

**REPORT TO THE MINISTER FOR SOCIAL SERVICES**

**REVIEW OF DEPARTMENT OF WORK AND INCOME  
IMPLEMENTATION OF THE COURT OF APPEAL DECISION**

***RUKA v DEPARTMENT OF SOCIAL WELFARE [1997] 1 NZLR 154***

Frances Joychild, Barrister

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# Executive Summary

## Introduction

In September 2000 the then Associate Minister for Social Services, Ruth Dyson, initiated this review of the Department of Work and Income's implementation of the Court of Appeal decision in *Ruka v Department of Social Welfare* [1997] 1 NZLR 154 following public criticism of the Department's response to it.

The court decision, issued on October 1 1996, significantly altered the test to be used to determine if a beneficiary was in a relationship in the nature of a marriage. Far reaching social security and legal consequences flow for a person considered to be in such a relationship.

As required in Terms of Reference 2.1; 2.2 and 2.3 an examination was made of the manner in which the case has been applied in investigating, establishing overpayments, penalties and prosecuting offences dealing with relationships in the nature of a marriage. Recommendations are made further to terms 2.4, 2.5 and 2.6 of the Terms of Reference.

The principal recommendation is that all decisions taken by the Department to establish overpayments against beneficiaries on the grounds that they were living in a marriage-type-relationship, between November 1996 and December 2000, be reviewed to ensure the evidence satisfies the *Ruka* legal test. The exceptions are those cases where the case went to the Social Security Appeal Authority or the beneficiary was prosecuted for benefit fraud.

It has been a combination of factors, all arising in the course of this review, which has led the writer to the conclusion that, of necessity, all such decisions are reviewed. At the heart of the recommendation are two key factors, namely that the decision significantly altered the marriage-type-relationship test and far reaching consequences flow from such a decision for the individual.

The principal influencing factors upon the conclusion that decisions need to be reviewed are:

- The failure of the Department between November 1996 and mid 2000 to amend any of the staff manuals, guidelines or informational resources to reflect the correct legal test to be applied when determining whether a beneficiary was living in a relationship in the nature of a marriage,
- The failure of the Department between November 1996 and mid 2000 to provide any written notification or documentation at all to benefit crime investigators specifically, that their investigative practices and assessments had to be altered to reflect the legal changes.

- The absence of further training after November 1996 of benefit crime investigators about the changes the *Ruka* decision made upon their marriage type relationship investigations and assessments,
- The absence of any training at all on the nature of violence to women and how that might be recognised and related to benefit entitlement
- The lack of adequate legal oversight of the operations of the benefit crime unit from its inception to mid 2000 and the lack of adequate checks and balances on decision making up to 2000.
- The fact that, though the sampling was small, the review of files and interviews with departmental employees and beneficiary advocacy representatives disclosed strong evidence that the incorrect legal test had been applied.

There are other minor influencing factors which include:

- The predominant culture of the benefit crime unit from its restructure in 1996 to mid 2000 which valued and rewarded investigators on the basis of the level of monetary overpayments they established against beneficiaries.
- The general lack of independent advice and support for beneficiaries to challenge the decisions made, particularly outside main centres.

There is no present concern that the incorrect legal test is being applied. Considerable changes have been implemented throughout 2000 to strengthen the reliability and robustness of decision making in this difficult area of social security administration. The failures listed above are systemic ones and there is no suggestion of any deliberate wrongdoing on the part of any of the Benefit Fraud Investigators employed over the time at issue.

The Department's responses to the draft report are included in the body of the report. Some matters reported upon which impact upon the manner in which the Department undertakes investigations and prosecutions of marriage-type-relationship cases<sup>1</sup> also raise wider systemic issues as to how the Benefit Control Unit operates both internally and externally.<sup>2</sup> That said, the difficult and highly discretionary nature of marriage-type-relationship investigations requires particular ongoing care to ensure there are always adequate checks and balances upon decision making.

The recommendations are set out below<sup>3</sup>.

## **A The soundness of overpayments established between October 1996 and December 2000.**

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<sup>1</sup> Term of Reference 2.5

<sup>2</sup> The are reported on further to Term of Reference 2.6

<sup>3</sup> Recommendations 12-15 raise issues which are not, strictly speaking, within the Terms of Reference. However issues relative to them arose during the course of the review and I consider it important to formulate recommendations in respect of them.

- 1 That the Department undertake a review of the basis of the decisions to establish overpayments further to section 63(b) of the Act, in all cases decided between 1 November 1996 and December 2000 except where the beneficiary has been prosecuted or an appeal considered by the Social Security Appeal Authority.

The review to consider whether the prerequisite factors of financial interdependence and emotional commitment had been established satisfactorily in each case and whether violence, where it was evident, had been assessed against those factors. The review also to consider and deduct any 'notional entitlement'.

The reviews to involve notification to beneficiaries and consultation with them where additional facts are required before assessment can be made.

*Comment:*

*Because of a number of factors listed at B-G below it is recommended that the department review certain decisions made by its Benefit Control Unit as the soundness of decisions is on doubt.*

## **B Application of the incorrect legal test**

- 2 The Department continue to update all staff resource documentation so as to give clear instructions to staff as to the correct legal test for a marriage-type-relationship. This will state clearly and unambiguously that there are essential requirements, which are financial interdependence, (meaning actual or a willingness to support if the need arose), co habitation and emotional commitment. Reformulated checklists can still be included in the context of identifying whether these essential requirements have been made out. In particular:

- The indicator list in use as of November 2000 must be amended as above.
- The draft chapter on conjugal status should include a separate heading for Violence in a Relationship.
- Consideration is given to amending the relationships pamphlet to add case studies so as to give greater assistance to beneficiaries to understand what a Marriage-type-relationship might be.

- 3 That all staff resource documentation is independently audited on a regular basis to ensure compliance with legislation and with relevant rulings of the Social Security Appeal Authority and the Courts.

*Comment:*

*No instructional documentation at all was distributed to investigating staff nor was present documentation changed to reflect the correct legal test for 3 ½ years until beneficiary advocacy groups drew the error to the attention of the Department. Further there was no update in most documentation in 1994 to reflect a change to the 1991 marriage-type-relationship test. The attachment of lawyers specifically to benefit control units will assist the Unit to comply with the law but nevertheless given this background, an independent audit seems a prudent additional step.*

### **C Taking account of Violence to Women in benefit fraud investigation and benefit entitlement decisions**

- 4 That training of all investigators be undertaken and that such training be prepared and delivered with the input of experts in the field. The training would be for the purposes of assisting staff to:
- Appreciate and understand the dynamics of domestic violence, particularly the power and control dynamic, which incorporates battered women's syndrome theories, and financial abuse as a characteristic of violence.
  - Recognise signs and symptoms of a beneficiary who is experiencing domestic violence.
  - Assess whether there has been a marriage-type-relationship where violence has been present.
  - Understand Departmental policy in respect to handling of cases where violence to women is evident.
- 5 That the Benefit Control Unit develop a policy relating to the handling of investigations where there is suspicion or knowledge that violence is an aspect of the relationship. It is recommended that such cases either be directed to a senior investigator to determine if a marriage-type-relationship exists or a senior supervises all such investigations.
- This policy would also provide that in all cases where violence has been a feature of the relationship the investigator must provide details of resources for the beneficiary including refuge contact details; counselling contacts, parenting support contacts, etc.
- 6 That all regional departmental offices establish a regular and ongoing liaison with local Women's Refuges so as to jointly review administrative practices in their areas relative to issues affecting beneficiaries who are victims of domestic violence. Consultation also takes place with the National Collective of Independent Refuges Head Office where national policies and protocols need developing.

*Comment:*

*There has been no staff training on violence to women and how it might affect benefit fraud and entitlement. This is in spite of the Court of Appeal*

*holding that where it exists it can affect the s 63(b) marriage- type-relationship test.*

*It seems evident that violence in a beneficiary relationship was not being identified or investigated to assess its impact upon the 63(b) test. It is likely that there are some beneficiaries with debts to the Department, who, if violence had been taken account of would not have such a debt.*

## **D Weaknesses in the checks on decision making**

- 7 That more robust checks and balances continue to be put in place to check the soundness and fairness of investigator decision-making. Specifically:
- (a) A senior investigator audit of all files where an overpayment of over \$4000 <sup>4</sup>is established.
  - (b) A monthly random 10% audit continue to be conducted by a senior of all other files.
  - (c) A benefit not be cancelled until a senior investigator has reviewed the file and the beneficiary accepts the decision made. Otherwise cancellation occur only after Benefit Review Committee review of the decision.
  - (d) That provision be made for urgency for Social Security Appeal Authority hearings once a benefit has been cancelled after review.
  - (e) The practice of cold calling be replaced by a system which notifies beneficiaries in writing of an appointment for an interview. The letter should advise that inquiries about benefit entitlement will be made at the interview and there is a right to bring an advocate or support person. Only in circumstances where the beneficiary does not respond should cold calling be undertaken.
  - (f) The letter notifying the beneficiary of the decision that a marriage-type-relationship was in existence, what the overpayment is and how much per week it is to be paid back should have enclosed with it an easy to read pamphlet setting out how to take a review, what happens during it and contact details of local advocacy groups.
  - (g) That legal training modules are developed and all members of the Benefit Control Unit undergo regular legal training

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<sup>4</sup> This figure is close to the median.

based upon them. Topics should include the impact of decisions of the Social Security Appeal Authority and courts, and concepts such as natural justice and fairness.

- (h) That the statutory power of the Department to impose a monetary penalty on a beneficiary be repealed. These punitive measures should be administered in a court system where there are inherently stronger checks and balances in the administration of justice.
- (i) That an independent complaints officer be appointed to deal with complaints against the Department of Work and Income similar to the Insurance and Banking Ombudsmen, the current external agencies responding too slowly to be effective.

