect on her children. Moreover, there is no official information about the impact of these intrusive investigations on individuals or their children.

Comments by MP Chester Burrow, such as 'relationships could develop quickly and some people might not be aware of their obligation to tell Work and Income'¹⁴ may have the effect of suggesting that any relationship may signal fraud, and that all relationships, no matter what stage they are at, should be announced to Work and Income. Such pressures around the status of new adults in their lives may create marked confusion for children.

A new offence (discussed in section 7 below), committed by anyone who benefits from their partner's 'fraud', may result in a \$5000 fine and/or a 12 month jail sentence. This new untested law change is likely to compound the deprivation for children. It may make it too dangerous, not only for the sole parent, but also for a potential partner, to enter a new relationship.

The effect of custodial sentences on children

In the extreme cases when primary caregivers serve custodial sentences for so called relationship fraud, they become separated from their children, wider family and whanau, with all the associated disruption to their lives and on-going distress to their children.

To put this in context, about 20,000 children at any point in time are affected by the incarceration of a parent. While only a small proportion of these parents' convictions involves 'relationship fraud', all children, whether in prison with their mother, or existing without her because she is in prison, are likely to be seriously disadvantaged. As described by Annaliese Johnston (2012) in her thesis

14 <http://www.stuff.co.nz/national/politics/9467737/House-call-plan-to-nab-benefit-fraudsters>

'Silencing the Silent', the welfare of all these children is compromised in a way that should be of great concern.

The incarceration of a parent can result in 'long-term detrimental effects on the child's development and behaviour' (Action for Children & Youth Aotearoa Inc. 2011, p2). The list of social, emotional and behavioural implications is lengthy. These children are more likely to struggle at school, to suffer emotional issues and to engage in violent behaviour. They often find it hard to form connections, and they experience social exclusion; in addition, many children become highly anxious. Children of imprisoned parents are six to seven times more likely to serve a prison sentence than are children whose parents have not been incarcerated. As they reach adolescence, the impact of having an imprisoned parent at some stage in their life can manifest in anti-social, aggressive and sexualized behaviour. Relatively high rates of parental imprisonment among Maori perpetuate Maori inequality and disadvantage (Action for Children & Youth Aotearoa Inc. 2011).

Gordon (2009) in *Invisible Children* described how families of prisoners are among the poorest in society, and most were struggling to make ends meet prior to incarceration. Families not only have reduced income but face extra costs of travel, phone bills, and relocation. The incarceration of a parent entrenches debt and poverty, often resulting in the children going without necessities. When the parent sent to jail is the *primary* caregiver, the impacts on children's well-being can be even more severe.

Pillars, a Christchurch-based charity which provides support for the children and families of prisoners, has researched the impacts of incarceration on children:

When parents go to prison, the children suffer. The loss of a parent to prison can precipitate trauma and disruption that few experience without serious consequences.

Fuelled by negative media images, children imagine the worst about their parent's condition, regardless of their parenting or what their parent has done. Families and children rarely have information about the arrest, and justice process. They have no idea how, when and if they will ever see the arrested person again. Many times, children of prisoners are not told the truth about where their imprisoned parent is. This leaves children confused and questioning. Children with parents in prison feel vulnerable and unprotected and at fault. Many children of prisoners exhibit symptoms of post traumatic stress disorder, attention deficit disorder (with or without hyperactivity) and attachment disorders. Most children of prisoners are cared for by family members. Some remain in stable environments while others are moved to new communities or schools. Many children are plunged into economic hardship or deeper poverty as a result of the imprisonment of a parent.¹⁵

Studies have shown that as well as parental imprisonment directly impacting on the child, mothers who have served a prison sentence often find it hard to readjust to everyday life outside jail. They have difficulty finding stable homes and jobs and reconnecting with their families, due to the negative effects of imprisonment (Action for Children & Youth Aotearoa Inc. 2011, p 4). It is worth noting that the annual cost of incarceration is around \$90,000 per person per annum, without considering the costs to the state of alternative caregiving for any children involved.

15 <http://www.pillars.org.nz/about-us/our-children.html>

There are numerous examples of custodial sentences for relationship fraud which raise major concerns. For example, 'Ms S' was recently given a two year prison sentence in a Dunedin case.¹⁶ It is unclear whether the impact on the children was considered at all. After the prison sentence, she will still owe \$130,000. Even if there is a genuine element of wrong doing in such cases, custodial sentences which involve children and do not result in the cancelling of any debt are draconian. Section 5 highlights some other recent cases.

An important ethical question is raised about who is being punished and for what purpose:

The innocent party doesn't have a choice. If I had done a crime it would be different.
(Gordon 2009)

The rights of the child

When repayments are required because of alleged overpayments, the family budget is invariably insufficient to cover the basic necessities such as adequate housing, clothing, enough food, and healthcare. This raises issues of human rights. The United Nations Convention on the Rights on the Child (UNCROC) imposes the obligation on government to act on ensuring the right of everyone to an adequate standard of living, including those on social welfare and their children. The fact that the Social Security Act and its various amendments fail to reference or guarantee these rights illustrates that New Zealand continues to fail to take the rights of children seriously.

The recent High Court decision in a well-publicised case, *H v Ministry of Social Development* [2012] NZHC 669, stressed that the Ministry is supposed to consider the international covenants and thus take into account:

A beneficiary's individual financial circumstances and the impact that ongoing benefit repayments would have on their ability to support themselves and any dependent child. (Ministry of Social Development 2013)

However, the court also noted that 'hardship does not necessarily preclude recovery, but it is a factor that should be considered'.

Ms H was convicted in 2001 in the District Court on six charges of wilfully omitting to advise that she was in a relationship in the nature of marriage for the purpose of misleading the Ministry's officer and receiving a benefit. Ms H maintained her innocence throughout the District Court proceedings and subsequent appeal to the Court of Appeal.

Ms H's background included the death of a child who was killed by a former partner. In addition, Ms H alleged that the partner with whom it was alleged she was in a 'relationship in the nature of marriage', had indecently assaulted her other children. Ms H served a term of imprisonment of six months as a result of the convictions, thereby taking her away from her children and meaning she was unable to care for them or protect them. In addition to the jail term, the Chief Executive of the Ministry of Social Development sought to recover the \$117,598.84 of benefit that Ms H allegedly was not entitled to receive.

Ms H was on an Invalid's Benefit and challenged the decision to recover the full amount, arguing that the deductions by the Ministry meant that she had insufficient income to care properly for the daughter who was still living with her, and that this was having an adverse impact on her child. In addition, given Ms H's age, lack of skills, employment history and poor health, it was unlikely that

16 <http://www.odt.co.nz/regions/south-otago/312525/jailed-2-years-130k-benefit-fraud>

she would ever in her life obtain a high-paying job with an income sufficient to make repayment of the full amount a realistic prospect. Ms H accordingly faced the prospect of a crushing debt burden for the rest of her life.

The debt also meant that any steps Ms H might be able to take to improve the financial prospects of herself and her daughter were in fact unlikely to result in any improvement since, if Ms H's income increased, the Ministry would immediately increase the sum it was deducting from her income each week to repay the debt.

Ms H was unsuccessful at both the Benefits Review Committee and the Social Security Appeal Authority, which both confirmed that she was required to repay the full sum. She challenged the decision in the High Court, arguing that the Chief Executive should have exercised his discretion under section 86 of the Social Security Act not to recover the full sum. The High Court, in a judgment dated 4 April 2012, held that the Authority had erred in law:

- in determining that it was not satisfied that the Chief Executive should exercise his discretion not to recover the debt, and
- in failing to give sufficient consideration to the effects of the ongoing reductions in benefit level on the rights of the dependent child under Articles 26 and 27 of the United Nations Convention on the Rights of the Child, and the rights of the affected citizen in need of social security to support herself and her child under Article 27 and under Articles 9-12 of the International Covenant on Economic, Social and Cultural Rights.

