

# Regulatory Impact Statement

## Tackling Welfare Fraud and Welfare Debt Recovery

### Agency Disclosure Statement

This Regulatory Impact Statement (RIS) has been prepared by the Ministry of Social Development (MSD). It accompanies two Cabinet papers *Tackling Welfare Fraud* and *Welfare Debt Recovery*.

The *Tackling Welfare Fraud* Cabinet paper proposes a package of three major initiatives and a range of other initiatives to enhance current practice. The *Welfare Debt Recovery* Cabinet paper proposes measures to ensure that MSD can recover debt effectively while enabling it to exercise sensible discretion in managing recovery in individual cases.

This RIS provides an analysis of the proposals which require legislative change. These proposals aim to:

- provide more equitable accountability for relationship fraud
- ensure fiscally prudent welfare debt recovery.

Policy proposals were developed within the parameters set out by Cabinet. Options were considered taking into account a number of constraints including IT limitations, time constraints, budget constraints and wider welfare reform changes.

Research regarding the effectiveness of individual anti-fraud initiatives is limited as these are typically rolled out as part of a wider package with various other anti-fraud initiatives, often alongside other changes to the social security system. The true extent of fraud which MSD does not detect is impossible to quantify. Therefore, while MSD may have evidence that there will be some impact, identifying the extent of the impact that an individual initiative may have is difficult. Monitoring and review activities will support the ongoing improvement of MSD's fraud and debt recovery initiatives.

The options in this RIS are not likely to impose additional costs on businesses, impair private property rights, restrict market competition, or reduce the incentives on businesses to innovate and invest or override fundamental common law principles.

Cathy Scott

Associate Deputy Chief Executive, Social Policy and Knowledge

8 November 2012

## Introduction and background

1. This Regulatory Impact Statement (RIS) accompanies the two Cabinet papers - *Tackling Welfare Fraud* and *Welfare Debt Recovery*.
2. The *Tackling Welfare Fraud* Cabinet paper proposes a policy package of three major initiatives and a range of other initiatives to enhance current practice. The initiatives seek to prevent and deter fraud from occurring, encourage compliance with the welfare system, detect fraud quickly, penalise appropriately and recover fraud debt. These measures largely realise commitments made in National Party election policy statements on Welfare Obligations<sup>1</sup> and the Post-Election Action Plan<sup>2</sup>. The three major initiatives are:
  - establishing an interagency approach to welfare fraud (the Welfare Fraud Collaborative Action Programme)
  - strengthening the approach to relationship fraud, in particular by making both parties in a relationship accountable for relationship fraud
  - new measures to respond to clients who have previously acted dishonestly in their dealings with the welfare system.
3. Most of the changes in the Cabinet paper build on the status quo or involve a change in practice and do not require legislative or regulatory change. This RIS examines the following proposals which require legislative change:
  - recover debt from spouses and partners who knowingly benefited or ought to have known they were benefitting from a fraud
  - widen the ability to recover debt from spouses and partners who make false statements or mislead MSD
  - create a new offence focusing on spouses and partners of beneficiaries.
4. The *Welfare Debt Recovery* Cabinet paper proposes a legislative duty on MSD to recover debt, balanced with discretion to determine the method and rate of recovery, and to defer recovery in exceptional circumstances.
5. This RIS is structured into two parts:
  - Part One discusses welfare fraud and in particular options to provide more equitable accountability for relationship fraud
  - Part Two discusses welfare debt recovery and measures to recover debt effectively while enabling it to exercise sensible discretion in managing recovery in individual cases.

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<sup>1</sup> [http://www.national.org.nz/PDF\\_General/Welfare\\_Obligations\\_policy.pdf](http://www.national.org.nz/PDF_General/Welfare_Obligations_policy.pdf)

<sup>2</sup> [http://www.national.org.nz/PDF\\_General/Post-Election\\_Action\\_Plan\\_.pdf](http://www.national.org.nz/PDF_General/Post-Election_Action_Plan_.pdf)

## Consultation

6. The Treasury, the Ministries of Justice, Education and Business, Innovation and Employment, ACC, Crown Law, the Office of the Privacy Commissioner, New Zealand Police, New Zealand Customs Service, Inland Revenue and the State Services Commission were consulted during the preparation of both Cabinet papers. The Department of Prime Minister and Cabinet, the Department of Internal Affairs, Te Puni Kokiri and the Ministries of Health, Women's Affairs and Pacific Island Affairs were informed during the preparation of both Cabinet papers.
7. The public will have the opportunity to comment on the proposals at the Select Committee stage of the Bill.