*Comment:*

*Overpayments created since October 1996 have been established by officers exercising wide discretions with minimal checks and balances. The adequacy of some at least of the interviews conducted by investigators is in doubt.*

*Of particular concern are:*

- *those overpayments established on the basis of an admission following one 'cold call' interview where the beneficiary was shown the wrong legal test (Excell indicator list) and asked to accept that she was (or was not) in a relationship. Interviewees were approached in their home without notice.*
- *Overpayments established on the basis of one cold call beneficiary interview.*

*The review process has also been a weak check on the investigator's decision making—with two out of three committee members from the department and those two generally being drawn from the same office as the investigator whose decision is under review comes from. Any internal departmental errors, such as using a wrong legal test, can only be replicated. It is significant that at the first stage of review that is entirely independent of the Department a very high number of overpayments under s63(b) are disestablished or amended in favour of the beneficiary.<sup>5</sup>*

## **E A need to refocus towards a dual emphasis in Benefit Crime Initiatives**

- 8 That in its activities in the areas of benefit fraud investigations, staff training and community education it maintain a dual focus. This requires attention to the need to ensure all New Zealanders in receipt of social

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<sup>5</sup> Department figures put this at 46%. A manual count by the reviewer put it at 62%.

security are treated with dignity, respect and equality with other citizens as well as the need to create an effective system to prevent, discourage, detect, investigate and create sanctions for those persons who are engaging in benefit fraud.

*Comment:*

*It is vital that the integrity of the social security system is protected so that it remains an insurance policy for all New Zealanders when they have lost all other means of support. Protecting its integrity is a two-fold task one of which involves ensuring that New Zealanders in receipt of social security are treated with dignity, respect and equality as is afforded all other citizens. The other is to create an effective system to prevent, discourage, detect, investigate and create sanctions for those persons who are engaging in benefit fraud. A balance must always be retained between these tasks.*

## **F More education for prevention needed**

- 9 That the Department develop an education policy and programme specifically for s. 63(b) benefit fraud prevention and take proactive steps with beneficiaries to ensure clearer knowledge of the boundaries of a relationship.
- 10 That the Department develop a well-publicised model based on the ‘facilitation’ process, as recorded in its manual, whereby beneficiaries commencing relationships are ‘facilitated’ through the transition from the benefit.

*Comment:*

*There was widespread confusion as to where the line was in relation to a marriage type relationship. In many of the beneficiary files reviewed the fact they were in a relationship in the nature of a marriage appeared to come as a surprise to the beneficiary.*

*Besides providing more specific information on relationships there is additional information which would be helpful for women and men raising children alone to have access to. Much of this information would also assist the Department in its mission of putting independence within the reach of all New Zealanders.*

## **G Community Relationships**

- 11 The Department initiates regular consultations with a view to building a co-operative approach with community groups to the administration of social security system. Particular attention be paid to relationships with specialist beneficiary advocacy groups and women’s refuges.

*Comment:*

*Good community relationships are vital to the maintenance of the integrity of the social security system. There was evidence that some individual investigators have very good relationships with advocacy groups and are well respected. However the overall community relationships appear, at best, patchy.*

**H (No recommendations)****I Influence of monetary targets for performance assessment.<sup>6</sup>**

- 12 That Key Performance Indicators be altered to focus on quality of investigations undertaken. Monetary target incentives be disestablished.

*Comment:*

*Monetary targets have driven the performance assessment system, particularly after 1996, though last year their influence lessened. It would be wrong to ignore the very real potential these had to unconsciously influence investigators assessments as to whether there was a marriage type relationship in existence and when it commenced. The culture valued and rewarded investigators on the basis of how much they collected in overpayments against beneficiaries as is reflected in the Department's establishment of the 'Million dollar club'. It is a fundamental principal of fairness that a public servant exercising statutory discretion should be free from enticements or encouragement to exercise the discretion in any particular direction.*

**J Non allowance for Notional Entitlement.<sup>7</sup>**

- 13 The policy issues relative to notional entitlement be assessed on an urgent basis with a view to clarifying section 81 via legislative amendment to provide the Department with the clear power to take account of the entitlement the beneficiary would have had to any other benefit when assessing an overpayment. Further that it places an obligation rather than a discretion upon the Department to do so and that it apply retrospectively to those decisions which it is recommended, under this review, be reviewed.

*Comment:*

*In many of the overpayments established there has been no allowance made, in debt calculation, for the fact the beneficiary would have been entitled to another benefit. If 'notional entitlement' were taken into account then the debt would often be reduced substantially. Where a*

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<sup>6</sup> See fn3

<sup>7</sup> See fn3

*beneficiary has appealed to the Authority between 1996 and March 2001 it has directed the Department to deduct it. The High Court has also given a strong message to the Department about the unfairness of not applying notional entitlement in a criminal case, though the most recent decision confirms the Department's contention that it does not have the statutory powers under the Act as it now stands to do this.*

*By not allowing for notional entitlement the Department has clawed back considerably more money than it would have been entitled to had there been no benefit fraud. In this sense it has claimed a loss it does not have.*

*It is disconcerting that, the Department would not deduct 'notional entitlement' from all beneficiaries debts, where there was an entitlement, when it knew that it will be directed to do so if the debt is appealed to the Social Security Appeal Authority.*

## **K The level of overpayments<sup>8</sup>**

- 14 That the Department develop a policy in relation to "debt burden" which removes the life time indebtedness which thousands of its beneficiaries, are currently living with. That it uses, as a guide, the principles underlying the concept of 'reparation' in the Criminal Justice Act and as enunciated by the judiciary.
- 15 At the same time, as a matter of fairness and justice, it bring before the Courts for prosecution all cases of blatant fraud, where persons can be appropriately tried and if convicted, sentenced.

### *Comment:*

*Currently large numbers of beneficiaries are indebted to the Department for considerable amounts of money. Since 1995, 20,905 beneficiaries have had overpayments established against them because they were considered to be in relationships in the nature of a marriage. Last year the average overpayment per beneficiary found to have been in a marriage-type-relationship was \$10,876.10. Five years ago the average was \$6733.05. Many debts are over \$50,000. Some are well over \$100,000.*

*At these debt levels many people will be indebted to the Department until they die. The practice of accruing large debts for people with no means of paying them back in the foreseeable future is quite at odds with how the courts apply the principles of reparation to persons convicted of a criminal offence.*

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<sup>8</sup> See fn3

*It is also difficult to see how such a practice is advancing the WINZ mission of 'putting independence within the reach of all New Zealanders'. It is creating a poverty cycle.*

Frances Joychild  
Barrister  
18 June 2001

## Report to the Minister for Social Services

June 12, 2001

By Frances Joychild, Barrister.

### 1 Introduction

In September 2000 the then Associate Minister for Social Services, Ruth Dyson, initiated this review of the Department of Work and Income's implementation of the Court of Appeal decision in *Ruka v Department of Social Welfare* [1997] 1 NZLR 154.

It was envisaged that, depending upon the outcome of this review which was to be limited, there may need to be a second phase. The review was initiated by the Minister following public criticism of the Department's response to this court decision.

One source of critical comment was a published paper<sup>1</sup> entitled "*Battered Women's Syndrome and 'Interdependence' as Factors in Establishing Conjugal Status in Social Security Law*" by John Hughes, senior lecturer in law and Welfare Law Specialist at Canterbury University. Another was an article appearing in several New Zealand newspapers in<sup>1</sup> May 2000 written by Stephen Price, journalist. Another source of persistent criticism has been beneficiary advocacy groups.

The general thrust of all the criticism has been that the Department has not been complying with the *Ruka* decision.

### 2 Terms of reference

The pertinent aspects of the terms of reference are reproduced below.

#### *Review*

*An inquiry is to be conducted into the manner in which the Department of Work and Income (DWI) has implemented the decision of Ruka v DSW.*

#### *Parameters of the Inquiry*

*The inquiry will focus on an examination of the manner in which this particular case has been applied by DWI in investigating, establishing overpayments, penalties and prosecuting offences dealing with relationships in the nature of a marriage.*

*The following areas are to be examined:*

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<sup>1</sup> Vol 7 1999 Waikato Law Review 1.

- 1 *The implementation of the Ruka decision in relation to both investigations and prosecutions undertaken by DWI, and in particular the way financial interdependence and emotional dependence has been taken into account.*
- 2 *Results from prosecutions in terms of cases, which have been taken by DWI post-Ruka which, have failed because Ruka has not been applied. Policies, procedures and systems, which guide decision making in relation to investigations and prosecutions. The inquiry team will:*
  - 1 *Identify the position of DWI pre Ruka in respect of assessing initial entitlement, investigating, establishing overpayments, penalties and prosecuting offences dealing with relationships in the nature of a marriage.*
  - 2 *Construct a detailed timeline of the events since the decision in Ruka was made, focusing on the manner in which the decision was notified to staff, any alterations made by the Department to its practices in relation to investigating, establishing overpayments, penalties and prosecuting offences dealing with relationships in the nature of a marriage.*
  - 3 *Interview DWI staff involved in investigating, establishing overpayments, penalties and prosecuting offences dealing with relationships in the nature of a marriage. In addition to DWI staff, Crown Law, defence counsel and beneficiary advocacy groups will be interviewed as appropriate.*
  - 4 *Identify any significant issues arising from DWI's management and implementation of the case.*
  - 5 *Make recommendations/comment on the matters raised in relation to the manner in which DWI undertake investigations and prosecutions of this nature.*
  - 6 *Investigate and comment on any other matter relevant to the review.*

### **3 Procedure undertaken**

The writer conducted the active phase of the review between October and December 2000. This consisted of considering all relevant Departmental policies and practices as evidenced in Departmental documentation supplied to the writer; considering material supplied by the Head Office of the National Collective of Women's Refuges; interviewing a small number of Departmental employees; a welfare law specialist academic; representatives of two beneficiary advocacy groups and attending a hui of women's refuge workers. It also involved perusal of a small number of files held at beneficiary advocacy offices and prosecution files held by the Department. Files

reviewed related to benefit fraud marital relationship investigations conducted by the Department since October 1996<sup>2</sup>.