However, the High Court refused to cancel the debt and instead referred the case back to the Social Security Appeal Authority for further consideration. The Authority, in a decision dated 16 December 2013, refused to cancel the debt. It noted that the Chief Executive had offered to suspend recovery of the debt until Ms H's daughter had left school.

Ms H not only served a six month prison sentence but also spent 15 years in unsuccessful legal challenges both against her criminal convictions and against the \$117,598.84 debt established by the Ministry against her.

This case illustrates issues which arise for many mothers in receipt of benefits. Relationships may be off and on rather than permanent, and the male partner may provide no or only a small amount of financial support, rather than a sum which supports the entire family. There may also be violence and/or sexual abuse of children. The mother may find herself without any income, as the violent partner withdraws any financial support. In such circumstances a benefit may be vital to protect her children but she runs the risk that the relationship nevertheless still found to be a 'relationship in the nature of marriage'.

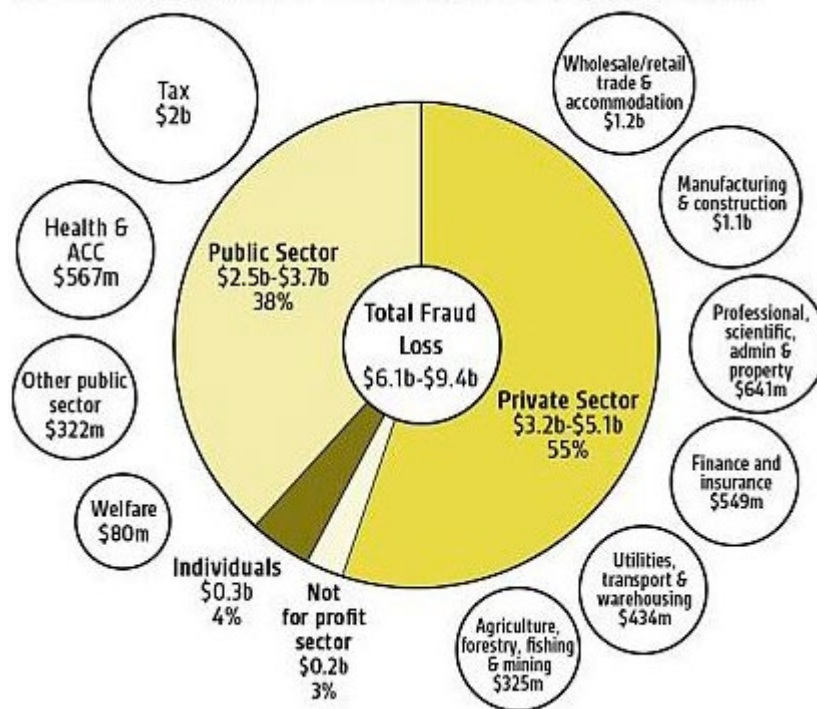
5. The disproportionate emphasis on relationship fraud

Dr Lisa Marriott (2013) highlights that the offences of tax evasion and welfare fraud are ‘conceptually similar’ in that they are non-violent, based on a financial breach, and involve the same prosecutor/victim (the government). However, as Marriott points out:

an important distinction is that serious cases of tax evasion are typically undertaken by individuals in privileged positions, while benefit fraud is typically undertaken by those less advantaged in society. (Marriott 2013 p. 403)

Figure 1: Welfare fraud in perspective¹⁷

Cost of economic crime report - total fraud loss range and point estimates



A draft government report from the Serious Fraud Office obtained by Radio New Zealand (October 2014) estimated the cost of economic crime to the New Zealand economy at between \$6.1 billion and \$9.4 billion each year. Figure 1 shows the insignificance of welfare fraud as a whole, of which relationship fraud is but a part. The tax fraud sum in Figure 1 of \$2 billion is likely to be significantly understated, based on other estimates. For example, New Zealand’s tax evasion has recently been estimated at \$5-7.2 billion (Tax Justice Network 2011).

Disproportionate penalties

The disproportionate responses to benefit fraud and tax evasion are examples of the disparity between legislation and practice surrounding beneficiaries and non-beneficiaries. Even the use of the term ‘benefit fraud’ is significant, given that tax fraud is described more euphemistically as ‘evasion’. As Marriott (2013) has described in her study, benefit overpayments connected with prosecuted ‘benefit fraud’ are typically \$20-40 million per annum, a small sum compared with detected tax evasion, which in 2012 was \$1.2 billion (Inland Revenue Department 2012). Moreover, as noted above, estimates

¹⁷ From the draft report obtained by Radio NZ, for discussion see <http://www.radionz.co.nz/national/programmes/sunday/audio/20153949/the-cost-of-economic-crime>

of total tax evasion (i.e. including what is not detected) range from \$5 billion to \$7 billion (Tax Justice Network 2011).

Marriott's (2013) study outlines how, since both benefit and tax 'fraud' are financial in nature and share a mutual victim – the tax payer and/or state – one might expect them to be treated similarly. The justice system, however, treats these two forms of fraud very differently. Beneficiary fraud is usually prosecuted under the Crimes Act, but tax evasion is usually prosecuted under the Tax Administration Act. Different maximum penalties apply under the different legislation: the maximum custodial sentence under the Tax Administration Act is five years, whereas charges such as 'obtaining by deception' carry a maximum penalty of seven years under the Crimes Act. Accordingly, outcomes differ for beneficiaries and non-beneficiaries.

There are very few cases of criminal prosecution for tax evasion (50 or 60 per annum), whereas 600 to 800 benefit fraud cases are prosecuted per year. Because there are so few prosecutions for tax evasion, it is difficult to compare penalties between the two. Many tax evasion cases are settled out of court. Over a 3-year period, tax fraud amounted on average to \$287,000 per individual prosecuted, with a 22% chance of a prison sentence. Tellingly, a sample of beneficiaries prosecuted for fraud (4% of overpayment cases) had overpayments averaging at \$67,000 per individual, but had a 60% chance of being imprisoned.

Outstanding tax debt is considerably higher than outstanding welfare debt. In 2012, total tax debt was \$5.9 billion (Inland Revenue Department 2012), whereas welfare debt was \$1 billion (Ministry of Social Development 2012). However, the Inland Revenue Department writes off significantly higher proportions of tax debt. Tax debt written off as a proportion of collectable debt is 11.6 per cent, and around 50 percent of penalties and interest are written off too. Welfare debt written off as a proportion of collectable debt is less than 1 per cent. From 2013, of 176 prosecutions for tax evasion, only 18 cases were repaid in full and 13 were partially repaid, so that 82% of those prosecuted for tax fraud did not repay their debt (Marriott 2014).

The Ministry of Social Development has the power to enforce debt repayment beyond the ability of the Justice Department, and at odds with the intention of common law. Accruing large debts for sole parents with no means of paying the debt back is at odds with the Courts' approach to reparation orders against someone convicted of a criminal offence. In line with Ministry policy, beneficiaries determined to have received overpayments are in essence 'bonded debtors' who are 'burdened' by a lifetime of indebtedness.

If the department were to follow the approach which the Courts take in reparation then there is little doubt that the amounts they would be establishing as overpayments would be substantially less than they currently are. The higher courts have shown disapproval of 'unrealistic' reparation orders which people have no hope of repaying in the foreseeable future but which expose them to enforcement procedures and 'burden' them with debt. (Joychild 2001)

The Joychild Report recommended that the underlying concept of 'reparation' in the criminal justice act be used as a guide, and that the Ministry develop a policy in relation to debt burden for beneficiaries. The Ministry did not adopt this recommendation; instead new amendments were introduced in 2014 to enforce recovery of all established debt and/or up to three times as much as the initial overpayment.

Women who have been incarcerated for benefit fraud and separated from their children emerge from prison with the full debt amount still to repay, even if a benefit is their only income.