## Part One: Welfare fraud

### Status quo

8. The Ministry of Social Development (MSD) is responsible for delivering around \$16 billion worth of financial assistance to over 1.6 million New Zealanders each year.<sup>3</sup>
9. The current welfare system generally provides targeted assistance to those in need. To receive assistance, generally a person's income from other sources must be below a prescribed level and they must meet certain eligibility criteria. Rates are payable depending on:
  - the type of benefit or other forms of assistance to which the person is eligible
  - the circumstances of the person.
10. Applicants are required to provide all information necessary for MSD to determine entitlement to assistance. Recipients also have a duty to tell MSD about circumstances which could affect their entitlement to assistance and to tell MSD if their circumstances change.
11. The vast majority of people declare their true circumstances and comply with their obligations by reporting changes in circumstances. However, a relatively 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. There is a difference between fraud, and overpayments that occur because of the way the system works or because of genuine mistakes.
12. The two most common ways people fraudulently claim a benefit are by:
  - failing to declare employment and wages received (often by continuing on benefit after starting work)
  - 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).

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<sup>3</sup> This includes beneficiaries, students, superannuitants, and non beneficiaries who may get assistance such as help with housing costs and one-off payments.

13. Other ways people fraudulently claim a benefit include incorrectly claiming the wrong number or type of dependants, claiming multiple benefits, continuing to receive benefit while abroad and incorrectly declaring housing costs or income from housing such as rent (see Appendix 1 for types of fraud prosecuted in 2011/2012).
14. While the true extent of fraud that MSD does not detect is impossible to quantify, in the 2011/12 financial year:
- 10,735 cases were investigated, resulting in 2,139 cases of overpayment being established
  - of the 2,139 cases of overpayment, 714 cases were successfully prosecuted (with debt of \$23.4 million being established), 1,425 cases were not prosecuted because they did not meet MSD or Crown Law guidelines for prosecution<sup>4</sup> or did not end in conviction<sup>5</sup> (with a further \$18.4 million of debt established)
  - 71,629 data matches were undertaken, which found 33,462 instances of overpayments leading to the establishment of a further \$46 million of debt.<sup>6</sup>
15. MSD takes welfare fraud seriously and has a range of measures, systems and processes in place to prevent, deter, detect and respond to fraud. Prevention and detection activities include:
- highlighting and reiterating with clients their obligations to inform MSD as soon as possible of any changes in circumstances and making it easy for clients to report changes in their circumstances
  - providing clients with information to ensure they receive their full correct benefit
  - data matching information on clients with information held by other agencies. For example, identity verification matches with the Department of Internal Affairs (Birth, Deaths and Marriages) and income matching with Inland Revenue.
16. Where a person has been investigated and found to have committed fraud MSD can respond to this by:
- seeking repayment of the overpayment
  - issuing a written warning
  - imposing a monetary penalty<sup>7</sup> of not more than three times the overpayment

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<sup>4</sup> MSD's internal guidelines for staff to determine whether a prosecution should be referred to Legal Services are followed which include evidential sufficiency and public interest factors including the duration of offending, if the quantum of overpayment is significant, premeditation, sophistication and degree of culpability. The cost of the fraud is not determinative, eg if documents are forged even a relatively low overpayment may be prosecuted. The Solicitor General's Prosecution Guidelines are also used by Legal Services to determine whether a prosecution should be commenced.

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

<sup>6</sup> MSD matches its records with six other government departments (Inland Revenue, Department of Corrections, New Zealand Customs Service, Department of Internal Affairs (matches with Births, Deaths and Marriages), ACC and Housing New Zealand Corporation) to identify clients who have a change in their circumstance, such as leaving the country, marrying or going to prison and are being overpaid.