In depth interviews<sup>3</sup> were conducted with:

- The Departmental Legal Manager, Douglas Craig, the Acting National Manager, Benefit Control and South Island Manager, Benefit Control, Audrey Blackwell.
- The National Manager, Benefit Control, Joan McQuay.
- Two Departmental prosecution lawyers attached to benefit control units – one in Auckland and one in Christchurch. The writer also reviewed four Auckland files where section 63(b) issues arose in the prosecution.
- A senior investigator in the Christchurch benefit control unit.
- Three benefit control investigating officers – one in Christchurch and two in Auckland .
- Representatives of the Combined Beneficiaries Union (CBU) in Auckland, particularly Mike Dark, Manager. Six files were reviewed where the union had represented beneficiaries alleged by the Department to have been in marriage-type-relationships and had overpayments established against them. A greater number of files were provided but the writer considered only those where the full file was available.
- Representatives of the Beneficiary Advisory Service (BAS) in Christchurch, particularly Jim Lamb, Director. Six files were reviewed where the Service had represented beneficiaries alleged by the Department to have been in marriage-type-relationships and had overpayments established against them.

Again a fuller number of files were made available but the writer reviewed only those where a full file existed.

- John Hughes, Senior Lecturer in Law and Welfare Law specialist at Canterbury University and author of the paper which initiated the review.

All lawyers attached to benefit crime units were asked a series of questions via email about their practices and knowledge in this area and responded via email.

The writer attended and facilitated a discussion at a hui of the Central Region Collective of Independent Refuges in Putaruru, an area covering regions

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<sup>2</sup> This is the date the *Ruka* Court of Appeal decision was released.

<sup>3</sup> Apart from those in managerial positions the names of departmental persons interviewed are not given. The review was aimed at a general review of processes undertaken for which these people were a random representative group.

from Thames to the Bay of Plenty and Hawkes Bay as well as Hamilton and the King Country. This hui was attended by approximately twenty refuge workers who often represent women living in refuges in their dealings with the Department.

She corresponded with the Head Office of the Independent Collective of Refuges and obtained research material from there. She also received feedback from a social worker employed at the Otautahi Womens Refuge in Christchurch and a worker from Dunedin.

She obtained, on request, Departmental documentation, information and statistics from the Head Office legal and policy units.

On February 9, 2001 a report was forwarded to the Department further to the Terms of Reference with advice that it was to be forwarded to the Minister in three days time. In the intervening period the Department asked for an opportunity to respond to the report to which the Minister agreed. In late February the Manager, Legal Services and Manager, Benefit Control, met with the writer to discuss the report and on 31 March written comments from the Department were received. This report has been amended in response to those comments. It has also been amended in one aspect, in response to a High Court decision which has clarified an aspect of the law in the meantime.

#### **4 Section 63(b) Social Security Act 1964**

##### **(a) A difficult and contentious provision**

The *Ruka* decision concerns section 63(b) of the Social Security Act. There appears to be agreement from all sides that this is the most problematic, contentious and difficult legislative provision to administer. This sentiment is echoed in the first sentence to Chapter 6 of the Investigation Unit Procedures Manual<sup>4</sup> which states:

*Probably the most complex and difficult investigations involve relationships. And in the Background to Chapter 9<sup>5</sup> :  
The vexed question of conjugal status has been an issue for many years but it became more complex since the Domestic Purposes Benefit was introduced in 1972.*

Investigators indicated they found s. 63(b) investigations more difficult than other investigations. They were always contentious in the community, were more invasive of people's privacy and involved more subjective judgements compared to investigations involving working and claiming a benefit, for example. They form a large part of the work of Beneficiary Advocacy Groups.

<sup>4</sup> Investigation Unit Procedures Manual, Chapter 6 last updated May 1994 and currently in use but soon to be replaced with the Benefit Control Manual, currently still in draft.

<sup>5</sup> Investigation Unit Procedures Manual, as above, Chapter 9 published December 1993.

**(b) What it says – its purpose**

Section 63(b), provides that, for the purposes of determining any application for any benefit, reviewing any benefit already granted, or determining any rate of benefit, the Director General may, in her or his discretion,

- (a) *Regard as an unmarried person any married applicant or beneficiary who is living apart from his wife or her husband, as the case may be:*
- (b) *Regard as husband and wife any man and woman who, not being legally married, have entered into a relationship in the nature of a marriage*

*and may determine a 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 its discretion grant a benefit, refuse to grant a benefit, or terminate, reduce, or increase any benefit already granted, from that date accordingly.<sup>6</sup>*

Hence the purpose of the provision is to ensure married persons are not disadvantaged over unmarried persons when it comes to benefit entitlement, or alternatively that persons living in marriage-type-relationships are not advantaged over persons who are married.

The reference to marital status in the provision comes about as a result of the fact that marriage creates a legal obligation on each spouse to support the other when for various reasons they cannot support themselves<sup>76</sup>. Hence the law creates a requirement of financial support when a spouse loses the means to support her or himself. When a person is married, therefore, the income of both is to be taken into account when need for and entitlement to social security is being claimed.

The major difficulty of section 63(b) is determining if persons who are not married have entered into a relationship in the nature of a marriage. Unmarried persons' personal relationships are on a continuum with enormous variation between couples as to their personal arrangements and nature of their commitment to the other.

Proof of marriage is comparatively simple – the marriage certificate provides a defined and easily identifiable date where it can be said with certainty that a person entered into a consensual legal contract to 'marry' the other. Arising out of that contract they have assumed a legal obligation to support the other when the other cannot support his or herself. There is no such readily identifiable comparative document in the case of unmarried couples.

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<sup>6</sup> Further to section 86(b) it can collect the 'overpayment' from the beneficiary, i.e. the amount which has been paid when there was no legal entitlement. This is done by deductions from the benefit or, if the beneficiary is now working, by attachment orders on to wages.

<sup>7</sup> Family Proceedings Act 1980 section 63. This requires a spouse to maintain the other during marriage when the other cannot practically do so because of a number of factors including division of functions within the marriage, disability, inability to earn an adequate income.

Together the Courts and the Department have, over the years, devised yardsticks with which to measure a relationship to see if it is a marriage type one. The Court of Appeal in *Ruka* altered the yardstick.

**(c) Impact of section 63 (b) on benefit entitlement.**

Section 63(b) applies to every benefit administered by the Department. If a person is in a relationship then, in the case of the domestic purposes benefit this removes entitlement altogether. In the case of the unemployment benefit (previously community wage), it affects the rate at which the benefit is paid, e.g. if both partners are unemployed then their entitlement is to a married person's benefit rather than to a single person's. The married rates of all benefits are less than two single benefits combined. Further, if a person is in a relationship to a person who is working it is unlikely they will be entitled to a benefit at all.<sup>8</sup>

There are therefore significant financial consequences which flow depending upon whether the beneficiary is married or in a marriage-type-relationship or not.

**5 Administration of Section 63(b)**

**(a) Applying for a benefit<sup>9</sup>**

Applicants for a benefit have always had a personal interview with an officer of the Department<sup>10</sup> prior to a benefit being granted. The application form is gone over with the person to ensure it has been completed correctly. Though the forms themselves have altered over the years standard features have been present for a long time. There is a section in the form for the applicant to fill out the details of his or her partner. The applicant signs the form as true and correct in front of the officer.

Applicants then have to make a separate declaration on another part of the form that they understand their obligations and undertake to advise the Department of any change in their situation which may affect their entitlement to the benefit.

It is and has been the general practice that case managers who interview applicants for benefits and decide whether to grant the benefit do not question the factual statements made by the applicant on the forms unless clarification is needed. Applicants are not challenged at that stage about statements they make that they are single and without support.

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<sup>8</sup> However, if the income of the other partner is low they may be entitled to other assistance.

<sup>9</sup> The information in this section was obtained in the course of interviewing BCU staff. Front line staff were not interviewed.

<sup>10</sup> Under a system in place since Department of Work and Income came into existence in 1997 every applicant now has a case manager who deals exclusively with all matters relating to that beneficiary (except where the beneficiary is being investigated for benefit fraud).

**(b) Detecting s. 63(b) benefit fraud****(i) Allegations, file suspicions and local initiatives.**

The primary source of detection of benefit fraud in this area is via allegations made to it via its 0800 telephone number which runs 5 days a week during office hours. The line is serviced by 4 employees who are occupied full time answering such calls. The large majority of allegations are anonymous.

Calls are taken from persons who expresses a belief, knowledge or suspicion that any other person who is in receipt of a benefit is not entitled to it. Callers are typically former partners, family members, neighbours and friends of the beneficiary.

Officers receiving the calls use a standard form (electronic) to record the allegation and then forward the form to the regional office which administers the beneficiary's file. After current benefit information is attached it is forwarded to the Benefit Control Unit at that office.

Allegations are also received in writing and follow the same procedure. Another source of detection is 'file suspicion'. This is where Departmental employees become suspicious there may be benefit fraud operating and forward a 'file suspicion' to the Benefit Control Unit. A third source is local initiatives. Marriage type relationship type fraud is not often detected via local initiative.

**(c) The typical section 63(b) fraud scenario**

While every case is different Departmental officers were in general agreement that there were some standard features of many s. 63(b) cases.

Nearly all of those who committed s. 63(b) fraud meet the criteria for the granting of a benefit when they first apply. They are not in a relationship and they have no other means of support. Sometime after that however their personal situation alters.

Either they fully or partially reconcile with their former husband or partner or they commence a new relationship. For a while they still remain eligible for the benefit but then the relationship becomes more serious and they meet the established criteria for a marriage-type-relationship (MTR). At this stage the woman has got used to having her own independent source of money, they have got used to managing on the extra money and may not think they can manage on less.

Officers said that they believed a beneficiary generally knows she is in a relationship such that she should not be receiving the benefit and often are relieved when they are approached by someone in a Benefit Control Unit as they had been feeling guilty and worrying about the situation for some time.

The general impression of benefit control staff is that most ‘crimes’ are not ‘premeditated’ but rather ones that are drifted into. It was often said that investigators often feel sorry for the situation the woman has got into. In its response the Department said that some cases are however clearly premeditated.