The strongest ability the Ministry has to eventually recover many debts is when people turn 65 and become eligible for New Zealand Superannuation. Any debts they have with the Ministry can then be recovered through deductions from their pension payments.¹⁸

Recovery of welfare debt can occur beyond the lifetime of the beneficiary, as the Ministry has the power under the Social Security Act 1964 to recover outstanding debts even from the estates of those who have passed away.

Media portrayal

A negative discourse around benefit dependency since the 1990s in various media sources may explain a general acceptance of harsh and enduring sanctions and a tolerance of stigmatisation. The media significantly influences the public's perception and interpretation of issues using persuasive and loaded language. Suggestive headlines such as 'Benefit fraud grows as repayments trickle in', 'Benefit fraud costs millions', 'Cheats' partners targeted' and use of terms such as 'bludgers' and 'fraudsters' are typical of relationship fraud reporting.

There are many examples of headlines and stories that vilify and stigmatise sole parents while failing to acknowledge the full circumstances, including how any children may be affected. For instance, in October 2014, the *Waikato Times* (see Box 3) triumphantly reported that, since July 2014, at least six women had been convicted through Waikato courts, each for defrauding the taxpayer of between \$80,000 and \$220,000, with 'more set to come'.¹⁹ The online article was accompanied by a full size colour picture of each woman. There is little detail in the examples of the nature of the charges, the children affected, the defence arguments, the defending lawyer, or the rights of appeal. The sentences ranged from home detention and community service to extended jail terms, even when children were involved.

18 <http://www.oag.govt.nz/2011/msd-recovery-of-debt/docs/recovery-of-debt.pdf>

19 <http://www.stuff.co.nz/waikato-times/news/10595620/Fraudster-crackdown-proving-its-worth>

Box 2 Media portrayal

GOTCHA GOVERNMENT CLAMPDOWN NAILS FRAUDSTERS



Fraudster crackdown proving its worth

Extract Waikato times 9th October, 2014.

Ms X was this month sentenced to almost three years' jail for unlawfully claiming \$296,000 from the state, Ms X, 46, told the court she was under pressure to provide for her six children, and also her parents over the 22-year period the offending occurred. Ms X also had 19 other convictions for fraud, all from the 1990s. Judge David Ruth sentenced Ms X to two years and 10 months' jail on 21 charges of using a document for pecuniary advantage, two charges of obtaining by false pretences and one of obtaining by deception.



Ms Z – \$222,000: Ms Z, 48, was jailed for two years and three months for defrauding the Ministry of Social Development for 12 years. Ms Z moved to New Zealand in 1992 and signed up for the unemployment benefit on June 10, 1997. In January 18, 2013, the Ministry of Social Development became aware that she had been living with her partner, since January 2001. As a result, Ms Z received \$222,369.75 in overpayments from a variety of benefits, including domestic purposes, sole parent support, accommodation supplement, disability and special needs grants.

An early media report entitled *Why I took the money – fraudster*²⁰ on Ms Z one of the six women in the Waikato courts in October 2014, does dig a little deeper:

The 47-year-old lives a meagre lifestyle in her Fairfield house, which she shares with her eldest son, 28...When the Times knocked on her door, she was sitting on the floor eating her dinner – a few boiled eggs to go with her hot-air fried chicken wings and sauce, placed on top of newspaper which was spread out on the carpet. Her surrounds aren't flash. [She] said she hadn't made any extravagant purchases but admits buying a new cellphone and 32-inch television for the lounge. She said she'll accept whatever sentence she gets in August, but is hoping she won't be jailed. This week she started a new job picking berries to help pay the taxpayer back, at \$32 a week. It's not a lot, but she's remorseful and wants to start the reparation process.

Ms Z's 12 year relationship with her partner was described as on and off and included the information that he spent 'all his earnings at the casino'. The article presents no evidence that her partner supported her, there was no suggestion of extravagant spending, and the motivation for the fraud was to pay the bills and feed her children. It was unclear if there had been an adequate assessment of what she would have been entitled to had she not claimed the sole parent benefit. She is now serving a lengthy jail sentence where none of these factors appears to have been taken into account or reported.

20 <http://www.stuff.co.nz/national/crime/10200506/Why-I-took-the-money-fraudster>

Similarly, in 2013 the *Manawatu Standard* ran an article headlined 'Pair's benefit fraud netted \$20,000-plus'.²¹ It was only at the end of the article that key features of the case were revealed. For instance, the woman involved did not declare the relationship because she received no financial benefit from it: 'he did nothing'. The complex situations behind many of these cases deserve to be carefully unpicked. Failure to do so further stigmatises a vulnerable group.

As discussed above, the legal system is harsher on beneficiaries than it is on tax evaders, even though tax evasion costs the government far more and individual amounts tend to be far higher (MacLennan 2012). This disparity is rarely exposed by the media, whose attention grabbing headlines may give a false impression of the scale of welfare fraud. For example, an article in the *Rotorua Daily Post* entitled 'Benefit fraudsters in court over \$1m'²² was less dramatic when it was revealed that this was the total for 24 beneficiaries who were prosecuted for benefit fraud in the year to June 2013.

To the journalist's credit, revealing comments from Rotorua barrister and solicitor Martin Hine were also included in the story. He said:

[T]he figures weren't representative because beneficiaries were often coaxed into admitting details about their relationships that weren't entirely true. [Work and Income] investigators will frequently become [beneficiaries'] best friends – they'll sit down with [the beneficiaries] and these people will yabber away, very often in a prejudicial way and very often not understanding the consequences of what they're saying. Investigators weren't obliged to tell beneficiaries their statements couldn't be challenged in court, which often led to prosecutions – sometimes unfairly.'

The media slant in reporting stories about beneficiary 'fraud' in ways that stigmatise can create the impression that benefit fraud is rampant and help foster public support for disproportionate sentences. The New Zealand media is not alone in doing so; a United Kingdom Church Action on Poverty report, *The blame game must stop*²³ found that between 2005 and 2011, over 60 percent of articles on beneficiaries in tabloid newspapers were negative and used abusive language such as 'Scroungers, skivers, chavs, underclass' Furthermore, because of the continuous messaging around benefit fraud, people in Britain 'hugely overestimate the level of fraud'. The report outlines how the UK is currently beset by the use of myths and distortions to justify 'enormous and harmful cuts to the social security budget, and the addition of restrictive conditions to benefit entitlement'. It also notes the important issue of underpayment:

*Because of the stigma attached to receiving benefits, many people fail to take up benefits they are entitled to. (For example, reports in Wales and Scotland found that many children prefer to go hungry than receive free school meals.) Stigmatisation can even lead to hate crime. Police figures for 2011 showed an increase of over 30% in attacks on disabled people.*²⁴

21 <http://www.stuff.co.nz/manawatu-standard/news/8933442/Pairs-benefit-fraud-netted-20-000-plus>

22 http://www.nzherald.co.nz/rotorua-daily-post/news/article.cfm?c_id=1503438&objectid=11302854.

23 <http://www.church-poverty.org.uk/stigma/report/blamegamereport>

24 <http://www.church-poverty.org.uk/stigma/report/blamegamereport>

6. Relationship fraud history

The Appendix outlines the historical treatment of 'relationship' in the welfare system in New Zealand. A brief synopsis of recent case law and resulting controversies is given in this section. The overwhelming impression of such a review of our history is that there are diminishing returns from the search for the holy grail of establishing an objective and fair test of 'relationship'.

The *Ruka Case*²⁵ is widely held to be a landmark in the area of determining whether there has been a relationship in the nature of marriage. Prior to this case, the Ministry determined relationship status on a discretionary basis by relying upon a checklist approach, based upon how the relationship appeared 'from the outside', rather than on accounting for the intentions or experiences of the individuals concerned 'from the inside'.