<sup>7</sup> Section 86(2) of the Social Security Act.

- seeking a criminal prosecution under either the Social Security Act 1964 or the Crimes Act 1961 (where the case meets the Crown Law and MSD guidelines for prosecution).

## Problem definition

17. Relationship fraud occurs when a person who is living in a de facto, marital or civil union relationship<sup>8</sup> claims a single or sole parent rate of benefit for which they are not eligible. Relationship fraud comprised of just under a third of all welfare fraud prosecutions in 2011/2012 and large sums of money were often involved. In 2010/2011, 67 per cent (41 cases out of 61) of those with overpayments of more than \$100,000 involved women in undeclared relationships.
18. In cases of relationship fraud where a client has an undeclared spouse or partner, the spouse or partner is usually not required to pay back any of the overpayment created or prosecuted for an offence. Generally, the client is solely responsible for the entire debt and solely vulnerable to criminal prosecution even when the undeclared spouse or partner was aware of and benefited from the payments. This situation is inequitable as there is a spouse or partner who, in many circumstances, could be considered equally culpable and who ends up with no debt and is free of criminal liability (see Box 1).

### Box 1. Example of the inequity in relationship fraud debt

- Suzanne\* was investigated in 2010 for living in a relationship in the nature of marriage with her partner Steve.
- It was proven that this couple lived continuously together for the period 14 May 2005 to 7 October 2010 and that they were financially interdependent and emotionally committed to each other.
- With Steve's knowledge, Suzanne received the Domestic Purposes Benefit – Sole Parent for the entire period and this money was used to pay for household expenses and goods.
- An overpayment was established of \$153,765.89. Suzanne was prosecuted for welfare fraud and owes MSD \$153,765.89.
- Steve owes MSD nothing, despite benefiting equally from the fraud. In the absence of any evidence that he counselled or incited Suzanne he cannot be prosecuted.

\*Note this is a fictitious example

19. Where the beneficiary has been in this situation for many years, the overpayment may be high and the beneficiary will struggle to repay it. A working spouse or partner may have more ability to pay, but often have no formal liability and rarely contribute to the repayment of a beneficiary's debt.

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<sup>8</sup> People are considered to be part of a couple when they are in a relationship with another adult and where there is a degree of companionship in which they are committed to each other emotionally for the foreseeable future and financially interdependent on each other. This includes couples who are married or in a civil union and couples who are living in a de facto relationship.

20. MSD currently has two options<sup>9</sup> to hold spouses or partners accountable for relationship fraud:

- Debt can be recovered from a spouse or partner of a beneficiary where there is evidence on the balance of probabilities that a spouse or partner has made a false statement to or otherwise misleads MSD about his or her own circumstances, and as a result the beneficiary has received more benefit money than they are entitled to.<sup>10</sup>
- Where there is evidence MSD can prosecute undeclared spouses or partners for providing misleading or false information or as a party to the offence<sup>11</sup> under the Crimes Act and seek reparation.

21. MSD is generally unable to establish sufficient evidence to use either of these options because an undeclared spouse or partner who is not a beneficiary usually has little or no contact with MSD. Prosecution can only occur when evidence exists that a spouse or partner has incited or counselled their partner to commit the offence or where a spouse or partner makes false or misleading statements to MSD. A spouse or partner who knows that they are benefiting from a welfare overpayments is presently neither liable for prosecution or debt recovery.

## **Objectives**

22. The overall objectives of the tackling welfare fraud package are to prevent and deter fraud from occurring, encourage compliance with the welfare system, detect fraud quickly, penalise appropriately and recover fraud debt.

23. MSD has identified the objective for the legislative amendments in the tackling fraud package as providing more equitable accountability for relationship fraud.

## **Regulatory impact analysis**

**Option 1: Empower recovery of debt from spouses and partners who knowingly benefited or ought to have known they were benefitting from payments to which the beneficiary was not entitled and make it an offence under the Social Security Act for a spouse or partner of a beneficiary to knowingly benefit from welfare fraud**

24. This option holds spouses or partners accountable for welfare fraud. It empowers MSD to recover debt from a spouse or partner who knowingly benefited or ought to have known they were benefitting from payments to which the beneficiary was not entitled.