**(d) Benefit Control Unit (BCU)**

Units were established in 1987 in regional offices with the specific purpose of investigating benefit entitlements. In 1996 they were restructured into one central dedicated investigation unit called the ‘Benefit Crime Unit’<sup>11</sup>. Its employees were answerable to their own unit manager in head office rather than to their local regional manager. Changes were implemented because funding and staff had often got diverted to other regional office needs. With a dedicated unit it was considered it could focus on core activities with a clear line of accountability. It was given its own budget. It has approximately 100 investigators throughout the country compared to 200 in the former system.

**(e) The Blueprint for Investigators – Standards of Practice and Performance**

This document was issued in April 1999 by the National Manager of Benefit Crime (since renamed Benefit Control). The first paragraph under the heading ‘Purpose’ reads:

*New Zealanders want a support system that they can access in times of crisis and need. They also want to know that taxpayer’s money funding this system is safe from abuse. The Business is committed to meeting both these expectations.*

**(f) Job description**

This records that investigators in BCU work under the Department of Work and Income mission:

*The Department of Work and Income mission is to put independence within the reach of all New Zealanders.*

One of the BCU background principles says:

*Critical to the integrity of Department of Work and Income is recognition and management of the threat of benefit crime. The Department aims to reduce the level of benefit crime.*

The investigator’s principal role as evidenced in the job description is to investigate allegations and file suspicions of benefit crime, evaluate them against benefit entitlement and identify, recommend appropriate sanctions and assist in preparation with prosecutions.

**(g) The investigator profile**

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<sup>11</sup> The Unit was renamed on Government Direction in 2000 and is now called the ‘Benefit Control Unit’

The majority of investigators have been recruited internally i.e. from other areas of the Department. 75% of staff of the unit have between 5 to 10 years service in the Department. Though a number of departmental interviewees indicated that the police make up a large number of new recruits in fact department figures do not bear this out. They represent only 6 out of 92 current investigators. Approximately 60% are female and 40% male and 90% of staff are over 34 years of age. A little over half are Pakeha/European (56.5%), 17.4% Maori, 6% Pacific Island and 20% are other ethnic groups.

The interviews undertaken disclosed a fairly high level of staff morale. Individual investigators appeared to be generally committed and enthusiastic about their work.

#### **(h) Investigator training and resources**

Investigators are mentored/apprenticed to a more senior investigator when they first commence work in the unit. They initially accompany a more senior investigator on her or his investigations. They are said to be closely supervised for the first few months with all work checked until they are deemed competent enough to manage with less supervision. They each work autonomously but are able to approach senior investigators for advice and guidance when they need it. Within the first year or so of employment Investigators attend a week long course at the Porirua Police College in investigation technique.

Since 2000 each regional unit has its own lawyer attached to it. These people principally undertake prosecutions and the investigators assist in preparing for these, though they are available for on the spot legal advice. When there are law changes they advise and train the investigation team of them. Prior to that departmental lawyers were available to the unit but had other tasks and functions as well as benefit control.

Investigator's documentary guidance in conducting investigations is principally the Investigation Procedures Manual. Since April 1999 they have a Standards and Performance Blueprint and more recently a Code Of Conduct relating to Investigations and Privacy.

#### **(i) The investigator's actual tasks**

Upon receipt of a file the investigator's tasks<sup>12</sup> are to:

- investigate the allegation or suspicion
- determine whether the beneficiary is or was living in a relationship in the nature of a marriage. If so
- determine the date upon which the 'marriage-type-relationship' commenced.

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<sup>12</sup> The Department adds that the tasks also include ensuring the client is receiving full entitlement and referring to an external agency where appropriate

- forward the dates to a technical officer who will calculate the actual monetary 'overpayment' which the beneficiary will now have to pay back to the Department.
- negotiate with the beneficiary what the rate of repayment will be
- arrange for the benefit to be cancelled immediately if the parties are still living together.
- Determine whether the beneficiary will be sent a warning letter, have a penalty applied to the overpayment or whether the file will be referred for a prosecution.
- Correspond with the beneficiary in relation to their determinations
- Forward the file to the civil debt unit in the Department for enforcement action.

**(j) Performance Assessment and remuneration for investigators**

Key Performance Indicators as set out in the Blueprint are:

- Number of cases investigated
- Value of overpayments established
- Number of cases referred for prosecution
- Debt repayment arranged within seven days of benefit cancellation.
- Estimated savings resulting from benefit cancellation or adjustment  
Actual vs forecasted financial expenditure on personnel and admin costs.

Monetary targets have featured strongly in performance assessment since the unit was restructured in 1996. The Unit had been funded on a dollar return basis since its inception in 1987. Upon restructure the figure was set in the Government purchase agreement at \$2 for every dollar spent. In 1998 this was increased to \$3 for every dollar spent and has remained the same since. The increase was at the initiation of the Unit itself, whose management consider it can attain this return comfortably.

Upon restructuring in 1996 performance of investigators changed to be measured almost entirely in the monetary savings that each achieved for the Department. A year or so later a 'Million Dollar Club' was formed by management of the Unit. Investigators who established over a million dollars in any one year in beneficiary overpayments joined the club. Its features were public commendation at the annual conference and presentation with a small membership pin. The purpose of the club was said to be to provide an incentive and reward for hard workers in a system where there was little else to reward them with.

Investigators interviewed expressed a strong preference for a system that valued quality over monetary targets. They viewed the monetary savings performance system as unfair and putting pressure on investigators to compromise quality investigations for achievement of a high level of dollar savings. The Department says however that it has never been acceptable for quality to be compromised for dollar return. It believes that the drive for

monetary targets does not impact on the integrity of those doing the job. Last year the monetary proportion of assessment was reduced.<sup>13</sup>

The salary scale for investigators, in 1996, was \$28,000 to \$36,000 pa plus 10% based on meeting their targets. Salaries increased in 1999 to range from \$36,000 to \$46,000 plus 10% performance pay. This was to adjust salaries to those based on like positions.

**(k) Investigation Practices**

Mode of investigation.

(i) Cold calling

Though some investigators send letters to some beneficiaries giving a time they must attend the office for an interview about their benefit, the first interview usually takes place 'cold' at the beneficiary's home. An investigator will simply turn up at the door and say they have some queries about the benefit and ask if they can come in. There has been no prior written or verbal notice to the beneficiary that the Department had received an allegation and needed to ask questions in relation to it.

The Department says that the investigator always advised they have received an allegation, prior to the interview starting and what the content of that allegation is. On the other hand advocacy groups maintain that before 2000 it could happen that even when the interview had commenced the beneficiary was often unaware that an allegation had been made. It also emphasises that an investigator never entered a home unless asked.

Since 2000 the beneficiary is now presented with a letter which advises that he or she does not have to talk to the investigator at that time though when they do they will be required by law to answer questions put by the officer. They can ask the officer to leave at any time.

(ii) Consensus style approach

Investigators indicated that they had been trained to adopt a non-confrontational approach to the beneficiary when they interviewed her or him. They would use either the indicator list from the manual or the pamphlet and work through this with the beneficiary, discussing each of the indicators. They would ask the beneficiary if based on that list, they thought they were in a relationship in the nature of a marriage. They would give their opinion that it sounded from what the beneficiary had said that they were or were not.

The Department commented that investigators are very familiar with relationships and when interviewing a client, encompass all aspects of

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<sup>13</sup> Precise figures were not able to confirmed by the date this review was completed but unconfirmed figures indicate it has reduced to 40% of the performance measure.

the particular relationship they are investigating. The interviews are lengthy, each one is unique and no one resource is ever used alone to determine whether there was a relationship.

Often they would obtain an admission from the beneficiary. Prior to July 2000 if an admission was obtained they would cease further investigations and move to the decision whether to cancel the benefit, establishment of the overpayment and decision whether to warn, set a penalty or send the file for prosecution. They would discuss with beneficiaries the rate of repayment.

Now the Department obtains corroborative evidence that there was a marriage type relationship even when there is an admission. The Department says that the downside is that the clients faces a privacy invasion even if they do not want it.

(iii) Caution

If at some stage during the course of the interview it becomes clear that an offence may have been committed a formal caution is given. i.e. if it becomes clear the beneficiary is living in a marriage type relationship.

(iv) Other investigations

If the beneficiary denies the relationship and there is contradictory evidence then the investigator will conduct further investigations in an attempt to establish the true nature of the relationship. Often this involves obtaining documentation from a variety of sources such as school enrolment forms, undertaker's records, bank records, hospital forms recording next of kin, hire purchase forms, loan applications and photographs. They will also interview neighbours, family members and friends of the beneficiary before making a determination.

Since the Privacy Code in 2000 beneficiaries are asked first of all to provide the additional information to the investigator themselves. Only if they do not or will not is the information obtained using powers under the Act. The client is also advised that further investigations will be undertaken.

**(k) Checks on the exercise of the discretion**

The tasks undertaken by the investigator involve the exercise of very wide discretion by a person acting essentially alone. The following are the checks on this exercise.

(i) Training and mentoring for new investigators

As indicated new investigators are mentored/apprenticed to a senior and closely supervised for the first few months. After that they have available the advice and assistance from a senior member of the team

when they need it. They receive one week's training from the New Zealand Police College on investigative skills. They also have access to the unit lawyer for advice and guidance.

(ii) Investigator's manual

The investigator's manual provides some guidance on the exercise of the discretions. In relation to section 63(b) there is a list of questions to ask when interviewing a beneficiary about their relationship<sup>14</sup> and a list of factors which are said to determine if a relationship may exist<sup>15</sup>.

Chapter 11, last revised in July 1995, deals with 'Administering Punitive Sanctions' and gives a policy direction:

*In all cases of suspected benefit fraud, consideration will be given to undertaking punitive sanctions. This will be primarily to initiate prosecution action, or, as a lesser alternative, to impose a monetary penalty under Section 86(2) of the Social Security Act 1964.*

In practice penalties have generally stopped being added to overpayments because the debt levels are considered too high. The Department says that penalties have stopped largely because they were supposed to be a deterrent but rarely act as one and in line with the Appeal Authority they look to "ability to pay".