Importantly the approach was that the absence of any one or more factors did not mean that there was no relationship. No factors were more important than others. A relationship could be found on several factors only. Amongst the list of factors under consideration financial in[ter]dependence was present but not given particular prominence. It was clearly not a prerequisite factor and it was said explicitly in both pamphlets sighted that lack of financial support does not mean a marriage type relationship does not exist. (Joychild 2001 p 21)

The *Ruka Case*

Ruka v Department of Social Welfare 1997 involved an appeal by Isabella Ruka to the Court of Appeal against conviction for benefit fraud, after failed attempts to appeal the Ministry decision to both the District Court and the High Court. She was alleged to have committed benefit fraud for receiving the sole parent's benefit (DPB) while she was in a relationship.

Isabella Ruka, had been living with a man (identified in the judgment only as T) for 18 years. For 16 years, she was viciously beaten by T. During this period, he beat her four or five times a week (sometimes using an axe and a baseball bat) to the point where she was hospitalised twice with broken bones, half of her teeth were smashed and her eyes were so severely blackened that she could not open them. Pregnancy did not stop the beatings. When their child was born, he beat her when the baby cried. After the first year, as one judge put it in the Court of Appeal, there was 'nothing less than a long series of rapes'. T did not take on parental responsibilities. He stopped her from seeing her family or friends. He contributed nothing to the running of the house in which they lived. Nor did he share his earnings (but, at the same time, he forced money from her). Threatening her with a shotgun, he repeatedly promised to hunt her down and kill her if she left him. She believed him. His sister described the relationship in evidence as almost being one of 'master and slave'. (Hughes 1999)²⁶

25 *Ruka v Department of Social Welfare* [1997] 1 NZLR 154. <https://www.msd.govt.nz/documents/about-msd-and-our-work/publications-resources/archive/2002-rukareport.pdf>

26 <http://www.nzlii.org/cgibin/sinodisp/nz/journals/WkoLawRw/1999/5.html?query=%20NZLR%20154>

Isabella Ruka had worked during much of the 16 years in question, but had at times gone on the DPB²⁷ to maintain herself and her son. As required, she signed declarations that she was 'not living in a relationship in the nature of marriage' with the father of her child. The Ministry determined that she was in a relationship during this period, had been overpaid and had received her benefit fraudulently, stating she had willingly omitted to report that she was living with the father of her child and in a relationship.

Even though both the District Court and High Court judges accepted that she was a victim of 'battered woman's syndrome', the Ministry's decision was upheld. Ms Ruka then appealed on the basis that she was not guilty of not disclosing the existence of a relationship. The Court of Appeal allowed the appeal and found that Ms Ruka had not been 'living in a relationship in the nature of marriage' within the meaning of Section 63. The Court ruled that the key positive components required to determine whether an individual is in a marriage-like or de facto relationship (for benefit entitlement purposes) were financial and emotional commitment.

The Court of Appeal discussed the meaning of 'relationship in the nature of marriage' in detail, and referred to earlier cases. Justices Blanchard and Richardson P said that, although checklists such as that adopted in the case of *Thompson v Department of Social Welfare*²⁸ might be of assistance in deciding some cases, it was more appropriate to begin an examination of whether a relationship in the nature of marriage existed by considering the purpose of the social welfare legislation.²⁹

In *Ruka*, Justices Blanchard and Richardson P said that a relationship in the nature of marriage was one in which:

an essential element is that there is acceptance by one partner that (to take the stereotypical role) he will support the other partner and any child or children of the relationship if she has not income of her own or to the extent that it becomes inadequate. The commitment must go beyond mere sharing of living expenses... it must amount to willingness to support, if the need exists. There must be at least that degree of financial engagement or understanding between the couple... Where financial support is available nevertheless there will not be a relationship in the nature of marriage for this purpose unless that support is accompanied by sufficient features evidencing a continuing emotional commitment not arising just from a blood relationship.

The Court of Appeal said that the primary focus should properly be on financial commitment. In this case it was non-existent – at least in favour of Ms Ruka, who did not receive financial support from Mr T but, rather, was forced to provide money to Mr T from time to time. A majority of the Court of Appeal held that Ms Ruka was not in a relationship in the nature of marriage at the relevant times and her convictions were accordingly quashed. Justices Blanchard and Richardson P also observed (although it was not one of the issues to be decided in the case) that the reparation order made in the criminal court requiring Ms Ruka to repay \$44,759 was inappropriate. They said that 'Where there is no realistic prospect of payment being made within a very few years an order should not be made, at least for the full amount sought.'

27 The DPB or Domestic Purposes Benefit is now called Sole Parent Support

28 [1994 2 NZLR 369]

29 It should also be noted that, although Justice Tipping in *Thompson* set out a checklist of factors relevant to determining whether the existence of a relationship in the nature of marriage, he also said that it required a commitment by both parties to their relationship.

Impact of the *Ruka* case

Following the *Ruka* case, the 'yardstick' by which relationships were determined by the Ministry should have altered considerably. Willingness to provide financial support for the partner, and ongoing emotional commitment were to be the fundamental principles to be applied by Ministry staff when determining relationship status. The case also highlighted the relevance of domestic violence in determining relationship status.

The Ministry prepared a somewhat defensive response:

Staff have to consider in every case whether or not the necessary ingredients of emotional commitment and financial interdependence are present. If there is violence in the relationship they also have to consider to what extent that violence affects the relationship's fundamental characteristics. It is our opinion that Benefit Control Investigators are, as a group, mature and experienced staff. They are skilled at eliciting information from people and, where they suspect violence may be an issue, will do everything possible to canvass the effect that this may have on the relationship.³⁰

The immediate response by the Ministry to the new case law, however, fell short. John Hughes, then senior lecturer in law and Welfare Law Specialist at Canterbury University outlined the general inertia to alter guidelines, provide education or use better processes of review:

What the Department appeared to intend was that it should be able to ignore financial considerations and emotional commitment when deciding whether the people concerned are in a relationship in the nature of marriage, if and when it became administratively arduous for the Department or contradicted the impression provided by the presence of other indicators. (Hughes 1999)

In 1998 a new Bill, *The Social Security Conjugal Status Amendment Bill*, was introduced to over-ride the legal implications of the *Ruka* case. The main intent was to say that because some marriages are violent, the presence of violence does not mean that a marriage-like relationship does not exist. Hughes was clearly unimpressed with the thrust of this Bill, and with the change of government in 1999, it did not see the light of day:

Ultimately, the Court of Appeal's decision in Ruka was about how a social democratic state defines marriage for its most vulnerable citizens. In the Court's opinion, viewed positively, the concept of marriage includes mutual financial and emotional support and excludes violence. In reversing this approach, the bill probably represents the first attempt by a democracy to enact legislation implying that domestic violence is consistent with the marriage relationship for social security purposes. (Hughes 1999)

The Joychild Report

In 2000, the Labour Government's Associate Minister for Social Services, Ruth Dyson, commissioned Barrister Frances Joychild to provide an independent review of the implementation of *Ruka* case law within the Ministry. The report (Joychild 2001) focused on whether the Ministry of Social Development was using the *Ruka* legal test accurately.

³⁰ <https://www.msds.govt.nz/about-msd-and-our-work/publications-resources/corporate/joychild-response/joychild-response.html>

This provided a unique opportunity to examine the inner workings of the Ministry. Failings in the area of beneficiary advocacy, lack of correct information and education, lack of training for staff, or checks and balances within the Ministry, and little staff awareness or ability to deal with issues surrounding battered woman's syndrome and domestic violence were all highlighted. The report found 'strong evidence that the incorrect test had been applied' and recommended that all the 15,600 cases from 1996 to 2000 be reviewed by the Ministry.

Significantly, the Ministry did not take responsibility for inadequate policies and practices and implement this recommendation. Instead the onus was put on beneficiaries to have their cases 'reconsidered'. Only 5700 applications were made; of those, 63% had overpayments disestablished, providing relief of \$35 million in alleged debt. The 9,900 other individuals owing approximately an alleged \$63 million in debt did not have their cases reviewed (McIvor 2005).