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<sup>9</sup>MSD can generally recover fraud debt 50/50 (based on the amount each party received) where a couple on benefit commits welfare fraud (eg one or both parties has failed to declare earnings) and if two people in a relationship are falsely claiming a benefit in their own right MSD can collect the debt from them as single people.

<sup>10</sup> Section 86(3) of the Social Security Act.

<sup>11</sup> Section 66 of the Crimes Act.

25. Debt would be recovered jointly from both parties and MSD would have discretion to determine the method and rate of recovery (as in Option 1 of the Welfare Debt Recovery section of this RIS). An option to attribute the debt 50/50 was examined, but decided against. This is because it would have meant that the beneficiary's accountability for the fraud debt would halve, and MSD would not be able to recover more than half of the overpayment from the person with more ability to make repayments, therefore it would take longer to recover.
26. The advantages of holding both parties jointly accountable for the debt are that:
- it is equitable to the extent that the full amount or part of the debt can be obtained from both parties according to his or her circumstances
  - it reflects that fraud is involved and taxpayers should be fully recompensed by either or both parties as soon as practicable.
27. For example, a \$10,000 overpayment is attributed jointly to both parties to the relationship. The beneficiary's partner repays at \$50 a week and the beneficiary repays at \$10 a week. The difference in recovery rates is caused by the difference in their individual circumstances (they have separated). After three years, the partner has paid \$7,800 and the beneficiary \$1,560. Assuming their circumstances do not change, the debt is paid in full shortly thereafter.
28. This option also creates a new offence so that it is an offence under the Social Security Act for a spouse or partner of a beneficiary to knowingly benefit from their partner's welfare fraud. This offence would be added to the Social Security Act and, on conviction, a person would be liable to imprisonment for a term not exceeding 12 months or to a fine not exceeding \$5,000, or both.
29. In addition, this option widens MSD's power to establish overpayment debt against a spouse or partner of a beneficiary<sup>12</sup> so that a debt can be established if a spouse or partner provides any false statements or misleading information that causes payments in excess of entitlement (currently the provision only covers information about the spouse or partner's own income and circumstances).
30. This option represents a more equitable approach as spouses or partners who knowingly benefit from welfare fraud can be prosecuted and also held responsible for the debt to the Crown arising from the overpayments. Spouses or partners who ought to have known they were benefitting from benefit overpayments may be held accountable for the debt, but this option recognises that they are unlikely to have the knowledge to justify prosecution.
31. In order to recover debt from a spouse or partner, this option relies on evidence that a spouse or partner knowingly benefited, or ought to have known they were benefitting from payments made in excess of entitlements. This evidence would be easier to obtain than under the status quo and there would be minimal impacts on MSD's current practices used to investigate fraud as this evidence is often gathered as part of this process.

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<sup>12</sup> Section 86(3) of the Social Security Act.

32. The type of evidence obtained to prove that the spouse or partner 'ought to have known they were benefiting from a fraud' would include circumstances, such as benefit money going into a joint bank account. If a spouse or partner was unaware that their partner was a beneficiary, believed they had no income and consequently contributed to the household on the understanding that they were the sole income earner, MSD would not seek to recover any of the overpayment established from the spouse or partner.
33. The advantages of this option are that:
- it provides greater equity to accountability for relationship fraud
  - recovery of debt (as well as prosecution) will be significantly enhanced as MSD will be able to actively seek repayment from both parties, not just one. MSD will be able to use the full range of debt recovery options available including using deduction notices against spouses and partners wages.
34. The option may raise potential New Zealand Bill of Rights Act 1990 (NZBoRA) issues in terms of the right to justice and the right to be free from discrimination on the grounds of family and marital status. MSD believes these potential issues are justifiable because it ensures a more equitable outcome as relationship fraud debt can be recovered from both partners, rather than just the beneficiary partner. MSD is also ensuring that a spouse or partner has a review and appeal right where it seeks to recover debt from them. The Ministry of Justice's final view on whether the proposals are consistent with the NZBoRA will not be known until the legislation has been drafted and considered.