(iii) 10% case audit by senior investigator

At the end of every month a random 10% of each investigator's files were audited by a senior investigator. Since mid-2000 the senior investigator has checked every file of an investigator where the overpayment established is greater than \$5000.

(iv) Review prior to Benefit Review Committee

A senior investigator reviews every file where an application for review has been made.

(v) Benefit Review Committee(BRC) review hearings<sup>16</sup>

Every beneficiary or former beneficiary against whom an overpayment is established may seek a review of that decision before a local benefit review committee. These committees have three members and are administered by the Department. Hearings are at Departmental offices. Two members are Departmental employees and one is a local layperson appointed by the Minister. One Departmental employee is a member of the Benefit Crime Unit.

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<sup>14</sup> Appendix II.

<sup>15</sup> Chapter 6.

<sup>16</sup> The Department advises that these have changed to a new process, following extensive consultation with beneficiary advocacy groups.

The beneficiary is advised of her or his right to seek a review of the decision in the letter which notifies them of the overpayment and tells them whether or not the file is being sent for prosecution or a monetary penalty applied. They are advised that they can collect a special form from any office of the Department. If they make application for review they are given an information pamphlet about how the review system works.

A senior investigator reviews files where there is an application for review. Some matters get resolved at that stage without going onto the formal review hearing. New information may have come to hand or the Senior considers the correct decision was not made and it is reversed. Last year review by a senior was more formalised than previously when it had been done more on an ad hoc basis.

(vi) Social Security Appeal Authority (SSAA)

If a beneficiary is dissatisfied with a decision of the BRC they can appeal to the SSAA. This is a specialist tribunal, entirely independent of the Department. Its members are appointed by the Minister and the Chair is a permanent member who sits on every case. The tribunal travels and conducts hearings as well as determining some decisions on the papers. Legal Aid is available for these hearings.

A manual count by the reviewer of all section 63 (b) cases heard before the authority from October 1996 to 2000 indicated that appeals were allowed in 12 (i.e. the client was successful), allowed partially in 10 (there was removal of a penalty or reduction in the amount) and 14 appeals were dismissed.<sup>177</sup>

(vii) Code of Conduct

In December 1999 the WINZ Code of Conduct was reviewed. Among other things it clarifies an employee's obligation to the public to act in a fair manner in areas such as confidentiality and security, impartiality and avoidance of conflict of interests etc. There is also a Privacy Code, agreed with the Privacy Commissioner in relation to safeguards on beneficiaries privacy.

(viii) Outcomes for the Department

Section 63(b) investigations have been, on average, one fifth of all investigations undertaken by the unit since 1994/95. Of s.63(b) allegations received via the 0800 hot line 24% result in an overpayment being established.

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<sup>17</sup> The Department comments that often the client offers new information at this stage.

Taking the financial year 1994/95 as a base year the total number of s. 63(b) investigations numbered 21,859. In the next two years the number fell relative to 94/95 by 23% and 31%. This fall coincides with the establishment of the BCU and the halving of staff numbers. By 97/98 the number of investigations was down only 7% on 94/95, up 26% on the previous year. In 98/99 it increased for the first time relative to 94/94 – by 15% but fell in 99/00 by 8% and 24% compared to the previous year.

In summary, though it halved its number of investigators the unit has not had to reduce its investigations by that amount. At its peak it was doing 15% more cases than in 94/95 with half the staff and last year a quarter less investigations than 94/95 with half the staff. Hence the investigation case load per investigator per year has increased significantly since the establishment of the unit.

Taking 94/95 as a base year (\$17,172,198 in overpayments were established), in 96 there was a drop of 5% compared to 94/95. However in 97/98 the figure leapt by 23% relative to 94/95. This pattern of increase was sustained throughout the period under review with overpayments of 149% for 97/98, 249% for 98/99 and 177% for 99/00.

In summary since the establishment of the BCU there has been a dramatic increase in overpayments. In 98/99 overpayments doubled in comparison to the previous year. This was followed by a 40% increase in 98/99 and finally a 20% reduction over the previous year<sup>18</sup>.

The level of overpayments<sup>19</sup> per beneficiary (derived from the Department figures for the average overpayment) shows a parallel pattern of sustained increases from the start up of the BCU. Whereas in financial year 95 the average overpayment per beneficiary was \$6,733.05 in 1999 it was \$10,982.51 and in 2000 it was \$10,876.19.

As at June 2000 the number of beneficiaries who have sustained an overpayment since the establishment of BCU and the Ruka decision is approximately 15,600.

The total number of overpayments which are referred for prosecution as a proportion of all overpayments is very small. Since 94/95 the average percentage is 4%. It increased with the establishment of BCU and peaked in 97/98 at 6.7% but last year had reduced to 3%.<sup>20</sup> The vast majority of cases where beneficiaries are considered to have been living in a relationship in the nature of a marriage and claiming the benefit as a single adult with dependent children needing support are dealt with administratively i.e. 96%.

<sup>18</sup> Actual figures are 94/95:\$17,1772,198; 95/96: \$16,280,965; 96/97 \$ 21,042,879; 97/98 \$42,791,087; 98/99: \$59,849,150; 99/00: \$47,611,053.

<sup>19</sup> Figures derived from Department figures for average overpayments.

<sup>20</sup> Actual figures are: 94/95: 52/2550; 95/96: 61/2510; 96/97 131/2900; 97/98: 318/4757; 98/99: 269/5443 and 1999/2000:131/4377.

Of all overpayments established, only a very small proportion of them are reviewed, whether or not they are go to prosecution. In 2% of cases beneficiaries challenged the decision made by the investigator and were reviewed internally. In !% of cases the beneficiary took it to a BRC hearing and 0.07% of beneficiaries to the Social Security Appeal Authority.<sup>21</sup>

A third of all cases reviewed internally is favourable or partially favourable to the beneficiary; 23% of decisions of BRC hearings are favourable or partially favourable to the beneficiary. On a manual count of all s. 63(b) cases before the Social Security Appeal Authority 62% are favourable or partially favourable to the beneficiary and 38% unfavourable<sup>22</sup> Departmental figures differed on this latter point indicating 45% favourable and 55% unfavourable to client.

In conclusion the statistics indicate that, since the establishment of a dedicated benefit crime unit within the Department in 1996, there has been a dramatic increase in the level of overall overpayment debts for s. 63(b) investigations. This does not correspond to a similar increase in number of cases. The total increase is largely the result of a dramatic increase in the level of overpayment per beneficiary.

The number of prosecutions remain very low as a total proportion of overpayments established. Very few decisions on overpayments are reviewed. The first stage internal review is more successful than reviews before Benefit Review Committees. Appeals to the Social Security Appeal Authority have significant rates of success compared to the internal processes. On Department figures it is 45% and on the reviewer's 62%.

## **6 Administration prior to *Ruka* -The yardstick for s. 63(b)**

### **(a) Court decisions**

The Department devised, over time, a list of criteria which it developed into internal guidelines for its officers to use in determining whether any relationship was in the nature of a marriage. Two decisions in particular endorsed the Departmental approach and provided High Court authority for the approach it was to take in administering section 63(b).

#### **(i) *Excell v DSW* (1991) 7 NZFLR 241.**

Fisher J acknowledged that the nature, quality and characteristics of a marriage vary widely but indicated that there were common elements that could be assessed. In listing 10

<sup>21</sup> These are based on Department figures for the years 1997 – 200. Internal review:332/16493;BRC: 164/16493.

<sup>22</sup> This was a count of 36 cases heard under 63(b) in response to a request to the department to supply all 63(b) decisions since 1 October 1996. 12 decisions were favourable to beneficiary, 10 partially favourable and 14 unfavourable.

factors he said that a decision cannot be based on the absence or presence of any one single factor. Rather,:

*the officer must consider the behaviour of the couple, indicated by the extent to which they:*

- share one dwelling as each party's principal place of residence*
- emotionally support and depend on each other*
- pool labour and financial resources*
- share household activities*
- provide domestic services for each other*
- share one bedroom and/or a sexual relationship*
- share companionship, leisure and social activities*
- share parental obligations*
- present to outsiders as a couple;or*
- exclude emotional and sexual relationships with third parties.*

- (ii) *Thompson v Department of Social Welfare* [1994] 2 NZLR 369 Justice Tipping took a different approach in that while he set out another list of 10 indicators expressed differently but with many commonalities to Fisher J's list these were for identifying the physical indicators of a marriage. There was another leg to the exercise which was identifying whether there was 'mental commitment'. Such commitment was a prerequisite. He said:

*Inherent in the concept of a relationship in the nature of a marriage are both mental and physical aspects. In deciding whether such a relationship has been entered into it will generally be helpful to consider the physical aspects first. Once they are determined the mental question can be addressed. As to physical aspects of the relationship the following list will be relevant:-*

- (1)Whether and how frequently the parties live in the same house*
- (2) Whether the parties have a sexual relationship*
- (3)Whether the parties give each other emotional support and companionship*
- (4)Whether the parties socialise together or attend activities together as a couple*
- (5)Whether and to what extent the parties share the responsibility for bringing up and supporting any relevant children*
- (6)Whether the parties share household and domestic tasks*
- (7)Whether the parties share costs and other financial responsibilities by the pooling of resources or otherwise*
- (8)Whether the parties run a common household, even if one or other partner is absent for periods of time*
- (9) Whether the parties go on holiday together*
- (10)Whether the parties conduct themselves toward, and are treated by friends, relations and others as if they are a married couple.*

Justice Tipping indicated that a negative answer to one or more of the questions will not necessarily mean the absence of a relationship in the nature of a marriage. Nor will positive answers to a number of the questions necessarily mean its presence. The weight and effect of all the answers must be assessed. In some cases other matters not on the list may well be relevant and require assessment in the overall picture.