The deficiencies in the operation of the Ministry of Social Development and the Social Security Appeal Authority when applying the conjugal status rule leave open the real possibility that beneficiaries living in violent relationships are not receiving benefits that they are legally entitled to, and many are paying back debts that should never have been established against them. This is especially troubling when it is realised that this has the potential to trap vulnerable people in violent relationships for longer periods of time, as they are financially unable to leave. (Shaw 2006)

The Joychild report had identified inadequate checks and balances on the 'enormous discretions' exercised by the individual benefit fraud officers. In particular, a disturbing culture within the Ministry was highlighted where investigations were driven by fiscal incentives, rather than the needs of very vulnerable people. An exclusive 'million dollar club' was set up for investigators who 'awarded' debt of over a million dollars per year to beneficiaries. The effect was to prioritise establishing debt over upholding the 'dignity, respect and equality' of the beneficiaries concerned.

A fundamental conflict exists between the use of monetary targets as a performance measurement in an administrative law context that requires the impartial exercise of a statutory power of decision as to benefit eligibility. (McIvor 2005)

Notional entitlement

A key finding of the Joychild report was that in many instances, the level of overpayment was overstated because the accused may have been entitled to some other benefit, referred to as 'notional entitlement'.

In many of the overpayments established there has been no allowance made in debt calculation for the fact [that] the beneficiary would have been entitled to another benefit. This is commonly referred to in the department as notional entitlement. Hence the amount of the debt many beneficiaries are paying back is far higher than if they had in fact been on the correct benefit. (Joychild 2001)

The *Ruka* decision on 'notional entitlement' created a serious conflict of interest. Ministry employees using discretion to determine high rates of debt or to maximize cases regarding overpayment were incentivised not to implement notional entitlement, or not to inform their clients of their entitlement.

The department declined to apply the law as articulated by the [High Court] and continued to establish overpayments against some beneficiaries which were larger than the actual loss to the department and which took no account of the fact [that] the beneficiary would have been entitled to other departmental assistance. (Joychild 2001)

What changed post-Joychild?

Frances Joychild was interviewed³¹ at the time of the release of the report on National Radio. She was outraged at the power imbalance and the harassment endured by those investigated:

[Officers] had the discretion to determine 'Is this woman in a marriage? When did the marriage start? Shall I put a monetary penalty on to the overpayment as well to punish her for what she's done?' So they are very wide discretions that have radical effects on people's lives. Their benefits get cut off there and then. People were suddenly left with absolutely no means of support. ...Not all of the staff were being supervised or checked. Ten percent were being randomly checked. They'd knock on the door of the beneficiary. This is called cold calling. Knock on the door. 'Hullo. We're here to check you're got your benefit entitlements. Come in. You don't have to let us come in.' But the women would always let them come in. 'Yes. Come in.' They were misled often as to why they were being interviewed. Then they would have a chat with them. And once the woman said something which was seen to be critical or they might lead her into 'Oh she's in a marriage', then they would issue her a caution. And by then she had the fraud officer sitting at the table in the kitchen 15 minutes on into an interview. She's got no legal advice. She's stunned. She suddenly realises her benefit might be cut off this afternoon, as some of them were. In Court [Ruka] said, 'I was terrified. All I could think of was that my son and I weren't going to have any money to live on. So I said whatever I thought the officer wanted to go along with.'

The Ministry's policy and practices appeared to continue to operate in opposition to the legal and civil rights afforded ordinary non-beneficiary citizens.

Although, post-Joychild, incentives for investigators were changed to relate to the number of investigations undertaken by the unit, rather than the level of overpayment established, MSD investigators continued to have investigations as their targets and the sole purpose of their employment. As well, the emphasis on the fiscal aspects of debt recovery created incentives to maximise alleged overpayments, facilitated by, for example, the discretion to determine the date at which the alleged fraud began.

The government agency responsible for ensuring that basic needs of the poorest in society are met, instead created a culture that persecuted those on the lowest incomes. When requested by the Minister to put things right, that same agency went out of its way to avoid accountability needed to ensure that those affected were treated with a fairness required by law. The [Benefit Control Unit] has a culture of financial gain so entrenched that it operates unfairly, unlawfully and contrary to the principles of natural justice. (McIvor, 2005)

31 Transcript supplied by Radio NZ

Post-Joychild it is deeply concerning that the Ministry still does not appear to have a formal policy to apply notional entitlement. The objective and accurate establishment of the amount that the Crown has foregone taking into account other entitlements that the accused may have been entitled to is no easy task. The amount established must be checked by independent experienced welfare advisors and a clear process of contesting the amounts put in place.

The lack of clarity, the seemingly fruitless search for a more objective way to determine relationship status, and the severe penalties for being on the wrong side of a particular definition, all suggest that new thinking is required.

7. Recent developments

After bitterly contested readings of the Social Security (Fraud Measures and Debt Recovery) Amendment Bill in early 2014, the new law came into force on 7 July 2014. It extended the ambit of relationship fraud to include the partner or spouse of a beneficiary convicted of such fraud.

This bill deals with one particularly troubling aspect of welfare fraud, which we refer to as relationship fraud. ... The reality of this offending is that it can occur only when the partner is present, but it takes two to tango. The current law means that the beneficiary, usually the woman, is held accountable for her fraud, while the partner often gets off scot-free. We say this is wrong. This bill will create a new offence to hold those partners to account. (Burrows 2014)³²

While the existing legislation allowed prosecution of a partner or spouse if there was evidence that they themselves misled or provided false information, a new offence applies if the Ministry determines that:³³

- 1. a beneficiary has received a benefit (or credit/advance) in excess of their entitlement*
- 2. a person is the partner/spouse of such a beneficiary*
- 3. the partner/spouse benefits directly or indirectly from this excess support*
- 4. the partner/spouse is aware or reckless as to whether the beneficiary is accessing more than they are entitled to.*

Under the new legislation the penalty for the partner of someone convicted of 'relationship fraud' is severe, including the possibility of a jail sentence of 12 months and/or a fine of up to \$5000. These punitive provisions apply if the Ministry determines that the partner/spouse 'knowingly' benefited or 'ought to have known' and directly or indirectly benefitted from the fraud, in which case the partner/spouse may be liable for the full amount obtained. Furthermore, the new reforms confirm that the Ministry will no longer have to inform people if they are under investigation for benefit fraud.

There are multiple issues associated with the subjective 'ought to have known' test. Perhaps the most complex will be the process of determining when and how an individual 'ought to have known' of the behaviour of another. However, the most serious issue with the 'ought to have known' test is the targeting of one group of people – welfare recipients – for different treatment in the justice system. There has been no suggestion that the partners/spouses of other types of financial offenders may be held liable for prosecution as a result of wrongdoing undertaken by their partner/spouse. Moreover, the partners/spouses of other offenders are not held liable for any debts generated fraudulently by their partner/spouse. To the extent that there is valid justification for targeting the partners of those on welfare on the basis of presumed guilt, it is a logical extension that the partners of all individuals convicted of financial crimes would also be prosecuted and held liable for the debt.

There is also the potential for the legislative changes to breach human rights in New Zealand. Under the New Zealand Bill of Rights Act 1990, everyone has the right to freedom from discrimination on

³² Social Security (Fraud Measures and Debt Recovery) Amendment Bill, First Reading, 2014, Hansard).

³³ Social Security (Fraud Measures and Debt Recovery) Amendment Act, new section 83AA.

the grounds outlined in the Human Rights Act 1993.³⁴ One of the prohibited grounds of discrimination in the Human Rights Act 1993 is employment status, which means: 'being unemployed; or being a recipient of a benefit under the Social Security Act 1964 or an entitlement under the Accident Compensation Act 2001'.³⁵ The legislative changes would appear to be inconsistent with this requirement, by targeting those on welfare benefits, or associated with those on welfare benefits, for special treatment in the justice system.