#### *Costs and impacts*

35. Approximately 700 cases per year are likely to be affected by this option. It is not possible to quantify the impact of the proposal on the amount of debt collected. However, the ability to recover the debt will be increased as MSD will be able to actively seek repayment from both parties, not just one.
36. More people are expected to apply for a review of decision and pursue appeals to the Social Security Appeal Authority from the decision of a Benefits Review Committee. This is partly because MSD will be providing appeal and review rights to a broader group of people.
37. Systems changes would be required, with an estimated cost of \$0.5 million. This will allow system and process changes for establishing and recovering a debt, including where the partner/spouse is not a current beneficiary. While a manual system would be less costly, there are significant risks with implementing a manual system in that MSD would not be able to easily identify the history of repayments or outstanding balances, and mistakes would be more likely.



**Option 2: Make it an offence under the Social Security Act for a spouse or partner of a beneficiary to knowingly benefit or to be reckless as to whether they were benefiting from their partner's welfare fraud**

38. This option extends the creation of the new offence in Option 1 (where a spouse or partner knowingly benefits from their partner's welfare fraud) so that it is also an offence where a spouse or partner was reckless as to whether they are benefiting from their partner's welfare fraud.

**Option 3: Impose a duty on spouses and partners of beneficiaries to advise MSD of changes that might affect their partner's benefit entitlement or rate, empowering recovery of debt and prosecution of those that fail to perform this duty**

39. This option requires spouses or partners to share the responsibility for advising MSD of changes which might affect the beneficiary's entitlements and share the consequences when they do not perform their obligations. Those consequences include prosecution for welfare fraud and liability to repay the debt.

40. By imposing a duty on the spouse or partner of a beneficiary to advise MSD of any changes in circumstances that might affect the beneficiary's entitlement or rate of benefit, the spouse or partner would be placed on more or less the same footing as the beneficiary. If they fail to advise MSD of changes which affect their partner's benefit they may be prosecuted for fraud or be subject to debt recovery for the overpayments.

41. This option has some risk in that spouse and partners would have an obligation to report changes of circumstances which may affect their spouse's or partner's (the beneficiary's) entitlement for a benefit without necessarily knowing that such an obligation exists or what the beneficiary is entitled to.

42. The option also raises potential NZBoRA issues in terms of the right to justice and the right to be free from discrimination on the grounds of family and marital status.

**Option 4: Recover fraud debt from an undeclared spouse or partner, where a marriage-type relationship with the client created the overpayment, unless exceptional circumstances exist**

43. This option recovers relationship fraud debt from an undeclared spouse or partner where a marriage-type relationship with the client created the overpayment. It is based on a general presumption that in marriage-type relationships both parties have benefited from the fraudulently gained money coming into the household (given that there is financial interdependence in such relationships) and because of this, debt should be recovered from both parties in the relationship.

44. In some exceptional circumstances, such as where the spouse or partner was not aware of the fraud and did not benefit, it may be unfair to recover half of the overpayment from the spouse or partner. The onus would be on the spouse or partner to prove an exceptional circumstance existed.

45. While this option would be simpler to administer than Option 1, it comes with several risks. It may be inconsistent with NZBoRA in terms of the right to justice. There is also some risk that it may be found unreasonable and procedurally unfair. This is because this option presumes that in all cases an undeclared spouse or partner has benefited from the money coming into the household or knew or should have known they were benefitting from welfare fraud simply because they are in a relationship without requiring MSD to provide proof.
46. Reviews and appeals and the associated costs may increase more than under the preferred option as it may be seen as unfair.

#### **Other options considered**

47. A range of other options to recover debt from spouses and partners were considered early on in the policy development stage. However, all of these were ruled out early in the process, because they did not address the problem at hand.
48. One of these options involved widening the criteria for recovering debt from a spouse or partner (section 86(3) of the Social Security Act) so that debt could be recovered from a spouse or partner where he or she was party to a fraud (incites or counsels) using similar wording to section 66 of the Crimes Act. This would mean that on the rare occasions that MSD does have evidence to prosecute an undeclared non beneficiary spouse or partner (usually under section 66 of the Crimes Act), or evidence on the balance of probabilities that the spouse or partner was a party to a fraud, MSD would be able to use their own debt recovery provisions. This option was ruled out because when MSD does prosecute spouses or partners reparation orders (administered by the Ministry of Justice) can be sought, so there is already a way to recover debt from this group.