In relation to the mental aspect Tipping J indicated that it involved some commitment of the parties to their relationship for the foreseeable future with any lesser commitment being neither sufficient for nor consistent with a relationship in the nature of a marriage. This commitment would be inferred from the couple's behaviour. This requirement is clearly intended to parallel the voluntary consensual commitment to the future which persons make when they enter marriage.

As indicated by John Hughes in his article<sup>23</sup> *Thompson* was significantly different to previous cases including *Excell* in that for the first time it required not just concentration on the physical or factual aspects of the relationship but on the significance of emotional commitment. Emotional commitment would be inferred from the parties' behaviour.

**(b) Departmental documentary material**

(i) Applying for a benefit - Core Topics Manual

Until July 1996 the Department had a hard copy "Core Topics Manual" used by all staff, including front line staff who took and processed applications for a benefit. In July 1996 the manual, generally with the same content, was issued to staff electronically via the ROAD system. Staff could access the manual which was on line via their desktop computers.

Chapter 8, which was in use prior to *Ruka* and is still in use, is entitled "Marital Status for Benefit Purposes". Its last revision is recorded as being February 1994 and last reprint July 1996.

In the overview to Chapter 8 it is said where a decision under s. 63(b) needs to be made then frontline staff are to seek the advice of those with the expertise, the Benefit Control Unit staff. Hence the benefit control units were the 'authority' on interpretation of s. 63 (b) in both the consideration of applications for benefit and in the investigation of alleged benefit crime or abuse.

Under the heading<sup>24</sup> "Determining 'A Relationship in The Nature Of Marriage'" there is the same list of factors endorsed in *Excell* which are set out at pages 13 and 14.

Appendix II to Chapter 8 of the Manual headed "Guidelines for Section 63(b) Inquiries". These are in the form of a series of questions for staff to ask in

<sup>23</sup> *Supra* fn1

<sup>24</sup> 8.2122 and 8.2123 of Chapter 8, Core Topics Manual.

relation to a couple under consideration. They seem to be intended to elicit information to then apply against the *Excell* criteria:

- 1 *How long has the relationship existed?*
- 2 *Are there children of the union – circumstances at time? Were they living together, etc?*
- 3 *Have they ever moved together from one place to another?*
- 4 *Do they live together continuously? Explain how many nights per week and reason. What would happen if benefit stopped?*
- 5 *What is partner's address? Who else lives there?*
- 6 *To what extent do they share their lives and extent of commitment?*
  - (a) *Do they go out together? How often? Where?*
  - (b) *Does partner discipline child – relate with child – exercise parental control?*
  - (c) *Do they go out as a family?*
  - (d) *Do they have meals together?*
  - (e) *Do they rely on partner when child gets sick?*
  - (f) *Do they do partner's washing, cooking, ironing, etc?*
  - (g) *Do they have separate boy/girlfriends or does their relationship prevent this happening?*
  - (h) *If a women beneficiary, does she ever use her partner's name? What is she known as in the community?*
  - (i) *Do they have joint assets? Has the partner bought anything for the home? Does the partner have any possessions at the home?*

Interestingly, neither the appendix nor the guide at 8.2122 appear to have been amended to reflect the 1994 *Thompson* formulation. There was no prerequisite requirement of “mental commitment” before a Marriage-type -relationship could be said to exist.

(ii) Investigating allegations - Investigation Unit Procedures Manual

The Department's officers charged with investigating and determining whether a marriage-type-relationship existed used, as their principal resource, a hard copy investigation manual: “New Zealand Income Support Service Investigation Unit Procedures Manual”. It consisted of 15 chapters with notes on the bottom left hand side of every page indicating the date it had been published or revised.

Chapter 6 entitled :Investigative Approach and Chapter 9 entitled Conjugal Status are both pertinent.

At page 6 of Chapter 6 there is a list of 22 factors which are said to be indicators that a relationship may exist. They cover the same topics as Fisher J's 10 indicator list and the reproduced list in the Core Topics Manual - though they are expressed differently, principally by being expanded upon and made more specific. It covers similar topics but is not identical to Appendix II in the Core Topics Manual (14 indicator

questions). The list was published in December 1993 and updated in May 1994. It reads:

*The couple:*

- *Are emotionally supportive of each other*
- *Have an exclusive relationship – no other partners*
- *Present to outsiders as a couple*
- *Spend free time together – outings, shopping, relaxation, social events, companionship, leisure time, holidays*
- *Have a relationship of some length*
- *Share parental obligations*
- *Share a vehicle*
- *Share meals*
- *Help each other with the domestic workload*
- *Physically reside together at the same address*
- *Have children in common*
- *Sleep together*
- *Have a sexual relationship*
- *Are legally married*
- *Have their mail delivered to the same address*
- *Receive telephone calls at the same address*
- *Share household expenses*
- *Financially support each other*
- *Share household expenses*
- *Financially support each other*
- *Have joint financial agreements (hire purchase; etc)*
- *Have property in joint ownership (house, car etc)*
- *Have joint liabilities*
- *Have joint legal obligations*

Paragraph 7 reads:

*The most reasoned viewpoint remains that no one factor by itself can constitute the establishment of a relationship and, no absence of a factor can be considered as determining a relationship. No list that attempts to determine what constitutes a relationship could ever be exhaustive.*

*The conduct of a couple, the cumulative situation resulting from the couple's quality, quantity, continuity and duration of relationship, are all determining factors in defining the nature of the relationship.*

In Chapter 9 under the heading: Investigation of Conjugal Status, paragraph 4 reads:

*Not all elements described as indicators of a relationship need to be present to define the nature of the relationship. At times it will be sufficient if only several of the indicators are present.*

*The circumstances of each case must be reviewed and regard must be given to the differing interests involved, including those of the customer, the non-custodial parent, and the tax-payer.*

(iii) Departmental pamphlets

In mid 2000 the Department published a new pamphlet entitled "Relationships and Income Support". It incorporates the *Ruka* formula.

Previous pamphlets, which had been in use until publication of this one, were an alternative means to the guideline list used by some investigators when discussing with the beneficiary whether she was in a relationship in the nature of a marriage. Both pamphlets sighted as having been in use up to the 2000 publication had a 'common questions' section. In one it said:

*Q: They don't give me any money. Are we still considered in a relationship?*

*A : Yes. Lack of financial support doesn't mean that your relationship is not 'like marriage'. You need to talk with us.*

In the other it said:

*Q: Can we be considered to be in a relationship when he/she doesn't give me any money?*

*A: Yes. The absence of financial support does not mean a marriage-type-relationship does not exist.*

(iv) Conclusion - The pre *Ruka* yardstick used by the Department

At the time of the *Ruka* decision in October 1996 the Departmental officers took a 'list' approach to the determination of whether a relationship in the nature of a marriage existed. The list reflected what the Department officers refer to colloquially as 'Fisher J's rules' i.e. the indicators from the 1991 High Court decision in *Excell*. The lists used had not been updated to include the requirement in *Thompson* that there be an emotional commitment for the foreseeable future to the relationship.

It was entirely based upon what the relationship appeared to be 'from the outside' without any account of the actual intentions and desires of the couple 'from the inside'.

Importantly the approach was that the absence of any one or more factors did not mean there was no relationship. No factors were more important than others. A relationship could be found based on several factors only.

Amongst the list of factors under consideration financial interdependence 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.

## 7 *Ruka v Department of Social Welfare* [1997] 1 NZLR 154

### (a) Ms Ruka's relationship with Mr T<sup>25</sup>

Ms Ruka applied for and received the DPB in October 1977, having been on the Sickness benefit since July 1977 when she was pregnant to Mr T, the man she had been living with since 1974. In neither application did she disclose she was in a relationship with Mr T.

She said she applied for the benefit because Mr T could "up and leave at any time". She "had to have some income" for her and her baby. Since the relationship had commenced (three or so years earlier) Mr T had never supported her financially. She would pay all the household bills out of her pay. He worked casually but was often out of work. When he worked he did not share his pay with her. However he would take half her pay for himself. He also came and went and had other women.

She came off the benefit when her son was 2 ½ years old and returned to work. However she reapplied for it or the unemployment benefit on three other occasions over the next 15 or so years when she could not get work and had no other means of support. When she had part-time work she always notified the Department and her benefit was deducted accordingly. She always declared her marital status to the Department as single.

She was worried each time she was on the benefit...*I knew I might get caught one day, but I stayed on it because I had to have some income for F and I.* She said she did not tell the Department about Mr T's existence because the relationship was never stable: *he could leave when he wanted to , come and go, because it was not stable living with him, I had to have some income.*

When she discussed her worries with Mr T he said to her that she had to get money from somewhere because it was not coming from him.

Following the first 6 months the relationship was characterised by the extreme violence of Mr T towards Ms Ruka. [Evidence relating to the violence was given by Ms Ruka herself, a psychologist and two relatives (who had been called by the Department to give evidence against her). The judge accepted the existence of extreme violence without reservation.]

The violence included incidents where she was hit several times with a baseball bat; pulled out of the car by her hair and kicked with steel capped boots; punched on the head and face; had hard objects thrown at her face and body, had her arm and leg broken by his kicks with steel capped boots, had many teeth broken; was repeatedly raped and sworn at and abused publicly and privately on a daily basis as a "lazy useless bitch". The violence occurred both when he was both sober and had been drinking. Dr Ratcliffe,

<sup>25</sup> Facts taken from reported Court of Appeal decision and transcript of evidence given at District Court hearing and documentation produced there.

who assessed Ms Ruka and gave evidence before the Court, assessed the violence as being at the extremely serious end of the spectrum because it persisted over a long duration, she was hospitalised, threatened with a death and the violence increased in severity as time went on.

In the early years she had wanted to leave and had told him she would but he had threatened her with a gun and told her there was no place in New Zealand or overseas that she could hide from him. That he would hunt her down and kill her. She gave up on trying to leave after that.

Mr T finally left Ms Ruka for good in 1992 and shortly thereafter an anonymous allegation was received that she had been living in a relationship in the nature of a marriage.