When the two Cabinet Papers relating to the legislative change were released, the human rights section of the Cabinet Papers was redacted. The redacted information, released under an Official Information Act 1982 request, stated that the policy proposals:

...may be inconsistent with the New Zealand Bill of Rights Act 1990 (NZBoRA) and the Human Rights Act 1993 in relation to the freedom from discrimination. This is because the proposals relating to spouses and partners accountable for relationship fraud may raise issues in terms of the right to justice and discrimination on the grounds of family and marital status.

This major issue is yet to be resolved.

The Ministry may seize assets deemed to be shared by the partner or spouse in order to pay off the debt accrued by fraud. Determination of debt/fraud can lead to a lifetime of indebtedness, and the Ministry may also recover alleged overpayment beyond the lifetime of the beneficiary through estate claims.

While the main intent of the new legislation is to address the perceived inequity when one person, the beneficiary, is entirely responsible for the debt repayment when the spouse may have benefited from or even instigated the 'fraud', another is to improve the debt recovery rate to achieve fiscal objectives. In pursuit of the fiscal goal, it was decided not to apportion the debt 50/50, but rather recover debt jointly from both parties according to capacity to pay. In this way the speed and completeness of repayment was expected to be improved (Ministry of Social Development 2013).

Under this legislation, the Government expected about 700 cases a year (Ministry of Social Development 2013). As is currently the case for beneficiaries, the rights and appeals process allow a review of any decision by the internally governed Benefits Review Committee, and where necessary an appeal to the Social Security Appeal Authority and higher courts.

Passage of the Bill

The Select Committee argued that the amendments are designed to 'make clearer the criteria for liability on the part of a beneficiary's spouse or partner who, knowingly or otherwise, benefits from an amount obtained by fraud'.³⁶ This leaves open the question of what they are expected to do. Are they supposed to 'dob' in their partner, for example, and/or leave the relationship? Why are they treated differently from a person who is married to a successful businessman and enjoys the lifestyle the relationship affords, but 'ought to have known' about his dodgy business practices or tax evasion?

In the debates in the House prior to the passage of the Bill, only the Green, Mana and Maori Parties could see its damaging consequences and voted against it.

³⁴ New Zealand Bill of Rights Act 1990, s.19.

³⁵ Human Rights Act 1993, s.21(1)(k).

³⁶ BILLS DIGESTS No. 2126 Social Security

We do not support law change to strengthen the ability of the Government to reclaim money from the poorest families who are just trying to provide the basics for themselves and their children. (Green Party 2014 Hansard)

The Labour Party failed to take a firm position on the bill, wavering between opposing the bill for its stigmatising effect and at the same time supporting its 'intent' and trying not appear to endorse crime. The Labour Party argued that the focus should be on tax fraud, which is of much greater monetary significance, and/or white collar relationships, and that the Government was adopting a double standard. Mystifyingly, they then voted with the Government for the passage of the Bill.

Box 2 Partners of beneficiaries jointly responsible for benefit fraud debt (MSD website, 2014)

Most people getting financial assistance from the Ministry of Social Development (MSD) do the right thing and tell us about changes that could affect their payments. However some receiving a benefit, Student Hardship or New Zealand Superannuation are in relationships they haven't told us about. Up until now when an MSD client was found to have dishonestly claimed a single benefit while in a relationship, that client has been solely responsible for paying back the fraud debt. This is changing!

You and your partner may now be jointly responsible for paying back benefit debt

If you're getting money you're not entitled to because you have a partner you haven't told us about, you both may be equally responsible for paying back the debt. From 7 July 2014 a new Relationship Debt Sharing law allows MSD to investigate and prosecute both clients **and** their partners for benefit fraud. It also makes clients and their partners jointly responsible for repaying debt. This applies to all debt where an investigation clearly shows that the partner has benefitted from benefit fraud. It's fair that a partner who has benefitted from the dishonesty shares the responsibility to repay the debt.

What is a relationship?

The two main factors MSD looks at to decide if you're in a relationship are:

- financial interdependence
- emotional commitment.

If you and your partner separate the debt still applies.

The debt shared between you and your partner is debt from when you're together as a couple. If you split up, the debt remains shared until it's paid in full. Any debt you have stays with you and your partner until it's paid off.

Benefit fraud has consequences for you, your family and the community

Benefit fraud is a crime and will have an ongoing impact on you, your family and your community. If MSD finds out that you haven't told us certain information, or information you've given us isn't true, your benefit can be stopped and you'll continue to have a debt that must be paid off. MSD may fine you, and you and your partner can be prosecuted. This could mean a prison sentence.

Almost all the submissions³⁷ on the bill were opposed to it. The Law Society³⁸ and others noted that this new offence of liability departs from general principles of criminal law: a positive act is usually

37 http://www.parliament.nz/en-nz/pb/sc/documents/evidence?custom=00dbhoh_bill12009_1

38 http://www.lawsociety.org.nz/__data/assets/pdf_file/0004/72418/Social-Security-Fraud-Measures-and-Debt-Recovery-Amendment-Bill-10-10-13.pdf

required before criminal liability can be found, and knowledge of or failure to report another person's offending is normally insufficient grounds for liability. It was also argued that it is unjust to place the full excess of liability on the partner, regardless of how much they benefited, and to place a more stringent 'ought to have known' standard on partners of 'fraudulent' beneficiaries, compared with partners of other fraudsters.

The Law Society also raised issues of a breach of international human rights obligations, especially New Zealand's obligations under the International Covenant on Economic, Social and Cultural Rights and the UN Convention on the Rights of the Child.

No compelling justification is apparent for the proposed debt recovery amendments. The concern arises that the Bill anticipates more welfare debt being recovered if 'relevant considerations' such as the adequacy of living standards (reflecting New Zealand's obligations under ICESCR and UNCROC) are removed from the decision-making process.

In the Law Society's view, there would need to be very compelling justification for welfare debt recovery to take precedence over international human rights obligations and other relevant considerations. Such justification is not evident.

The Bill was amended to somewhat address the concern. It was reported back from select committee:

We recommend amending new section 86(1BA) so that the ministry's chief executive, in determining the rate and method of debt recovery, is not limited to considering only factors set out in the ministerial direction. We believe that this would ensure that the amendment did not undermine the general public law principle that decision-makers must take all relevant considerations into account. It would also alleviate any concerns about the legislation breaching New Zealand's international human rights obligations, by ensuring that matters pertaining to such rights could be taken into account where necessary.

Some advocacy groups have welcomed a broader sharing of the burden of debt repayment:

Currently the majority of people being punished for relationship fraud were women, who were often pressured into the crime. While there would be situations where a partner was not aware of the fraud, this would be the minority, she said. 'I'd love to think that this would discourage men, and I know I'm being very sexist but what we see is mostly men, to discourage them from pressuring their partner into doing this.' (Cowlshaw 2013 quoting K Brereton)

However, beneficiary advocates such as Kay Brereton were also concerned about plans not to tell beneficiaries that they were being investigated for fraud, and treating individuals as 'guilty just because they're under investigation'. Rotorua district councillor Merepeka Raukawa-Tait has expressed this view:

[Women] are easier to go after. I'm pleased that this law change now has the potential to level the playing field... However, women's safety during the prosecution process was a concern, and not something likely to be considered by the ministry. They will concentrate on prosecuting and the women will be at risk. There needs to be further discussion around the likely impacts of this law change and what measures need to be

*in place so that we don't end up transferring costs to another social service area [like] mental health.*³⁹

There is no case law to draw on yet for the operation of this new law. The amendment perpetuates the stigmatisation of beneficiaries and reinforces negative societal views of those receiving welfare support, blind to the effect on any children involved. The rudimentary definition of 'relationship', the difficulties facing beneficiaries wanting to enter a relationship, the low level of awareness required for a partner to be liable, and the unjust repayment system are some of the unresolved issues.