#### **Conclusions and recommendations**

49. MSD analysed each option and weighed up the advantages and disadvantages. MSD recommends progressing options to:
- recover debt from spouses and partners who knowingly benefited or ought to have known they were benefitting from a fraud
  - widen the ability to recover debt from spouses and partners who make false statements or mislead MSD
  - create a new offence focusing on spouses and partners of beneficiaries.

#### **Implementation**

50. Implementation of the overall package to tackle welfare fraud will be phased following the passage of legislation.
51. The proposal to recover debt from spouses and partners who knowingly benefited or ought to have known they were benefitting from a fraud and a new offence focusing on spouses and partners of beneficiaries will be implemented in early November

2013. This is because IT system changes are needed to be able to easily record information correctly against benefit and finance records.

## **Monitoring, evaluation and review**

52. The purpose of monitoring and review activities will be to support the ongoing improvement of MSD's fraud initiatives.
53. Assessing the impact of the overall package of welfare fraud initiatives will be challenging. This is because they are likely to be rolled out as part of a wider package of anti-fraud initiatives and alongside changes to social security system. Taking these issues into account MSD will assess the implementation and outcomes of the initiatives. For example, analysis may include reporting of any trends in overpayment data, welfare fraud convictions, and providing commentary on the likely reasons behind any trends. Changes that may impact on client investigation and prosecution numbers and values will be reported and monitored through regular monthly reports.
54. Welfare fraud initiatives will also be reviewed to assess how they have been implemented in practice, identify any opportunities for improvement and review existing data on any progress towards key outcomes. This will include mapping out the rationale, key outcomes and key indicators for the initiatives and reporting available data.

## **Part Two: Welfare debt recovery**

### **Status quo**

55. The Social Security Act empowers MSD to recover debt through a variety of means, including court proceedings and deductions from benefits and other sources (see Appendix 2 for relevant debt recovery provisions). MSD practice is to actively pursue recovery of all monies owed, while exercising discretion about the method and rate of recovery, or in exceptional circumstances, temporarily deferring recovery until a person's financial circumstance improves. This discretion is generally exercised by negotiating realistic repayment rates with beneficiaries and former beneficiaries that do not cause hardship.<sup>13</sup>
56. As at 30 June 2012, MSD was owed \$485 million in debt arising from investigations and data matching, including \$106 million owed as a result of prosecuted fraud. MSD also manages debt from overpayments, which are routinely picked up by Work and Income (\$176 million owed as at 30 June 2012).
57. Although some assistance is provided on the explicit condition that it is recoverable, it is still deemed to be debt under the same provisions as overpayments in the Social Security Act.<sup>14</sup> Recoverable assistance provides interest free advance payments of

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<sup>13</sup> Both current beneficiaries and non-current beneficiaries are able to review the rate of recovery at any time due to hardship.

<sup>14</sup> Section 85A of the Social Security Act.

benefit or recoverable assistance grants for essential items, such as school uniforms or washing machines. Arrangements for repaying these advances or recoverable grants are made when they are approved.<sup>15</sup>

58. For current beneficiaries repayments are deducted straight from their benefit or other ongoing entitlement, such as Working for Families Accommodation Supplement. For people no longer receiving income support, MSD's Collections Unit actively manages their repayments. In both circumstances, repayment levels are often negotiated to avoid causing significant hardship.
59. A high proportion of beneficiaries are repaying what they owe with 92 per cent of current clients repaying and 88 per cent of former clients have paid or are repaying within 12 months of leaving the benefit system.
60. An Auditor-General report from 2011<sup>16</sup> found that MSD uses well-established and appropriate systems to effectively recover money owed. However, there is little legislative guidance and only broad operational guidance, to ensure consistency of approach in determining hardship or how the discretion should be exercised and documented.