The Department investigated, established an overpayment of \$67,706.07 representing the cumulative total of income support she had received from the Department since 1977 and sent her case for prosecution for wilfully omitting to disclose information, namely that she was in a relationship in the nature of a marriage, under both the Crimes Act <sup>26</sup> and the Social Security Act.

At the District Court a defence of Battered Women's Syndrome (BWS) was argued unsuccessfully and she was convicted. The High Court dismissed her appeal. The Court of Appeal upheld the appeal and quashed her convictions.

**(b) Ms Ruka's relationship with the Department.**

On each occasion when Ms R applied for income support she filled out an application form and was interviewed in person by an officer prior to her benefit being granted. She frequently left the part of the form dealing with details of a partner blank and indicated her marital status as single. On others she left blank all questions dealing with marital status. According to the officer's evidence it was not the practice to question clients about the parts that they had left blank as "we like to believe our customers are honest with us"

She also signed an undertaking at these times that she would notify the Department of any change in her circumstances including entering into a relationship in the nature of a marriage which could affect her entitlement to benefit.

On other occasions she filled out renewal applications and answered *no* to the question *Have you married or are you living with a person in a relationship of a marriage?*

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<sup>26</sup> The penalties for breaches of the Crimes Act are more severe than under the Social Security Act. The prosecution has a discretion as to which statute to use – general practice is to lay charges under both.

**(c) Receipt of an anonymous allegation that she had been claiming the benefit when living with a man**

Following receipt of an anonymous allegation Ms Ruka was notified by letter that an officer wanted to interview her in relation to her benefit and an appointment had been made for her for 26 January 1993. She duly attended the Department offices and was interviewed by an officer of the benefit control unit.

**(d) The interview – questions and answers**

The interview commenced with her being told the Department was investigating her eligibility for a social welfare benefit and the result of the interview could be the cancellation of her benefit and it could also result in prosecution action being taken against her.

She was then shown a copy of section 12 of the Social Security Act, in particular the provision stating that it was the duty of every person to answer all questions put to him by any officer of the Department in relation to applicants for benefits of relevant documentation. She acknowledged she understood the requirement and was offered and accepted a coffee.

The officer then went through the various applications she had made and obtained her confirmation that the signatures were hers and that she had understood her obligations to notify the Department if she was living with anyone or her situation changed.

After saying that F (her son's) father was Mr T she was asked when she started living with him:

*A: In 1974 as a defacto*

*Q: Why did you not notify the Department that you had entered into a defacto/married type relationship with Mr T?*

*A: At the time he was not working and my father said it is no way to bring up my grandchild. I had to apply for the Domestic Purposes Benefit. I should have let Social Welfare know about the situation but I did not.*

Later after further documents were shown to her..

*Q: why did you not notify the Department?*

*A: Stupidity. The greed got in my eyes.*

Later..

*Q: was this a true statement?*

*A: No it was not a load of crap apart from Mr T is the father of my child*

Later..

*A: All this paper work is a waste of time and your energy to tell you the truth all the paper work is lies, the only truth on the whole file is that I am F's mum,*

*I was even told by Mr T, the father, not to be on the Domestic Purposes Benefit but I wouldn't listen to him.*

Following this interview the officer interviewed Mr T who confirmed he had been living with Ms Ruka in a relationship in the nature of a marriage and that he had not wanted her to be on the benefit. She also interviewed Mr T's sister with whom Ms Ruka and Mr T had lived for 6 months in the early 1990's. She confirmed they had been living in the same bedroom, kept their personal possessions there and cared for their son who lived with them.

A second interview was conducted on March 10 1993 which went through further documentation and confirmed bank accounts. She was asked an additional series of questions as to why she had applied for the DPB (rather than unemployment benefit – which she had been on). She said she had needed the extra money.

**(e) The officer's later evidence about the interview**

The officer acknowledged that she had never told Ms Ruka she was free to leave at any stage or that she was able to consult with or instruct a lawyer, though said the Department does this now.

In cross examination as to why she had not asked Ms Ruka about the quality and nature of the de facto relationship, the officer said<sup>27</sup> :

*No we didn't discuss that because she was very voluntary in what she was saying to me.*

In commenting on the interview the officer said:

*...it was a fairly good interview in as much as Ms R related very well to the questions. At the end of the interview we talked quite a bit about various things and after that when she left she rang me several times to talk about things and I had to in the finish say that it was better that she didn't keep contact with me, but she was a very honest person.*

Q: And was she hesitant in any of her answers?

A: No – not at all.

**(f) Ms Ruka's later evidence about the interview**

In response to a question as to whether she felt she could come and go from the interview she said:

*...I was scared because I knew I had to or else I would have no income whatsoever, so I spoke to X (officer)*

Q: How did you feel in the interview?

A: *I was scared I was frightened, everything was going through my head but I knew I had to have some sort of income for F and I. Later..*

Q: *Why didn't you mention any of this (the violence)?*

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<sup>27</sup> P 14 Transcript of evidence

*A :Well the reason is just that she was asking the questions and I was answering her.*

*Q: But why didn't you mention about what type of relationship it was?*

*A: All I thought was that she was a fraud squad officer and she asked questions that had to do with the benefit.*

*Later:*

*..I was scared yes, and I thought that the benefit would stop, because F and I were renting a flat in Mt Wellington at that time and that is why, like I said I spoke out to her about everything, because I knew that my benefit would stop and what other income I would get, because at that time I had part time work with the Post Office which I told SW about, they deducted from my benefit, but it was only temporary, sort of call in work.*

**(g) The psychologist's opinion evidence about the interview<sup>28</sup>**

Dr Gail Ratcliffes', is a psychologist who assessed Ms Ruka as suffering from post traumatic stress syndrome, as a result of the violence to which she was subjected.

*Q: Would you be able to give an opinion as to if she may be inclined to incriminate or blame herself or if she wouldn't as a result of her experience?*

*A: She suffers PTSD which would make her extremely susceptible to any stressful situation. In such a situation she would not think rationally, her decision making would be impaired but she would also be more likely to blame herself for things that went wrong because in her marriage she was always told that things were her fault and such women frequently come to believe that part of the violence is deserved.*

*Q: Is a woman subject to a battering relationship easily able to tell others about it or do they find it difficult?*

*A: It is generally very shameful and hidden if possible and that certainly was Ms Ruka's attitude to her relationship.*

*Q: Are you able to give an opinion as to how she may be likely to react during questioning from authority figures?*

*A: I would expect her to be frightened ....I would expect her to assume responsibility or fault if she thought that that would placate the authority figure.*

*Q: Is there a reason why Ms Ruka in your opinion may not have mentioned the nature and quality or the relationship she says she had with Mr T to SW officials?*

*A : I would think she would be too ashamed to do that.*

*Later...*

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<sup>28</sup> P 46 Transcript

Q *Was she capable of explaining to the Department the nature of the relationship that she was in with Mr T...*

A *I believe she would have been unlikely to do that because of the shame.*

*Later..*

Q *What would have been her thought processes?*

A: *If she thought that talking to SW would have resulted in more violence because there was no money in the house and starvation for her son and herself, then she would have been extremely unlikely to have said anything*

Q *Was she able to make a fully informed choice about applying for a dept benefit*

A: *She believed that she could not leave the relationship and that that was her choice, she had no other choice but to stay there.*

**(h) The Court of Appeal decision.**

The Court by a majority of 3:2 found that there had not been a relationship in the nature of a marriage.

It said that the financial commitment of Mr T to Ms Ruka was non-existent – at least in her favour. There was no willingness to contribute if needed. He spent all his money on himself. He in fact was indifferent about whether she claimed a benefit.

They may have appeared to the casual observer to be a couple, they were sharing their lives, living intermittently under the same roof and sharing the same bed. This latter circumstance was misleading and could carry little weight. She submitted to sex because of the use of force or threat of it.

These circumstances alone meant there was no relationship in the nature of a marriage. However, if the Court had to consider Battered Women's Syndrome that would have had some consequence. The evidence about the greatest risk to a battered woman being when she leaves the relationship provided an explanation for the continued sharing of the same accommodation and her other linkages with him. She had an inability to live elsewhere.

**(i) A change to the yardstick**

The decision significantly altered the yardstick whereby relationships would be assessed to determine whether they were relationships in the nature of a marriage. Rather than it being a test like *Excell* as to the cumulative effect of a number of factors, none of which were more important than any other, or *Thompson* where there had to be at least one prerequisite factor, that of mental commitment, there were now two essential criteria which had to be established. These were together determinative of whether there was a relationship in the nature of a marriage for the purposes of the Social Security Act. They were financial interdependence and emotional commitment to the relationship:

- An *essential* element was a degree of financial engagement or understanding between a couple evidenced by, at the least, acceptance by one partner that s/he would support the other and any children of the relationship if s/he had no or inadequate income. The commitment must go beyond mere sharing of living expenses, as platonic flatmates or siblings together may do – it must amount to a willingness to support, if the need arises. (This was in line with the purpose of social security legislation to provide a means of financial support for persons with no other means of support). Refusal to support however, motivated by the knowledge that the dependent partner will be able to claim a benefit, would not create a genuine absence of support.

The financial interdependence could be direct, being actual support, or indirect, reflecting a mutual understanding about the financial arrangements relating to the relationship. The relationship either way, must exhibit this mutual commitment and assumption of responsibility.

The financial support alone was not indicative of the relationship. There must be

- Co habitation and a degree of companionship demonstrating an emotional commitment. The relationship must be accompanied by *sufficient features evidencing a continuing emotional commitment not arising just from a blood relationship. Of these sharing the same roof and a sexual relationship were likely to be the most significant indicators.*

The Court held that where the latter was found *together with financial interdependence there will be such a merging of lives as equates for the purposes of the legislation to a legal marriage.*

On the application of the facts to the case the Court held that financial interdependence had been non existent, *at least in favour of the appellant.* In fact there was evidence that Ms Ruka had supported Mr T on her benefit by paying all the household bills and giving him money when he demanded it. Hence financial interdependence must be looked at from the point of view of the beneficiary – was she/he getting support from her husband/ his wife, or, was there evidence she/he would get support if the need arose.