The appearance is given that the Ministry is concerned only with fiscal objectives, and that recovery is at the centre of the policy, rather than the needs of children and their mothers.

Debt recovery provisions

The second major change made by the Social Security (Fraud Measures and Debt Recovery) Amendment Act 2014 relates to the debt recovery provisions of the Social Security Act. Section 86 previously stated that benefit overpayments 'may be recovered from the beneficiary as a debt due to the Crown' by the Chief Executive. The section also provided that the Chief Executive could recover by way of penalty an amount not exceeding three times the amount in excess when fraud was involved.

This section has now been amended to strengthen the Chief Executive's duty to recover overpayments by spelling out a positive duty on the Chief Executive to do so. Section 86(1) now states that 'The chief executive is under a duty imposed by this subsection to take all reasonably practicable steps to recover a debt referred to in section 85A.' This is far stronger wording than the previous section, which stated that overpayments 'may' be recovered by the Chief Executive, and it appears to indicate an intention by the Government than an even tougher approach to repayments be taken in future.

Section 86 (IA) provides for exceptions. These are when the debt either falls within a class specified by the Chief Executive in a written determination to be uneconomic to recover, or is specified by the Minister of Social Development as debt to be written off.

What is new is a provision giving the Chief Executive discretion to temporarily defer repayments. The Social Services Select Committee which considered the bill recommended changes to the original wording. That wording would have allowed the Chief Executive to temporarily defer recovery of debts in 'exceptional' circumstances. The committee recommended that the section as originally drafted be amended, so that 'exceptional' circumstances would not be required for temporary deferral. This was designed to allow the Ministry to provide relief in cases that did not qualify as exceptional, and thereby allow for more flexibility. It remains to be seen how this provision will be applied by the Ministry in practice. Notably, allowance is made in this section only for the temporary deferral of repayments, rather than for cancellation of the entire debt.

39 http://www.nzherald.co.nz/rotorua-daily-post/news/article.cfm?c_id=1503438&objectid=11302854

8. A possible way forward

The Social Security Act 1964 is based predominantly upon the Social Security Act 1938, and has for the most part been amended with a patchwork approach relying heavily on case law. Changes to the Act may alter the directives of the Ministry, but the Act does not provide for active oversight of the implementation or interpretation of policy. The *Ruka* case and the Joychild Report highlight the urgent need for proper external monitoring of the Ministry's discretionary decision making, including a thorough reflection, examination and review of the working of the Ministry's National Fraud Investigation Unit.

Consider the children

The effects on children of the use of relationship status to establish overpayment or fraud have clearly not been considered at a policy level. Children and their needs do not adequately feature in the design of welfare benefits, or in the way policy is implemented around them, including the pursuit of those accused of relationship fraud. There appears to be no merit in custodial sentences or excessive financial penalties from a punitive or deterrent point of view, especially once the cost and the impact on children is considered.

A serious confusion about relationships in our system needs to be acknowledged. There are so many combinations and permutations of co-habitation, financial interdependence, emotional commitment, forward plans, and sexual/family patterns, it is no wonder that no one simple clear definition can be found. So much is at stake for those whose lives are already complex, stressed and difficult. Full welfare reform is well overdue, to reflect the changed nature of relationships in the 21st century and to better protect children.

A society of equal citizens forms the basis of a civil society. While justice does not require equal treatment of all individuals in all circumstances, the extent to which inequalities are acceptable needs to be justified.

(Marriott 2013 p 404)

It is difficult to justify a policy that pays less to a couple than to two individuals who share accommodation and costs. A sole mother who flats with another person may be in a very similar financial situation to one who is living with someone, male or female, in a 'relationship'. The tests for the degree of financial interdependence and emotional commitment needed for the relationship to be treated as 'in the nature of marriage' continue to be subjective and inconsistent.

The design of New Zealand Superannuation is in some sense a beacon light. Once the different rates are aligned, the individual basis of the state pension should be celebrated as an example or prototype of how social security on a marriage-neutral basis should exist in the 21st century.⁴⁰

In spite of the media promoting negative stereotyping of beneficiaries, helping to make their demonisation acceptable, a recent UMR Research survey found that New Zealanders believe beneficiaries are the most discriminated against group in the country (MacLennan 2012). This recognition provides some measure of understanding of their circumstances and hope for garnering public support for a change to policies.

⁴⁰ The spousal deduction under section 70 for those with partners with overseas pensions, however, must be abolished.

If social security benefits were made to individuals, regardless of whether they are in a relationship or not, then the problems of determining whether a relationship exists and paying less when it does, or prosecuting 'relationship fraud', would be eliminated. The detrimental impacts stemming from the use of the couple as the unit upon the most vulnerable low income families with children would be removed.

It is acknowledged, however, that where there are young children, the principle of individual entitlement is more complex to implement. Where possible, parenthood rather than 'relationship' should be the basis of tax-funded assistance when there are children. One possibility might be to allow a sole parent to be treated as independent of a new partner until either formal marriage, or an equal division of the couple's property under the Property (Relationships) Act 1976 would apply if the relationship dissolved, whichever occurs soonest. The Sole Parent Support benefit would continue to be offset by Child Support payments from the non-custodial parent. New Zealand should look carefully at Australian policy, which has been more inclusive and more generous in some key areas. For example, a sole parent may take a reduced parenting payment into a new relationship while she has a child aged under 6.⁴¹

The current unpaid status of the work of a mother caring for her own children lies at the heart of the policy dilemmas. Paid Parental Leave is an example of a relationship-neutral recognition of the work of being a mother with a new-born child, and the thinking behind this could be usefully extended (see O'Brien & St John, 2014).

If we accept that an individual unit of assessment is the long-term goal, there are numerous changes in the short term that could improve the welfare system, with positive impacts especially, but not only, for children and their mothers. While it is beyond the scope of this report to engage in depth with a redesign of a welfare state fit for the 21st century, the hope is that the dialogue will begin. New Zealand could lead the way in the redesign of support for women with young children. The recommendations listed below are intended to provide the spring-board for action and lead to further research and debate.

Recommendations

- Acknowledge the contradictory, confused nature of the relationship definitions throughout the system and their potential to negatively affect the well-being of children.
- Consciously adopt the prioritisation of children in policy development of any kind that impacts directly or indirectly on children's well-being.
- Abolish Benefits Review Committee and establish an independent review process and provide beneficiaries with legal aid so that a lawyer can assist them in preparing their cases.
- Review the intrusive and stressful nature of the investigative process for 'relationship fraud' and the activities of the National Fraud Investigation Unit.
- Write into law a ban on sentencing mothers with dependent children under 20 to jail following conviction for benefit fraud.
- Require any debt to be a real loss to the state from overpayment or alleged fraud by taking full account of entitlements that would otherwise have been paid. Provide an independent expert review in an open process of the amount of debt so established.