## **Problem definition**

61. Welfare assistance is a major form of public expenditure and the public is entitled to expect that MSD will effectively recover welfare debts. This is part and parcel of MSD's obligations to manage public money responsibly under the Public Finance Act 1989.
62. Recent High Court decisions have questioned how MSD applies discretion to recover welfare debt. In the most recent decision *Harlen v Ministry of Social Development*<sup>17</sup> (*Harlen*), the High Court held that:
  - there is no presumption in the Social Security Act that MSD will recover debt
  - in exercising the discretion to recover debt, MSD must consider:
    - a beneficiary's individual financial circumstances and the impact that ongoing benefit repayments would have on their ability to support themselves and any dependent child
    - international instruments such as the International Covenant on Economic, Social and Cultural Rights (ICESCR) and the United Nations Convention on the Rights of the Child (UNCROC) having regard to the adequacy of the beneficiary's standard of living and the impact debt collection would have on it and their dependent children.
63. The Court also noted that hardship does not necessarily preclude recovery, but is a factor that should be considered.

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<sup>15</sup> As at 30 June 2012, MSD was owed \$407 million in recoverable assistance.

<sup>16</sup> Office of the Auditor-General (2011) Ministry of Social Development: Managing the recovery of debt. Wellington: Office of the Auditor-General. <http://www.oag.govt.nz/2011/msd-recovery-of-debt/docs/recovery-of-debt.pdf>.

<sup>17</sup> [2012] NZAR 491.

64. There have been other previous High Court decisions which, when considered together with *Harlen*, provide insufficient clarity about MSD's rights and obligations when recovering debt.
65. *Harlen* clearly conflicts with MSD's practices, which presume that MSD will always seek to recover a debt and actively pursue it until all avenues to recover it have been exhausted.
66. The implications of the lack of clarity in the case law, and the direction *Harlen* appears to be travelling in, is that MSD could be challenged to re-open individual cases, classes of cases or all cases where they have exercised discretion to recover debt. In the absence of clarification to legal settings MSD would probably be obliged to change their approach to debt recovery in the future (with a likely consequential reduction in the recovery of debt).

9(2)(h)

## **Objective**

68. The policy objective is to ensure that the Social Security Act enables MSD to recover welfare debt effectively while enabling it to exercise sensible discretion in managing recovery in individual cases.

## **Regulatory impact analysis**

### **Option 1: Legislative duty to recover debt with discretion over method and rate of recovery**

69. This option proposes legislative amendment to ensure that there is a duty on MSD to recover debt. The duty to recover debt will not prevent MSD from writing-off debt under the Public Finance Act or not recovering debt where the Social Security Act (section 86(9A) and (9B)) already directs that it should not be recovered.
70. Discretion to determine the method and rate of recovery, including realistic case by case negotiation with debtors, and in exceptional circumstances temporarily deferring recovery will continue. Under this option, the Minister responsible for the Social Security Act may issue, and MSD must comply with, directions about the matters that MSD must have regard to in setting the method or rate of recovery. These directions will also set out the circumstances in which it is appropriate to temporarily defer recovery, such as in cases of exceptional hardship. Such deferrals would be reviewable from time to time to determine whether the debtor's circumstances still warrant such a response.
71. The advantages of this option are that:
  - it largely re-affirms and strengthens MSD's existing assumptions and practices; it is clear that debt is to be recovered while providing sufficient opportunity to respond to exceptional cases

- the Ministerial direction and supporting guidelines will provide consistency to how MSD balances the recovery of debt with issues of hardship (including hardship faced by dependent children)
- it is relatively simple to administer because it only requires one decision to be made in respect of the rate of recovery
- it would provide consistency and clarity across MSD and for debtors.

72. One risk with this option is that it could create perverse incentives for a debtor to claim that their financial situation is severely constrained in order to have recovery deferred. However, this risk can be managed through the settings in the Ministerial direction.

#### *Costs and impacts*

73. The preferred option is similar to the way in which MSD presently operates and therefore it is not likely to have any significant financial or operational implications.

#### **Option 2: Legislative presumption of debt recovery with discretion over both recovery and rate**

74. This option requires legislative change so that there is a presumption on MSD to recover debt. Guidelines would be used to decide whether, firstly, to recover or not recover debt. If recovery is appropriate then there is another set of guidelines to set the rate of recovery.

75. One of the disadvantages of this option is that it is harder to administer than Option 1 because it requires two decisions to be made in respect of recovery and the rate of recovery.

76. A potential risk of this option is that it may be more likely to reduce volumes of debt recovered, as more debts may be subject to a decision not to recover. Additionally, this option could create perverse incentives for a debtor to claim that their financial situation is severely constrained in order to have recovery deferred. However, this risk could be managed through the settings in the guidelines.

#### **Conclusions and recommendations**

77. MSD weighed up the advantages and disadvantages of the options and recommends progressing proposals to:

- impose a legislative duty on MSD to recover debt, balanced with discretion to determine the method and rate of recovery and to defer recovery in exceptional circumstances.

#### **Implementation**

78. The proposal will be implemented in early November 2013 and be guided by Ministerial direction. The first Ministerial direction will be in place on, or as soon as practicable, after the amending legislation comes into force. Operational guidelines will also be prepared within MSD to support Ministerial directions.

## **Monitoring, evaluation and review**

79. MSD will assess the implementation and outcomes of the proposal and monitor debt recovery, including reporting trends in overpayment data and debt recovery, and providing commentary on the likely reasons behind any trends. The proposal may also be reviewed to assess how it has been implemented in practice and to identify any opportunities for improvement to debt recovery practice.

## Appendix 1

### Prosecuted fraud by type 2011/2012

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
<b>Total</b>	<b>742</b>	<b>100</b>



## Appendix 2

### Relevant debt recovery sections of the Social Security Act 1964

#### Section 85A Payments that are debts due to the Crown

The following payments or other sums are debts due to the Crown:

- (a) any penalty payable under this Act;
- (b) any benefit paid conditionally or provisionally under this Act that a person has become liable to repay (by direction of the chief executive or otherwise);
- (c) any advance payment of a benefit made to a person under section 82(6);
- (d) any money paid to or for the credit of a person as a grant of special assistance under a welfare programme approved under section 124(1)(d) that is—
  - (i) paid as a recoverable grant of assistance; or
  - (ii) otherwise recoverable from that person under the terms and conditions of the programme;
- (e) any amount described by this Act as a debt due to the Crown from the person;
- (f) a sum (an overpayment), paid or advanced under this Act or the Social Welfare (Transitional Provisions) Act 1990 or Part 6 of the War Pensions Act 1954 or Part 1 of the New Zealand Superannuation and Retirement Income Act 2001 to or for the credit of a person—
  - (i) that is in excess of the amount to which the person is entitled; or
  - (ii) to which the person has no entitlement.

#### Recovery of payments made in excess of authorised rates

##### Section 86(1)

- (1) The chief executive, in order to recover a debt referred to in section 85A, may—
- (a) bring proceedings in the name of the chief executive; or
  - (b) deduct all or part of that debt from any amount payable to that person by the department as a benefit or a student allowance; or
  - (c) in the case of a debt referred to in section 85A(d), deduct all or part of that debt from any payment of a grant of special assistance under a welfare programme approved under section 124(1)(d).

(1A) Subsection (1) is subject to subsections (9A) and (9B), and to any regulations made under section 132G.

1B) Nothing in section 94B of the Judicature Act 1908 or any rule of law relating to payment by or under mistake prevents recovery of a debt under subsection (1).

##### Section 86(9A)

(9A) The chief executive may not recover any sum comprising that part of a debt that was caused wholly or partly by an error to which the debtor did not intentionally contribute if—

- (a) the debtor—
  - (i) received that sum in good faith; and
  - (ii) changed his or her position in the belief that he or she was entitled to that sum and would not have to pay or repay that sum to the chief executive; and
- (b) it would be inequitable in all the circumstances, including the debtor's financial circumstances, to permit recovery.

**Section 86(9B)**

(9B) In subsection (9A), **error**—

- (a) means—
  - (i) the provision of incorrect information by an officer of the department;
  - (ii) any erroneous act or omission of an officer of the department that occurs during an investigation under section 12;
  - (iii) any other erroneous act or omission of an officer of the department; but
- (b) does not include the simple act of making a payment to which the recipient is not entitled if that act is not caused, wholly or partly, by any erroneous act or omission of an officer of the department.