41 <http://www.humanservices.gov.au/customer/services/centrelink/parenting-payment>

- Write into the Social Security Act a requirement that any debt to be recovered from a beneficiary is to be capped at the amount that will realistically be repaid within a five year period, taking into account the specific situation of the beneficiary at the time the debt is established.
- Make it a requirement for the Chief Executive to take into account the welfare and best interests of the beneficiary's dependent children when deciding whether or not to recover overpayments. It should be specified that the debt is to be written off in full if recovering it would impact adversely on dependent children.
- Seek to expand the use of the individual as the unit for benefits, and the principle of recognising monetarily the work of parenting of young children (as occurs with Paid Parental Leave).
- Pay all benefits, including New Zealand Superannuation, at the single rate by eliminating the married person rate. There should be an immediate lifting of the married rate of benefits to align with the single rate. For New Zealand Superannuation, fiscal constraints may require freezing the single sharing rate and allowing the existing married rate to rise over time.
- Meet extra costs of accommodation, including 'living alone costs', on the basis of need, size of the household in which the individual resides, and actual costs paid through supplementary payments such as a reformed accommodation supplement.
- When couples with young children are on a benefit, entitle the mother (or primary caregiver) to the Sole Parent Support rate, so that their total income increases to a more liveable rate and the incentive to separate is removed.
- Abolish the joint income test for extra earned income for couples on benefits.
- Set the Sole Parent Support rate at the single Supported Living Payment rate. This rate is higher than the Jobseekers Support rate, reflecting the presence of children. It reflects that a single adult with child responsibilities has the equivalent of a disability in seeking work. This step reduces the rate slightly and is only to be taken when child-related tax credits are paid on the same basis to all low income families.
- Abolish the In Work Tax Credit and add its amount to the first child rate of the Family Tax Credit for Working for families. This eliminates the use of relationship as one feature of eligibility, as well as removing its inherently discriminatory features.
- Devise carefully thought through possibilities with full regard for any unintended consequences so as to give a sole parent entering a new relationship more autonomy. For example, defray the cost of Sole Parent Support by Child Support paid by the other parent, as is current policy, and allow the remaining Sole Parent Support to be taken into a new relationship for at least 6 months. Consider how Working for Families entitlements may be determined to best reflect needs of children in blended families.

In the meantime, a far less aggressive pursuit of relationship fraud is called for. Notional entitlement needs to be independently assessed and much more weight given to any abusive and controlling aspects of partners. Greater transparency in decision-making and a better process that respects privacy and provides support is imperative, always with the needs of any children given priority.

9. Appendix

Synopsis of the historical use of relationship status⁴²

Traditionally, New Zealand mothers were expected to be supported financially by their husbands or partners. Over time, as the nature of relationships changed, the nature of the financial obligation became less clear, especially when there was no partner or the partner provided inadequate, or no financial support. Ad hoc, civil and legislative responses acted to create confusion surrounding welfare entitlement and to fuel prejudice, especially against sole parents.

In the early 20th century, unwed mothers' care was largely left to religious or charitable organisations. The Widows Pension Act 1911 made widows with dependent children the first sole parents to receive statutory income support, but successive acts used discretionary rights to disregard the needs of unwed mothers and their 'illegitimate' children.

The male breadwinner wage in the 1920s and 1930s was set in the Arbitration Court to guarantee a male worker a wage that would enable him to support a wife and two children. While a family allowance for more than two children could be paid to the mother, a traditional male breadwinner family structure was expected.

A deserted woman bringing up children on her own, or with a husband that refused to sign on her behalf was ineligible for formal state assistance. (McClure 1998 p 42)

It was argued that to extend this payment to women in other family structures would 'encourage desertion', but the consequence was the continuing hardship of deserted and single mothers. The Pensions Amendment Act 1936 extended a payment under certain conditions to deserted wives, and the 1938 Act provided for an emergency benefit for a sole parent, but it was a discretionary payment, more akin to seeking charity. Provisions were extended to women whose husbands' whereabouts were not known in 1943, and to unmarried mothers in 1968.

Single mothers were treated differently from sole mothers who were previously married. Under the legislation for relief of destitution, they could obtain affiliation orders for their child's maintenance, but could not claim maintenance for themselves. In 1938, employed unmarried pregnant women became eligible for an emergency sickness benefit for a limited period before and after giving birth, on the grounds that they were temporarily incapacitated for work. This short-term benefit, which is still available, is not conditional on the pursuit of maintenance. Thus, single mothers were initially assisted as workers, rather than mothers or dependent wives. (Goodger 1998)

The inherent cultural and policy leanings towards viewing and treating women in relation to their marital status also underpinned the creation of the new Social Security Department (forerunner to the Ministry of Social Development), which was given the job of administering discretionary monetary benefits. 'Social welfare' benefits continued to be predicated upon a man's obligation to support his wife financially until the introduction of the statutory Domestic Purposes Benefit in 1973, which offered sole mothers financial support in their own right, 'distinguished by their responsibility for dependent children, and not by their marital status or the cause of their becoming a sole parent' (Carpinter 2012). With the assumption of female dependence firmly in place, an increase in social welfare for women gave rise to policy and practices designed to ensure that women and mothers did

42 This section draws on McClure (1998), Easton(1980), Cook (2012), and Goodger (1998)

not receive state support unless they were not in a relationship with a man. Relationship status thus became the primary indicator for benefit eligibility.

Marked increases in social and demographic changes in the 1970s and 1980s – in particular for women – saw a shift in social security ideology, extending beyond the relief of need (and eventual return to the workforce) to requiring social obligations that were not required of non-beneficiary citizens.

So began a new language in the Welfare debate: commentators began to discuss the 'corrosive' effects of benefit receipt. It was suggested that benefit receipt robbed people of their motivation to find work. Politicians spoke of 'welfare dependency', benefit fraud, loss of the work ethic, and encouragement for single mothers to have more and more children. (Maharey, 2000)⁴³

In the 1970s and 1980s Brian Easton wrote extensively about the issues for the welfare system that arose from the introduction of the Domestic Purposes Benefit and its possible impact on intact two-parent families.⁴⁴ Many of the issues identified over 40 years ago have never been resolved, for example: who pays maintenance and how, whether a de facto partner is financially responsible for the children, payments for child-rearing and working mothers' subsidies for childcare.

New language with denigratory overtones towards single mothers and beneficiaries as a whole, created the climate in the 1990s for new policy to reflect the political tone. Drastic benefit cuts in 1991 were followed by National's 'dob in a beneficiary' campaign in 1998, deepening public prejudice against beneficiaries and fuelling public perception that mothers who did not have a husband to support them were unworthy burdens on the state. Increasingly beneficiaries were required to show 'good behaviour', i.e. to act in certain ways via new Social Security Act directives, or face punishment through sanctions – partial or full benefit cuts.

New social obligations established under Sections 60RA–60RC of the Act required beneficiary parents to 'carry out parenting activities that other parents are not required to do' (Hughes 2005). The impact upon single mothers was insidious; those already suffering from self-esteem issues were vulnerable to false accusations from ex-partners and forced to share their personal and private lives, in particular their sexual relationships, in order to avoid losing their only support safety net (Hughes 1999, 2005). The unpaid nature of a mother's work was invisible and thus could be ignored; instead the pressure mounted for mothers to pay 'professionals' to care for their children so they could 'get back to work'.

[B]eneficiary parents of dependent children, regardless of whether they are the parents of vulnerable children, are now themselves vulnerable to a level of legislatively directed intrusion and direction that arguably outstrips that experienced by applicants undergoing morality testing under the Old Age Pension Act 1898 and the Social Security Act 1938. (Stephens 2005)

Work and Income inform their clients that, 'Whether people are single or a couple 'affects eligibility for certain income assistance'. WINZ encourage their clients to 'tell them everything' and 'answer any questions' about their personal situation so that WINZ can ensure they receive the right entitlement and aren't inadvertently breaking the law.

43 Social Welfare in New Zealand, see <http://www.beehive.govt.nz/node/8642>

44 For an extensive discussion see for example Easton, B. (1980). Social policy and the welfare state Sydney, Allen & Unwin.

The aim here is to create 'responsible individuals'. These responsible individuals only need state support in the absence of a male breadwinner. The state is only obliged to financially support a woman if a man is not obligated to [do so], through living with her as man and wife. It is the woman's responsibility to let the state know if she is living 'with a man as his wife on a bona fide domestic basis although not legally married to him'. It is the state's responsibility to ensure women honour this responsibility. Indeed if a woman received payment she is not qualified for because she is an unmarried wife, her payment ceases and prosecutions may ensue. (Sleep 2006)

Relationship status as a factor for determining individual entitlement to social security payments is not an innate determining factor, but a socially constructed one deeply embedded in New Zealand's history.

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Child Poverty Action Group Inc.

PO Box 5611

Wellesley St

Auckland 1141, New Zealand.

www.cpag.org.nz