A full bench of the Court of Appeal confirmed this interpretation in *Queen v Knight* CA 210/97, unreported, 12 November 1997. The President Justice Richardson said <sup>29</sup>:

*This court has held in Ruka...that there must be a degree of financial interdependence in the sense of a willingness to support if the need exists, accompanied by sufficient features evidencing a continuing emotional commitment between the parties. That represented a departure from the previous departmental approach....*

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<sup>29</sup> page 2 and also at page 4 where he indicated that financial interdependence was an 'elemental' quality of a relationship in the nature of a marriage.

In practical terms for the Department the changes made by the decision were particularly significant because they were still operating, at least as far as their documentary paper trail was concerned under the *Excell* decision which had no prerequisite factors.

**(j) What of the Excell and Thompson checklist?**

These lists, though removed from their previous function were not made entirely redundant. The judgments of Richardson and Blanchard said they *may give assistance in deciding some cases*.

In practice it seems that they may have relevance as indicators in particular cases as to whether the two essential criterion have been made out. However, the ultimate question is not one as to whether on balance the factors accumulate to establish proof of marriage per se as previously. It is rather do they prove of financial interdependence and a willingness to support and a continuing emotional commitment?.

**(k) The impact of Battered Women's Syndrome (BWS) on the s. 63 (b) yardstick.**

The majority judgements held that the existence of Battered Women's Syndrome could be taken into account in determining whether a relationship in the nature of a marriage existed. It was necessary to consider the effects on the battered woman's mind and will and the ultimate question was whether her symptoms or characteristics negate or tend to negate any element which would otherwise point to the relationship being one in the nature of a marriage. The Court commented that BWS provided an explanation as to why she continued to live under the same roof.

Importantly Thomas J<sup>30</sup> emphasised the danger in too closely defining BWS and it becoming too rigidly applied. Knowledge of violence to women in domestic situations is evolving. Few aspects of any discipline remain static and further research and experience may well lead to developments and changed or new perceptions in relation to the battering relationship and its effects on the mind and will of women in such relationships. It was probably better therefore to speak of a woman living in a battering relationship.

## **8 The Department's Response Post *Ruka***

**(a) Obtaining an opinion from the Solicitor General**

The *Ruka* decision was released in October 1 1996<sup>31</sup> By memorandum dated October 4 1996 the Department office solicitor sought an opinion from the

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<sup>30</sup> P173 L 35- 55.

<sup>31</sup> It seems the decision was generally not well received in the Department as it was considered it would be harder to prove whether a marriage type relationship existed, though few disagreed with the result for Ms *Ruka* herself.

Solicitor General as to the effect of the decision. The opinion was sought by way of a response to seven specific questions. The Solicitor General provided a response by letter dated October 17 1996.

**(b) Information Bulletin 1996/087**

On 13 November 1996 an Information Bulletin 1996 087: *Definition of a relationship in the nature of a marriage* was prepared. The Department says a copy of it was circulated to each site. This incorporated the opinion of the Solicitor General as to the changes which the decision required. It was a one-off paper copy issue.

The Department says 'In Benefit Control Units the document was a subject of discussion and training because of its' impacts. Once staff received training the "Bulletin" or "Circular" is held in the Unit. Staff do not have individual copies. All advocacy groups were sent a circular, as was the normal practice at the time".

A media release was issued immediately after the issue which read in part: *New instructions have been sent to Income Support staff concerning how they deal with relationships in the nature of a marriage when granting benefits or investigating benefit crime. ...Income Support Legal Manager ... said Income Support had been operating correctly the way the law stood. The successful appeal now meant it was necessary to reconsider the boundaries of the definition "living in a relationship in the nature of marriage"...As a result of the judgement, Income Support is instructing staff to ensure experienced customer service officers must be involved in cases where "battered women's syndrome" appears to be a factor.*

However it appears that the document held at each site did not stay in purview of employees for long. Several Official Information Act disclosures to beneficiary groups between 1997 and 1999, which had sought the guidelines and policies the Department was using when applying section s. 63(b), did not include the document. As late as May 2000 it was not released pursuant to an Official Information Act request to the legal division but was released shortly thereafter when it had been brought to the staff member's attention.<sup>32</sup>

However most departmental interviewees had copies of it when interviewed in October/November 2000. One did appear to have had a copy since 1996 and some said they had lost their copy and had only recently located it, suggesting it may have been circulated to some employees. However in any event most appeared unfamiliar with its detail. In fact it now seems their unfamiliarity was because they had not been given the copy at all until recently.

Being a one-off document it appears to have been lost over time in what a number of interviewees described as a 'nightmare of paper' at that time. Information bulletins were released frequently on paper at that time.

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<sup>32</sup> Letter from Department to Beneficiary Advocacy Services – May 2000 –sighted.

The Department says that despite the difficulties of the paper based system “this did not mean that staff were unaware of the decision. It impacted greatly on their way of working”

Today all new information is distributed via the Intranet - Mapp – the Department’s on-line electronic information database. Such a significant policy change would now be placed in the Departmental intranet site for all staff to see and access from their desk tops. However it would still not appear to be able to be automatically incorporated into manuals.

**(c) Conjugal Status Bill**

Within 2 months of the *Ruka* decision there was a new coalition government and the next year, in 1997 the then Minister of Social Welfare decided to amend the law so that *Ruka* would be overturned retrospectively. In the first half of 1997 the bill was drafted and introduced into the house in the second half. This bill, which was controversial, ultimately did not proceed. *Ruka* was said by the department to be unworkable and would create a strain on the financial resources of the state.

**(d) Training**

The department states that all employees in Benefit Control Units received training on the “Ruka” decision. Both lawyers now attached to units advised the writer they did a blackboard training session with investigators as to what the decision meant just after it came out in 1996. One had an all day session with investigators on it. A senior investigator advised the decision had created a stir and without a doubt everyone knew about it.

Unfortunately no precedent training materials were produced for later reuse out of these initial sessions and no training materials appear to have been retained from the 1996 sessions. Apart from occasional group training when new issues arise in the benefit control area, ongoing legal training, principally one on one, is given by lawyers to investigators on an ad hoc basis when the need arises. Also most benefit control lawyers now employed were not employed at the time of the *Ruka* decision.

There has never been any specific staff training on violence towards women, its effects, signs and symptoms.

**(e) Departmental documentation**

Details from the information bulletin were not incorporated into the investigator’s manual or the Core Topics Manual used by front line staff. Neither were the pamphlets explaining relationships for the purposes of s. 63(b) changed. As at November 2000 investigators were using the manual updated last in July 1993 though a new draft was in the final stages before release.

The Department advises that the Investigation and Core Topics Manual have now been updated.

All staff were using pre *Ruka* relationship pamphlets in their discussions with clients until mid 2000 when new pamphlets reflecting the changes made by *Ruka* were published.

**(f) Revised indicator list sheet**

In some offices, in late 1999, three years after the decision, a revised indicator list sheet appeared to come into use. It was found on two files reviewed. I was advised it was the document currently used in one region. It sets out a list of 14 indicators and gives as the first two indicators, Financial interdependence and Emotional Commitment and Support to each other. At the top it says'

*It is the level of commitment between two people that determines whether their relationship is in the nature of a marriage or not. People outside the relationship see the manifestation of that commitment and it is on these factors that WINZ must decide the matter.*

At the bottom it says

*This list is not exhaustive. It is important to remember that several of these elements are critical when determining the nature of a relationship. The presence of abuse in a relationship does not in itself disqualify a relationship but needs to be considered carefully within the above boundaries.*

This list is unsatisfactory and misleading as a guide to investigators and beneficiaries. It does not identify that there are two prerequisite factors or what they are.

**(g) Investigation practices post *Ruka***

Investigating officers in interview with a beneficiary against whom an allegation had been made were using one-off sheets listing Fisher J's *Excell* indicators or "rules" as they were colloquially called. They were also distributing pamphlets to beneficiaries printed by the Department which were based on Fisher J's rules. It was on the basis of these documents that the beneficiary and the investigator were discussing whether the beneficiary was in a relationship in the nature of a marriage. It was the common position of the investigators spoken to that nevertheless they believed they were applying *Ruka* principles, despite the fact they were using the old checklists.

The Department has accepted the criticism that its documentation was not up to date. However it says that it is not correct to assume from that that investigations were completed with no reference to "Ruka".

**(h) Prosecutions**

As indicated these have averaged only 4% of all cases. Though exact figures are not known it is understood that the vast majority of those are successful. Often these are on the basis of guilty pleas however, where the facts are not

tested in Court<sup>33</sup>. Nevertheless, a thorough review of the file is undertaken by the in house lawyer before proceedings are filed. Further to their training as lawyers it is to be expected that they would have had a detailed understanding of the *Ruka* formulation and were not dependent on a departmental manual to guide them as to what the law was (which was incorrectly stating the law).

Additional investigations are frequently undertaken by the investigator under the direction of the lawyer. One lawyer commented she frequently advised investigators on referral for prosecution that they needed to be more thorough in their investigations to succeed on the 'beyond reasonable doubt' criminal law standard. Hence if a case came through to prosecution without an accurate assessment of the marriage – type -relationship test that could be rectified under the lawyer's directions.

Beneficiaries also have access to their own defence lawyer at this stage, who are able to negotiate with the department lawyer to have the proceedings dropped or different or lesser charges laid. Figures as to the number of prosecutions altered or dropped are unknown but lawyers interviewed advised that this negotiation process takes place with a variety of results.

Of the sample of prosecution files and decisions of the District Court reviewed there was no obvious evidence that the *Ruka* test was not being argued. In fact some decisions were reviewed where the prosecution had failed because the judge did not consider the test, though argued, had been made out.

## **9 Taking account of Violence to Women in Benefit Fraud and Benefit Entitlement decisions**

### **(a) Departmental perspectives**

There were widely different perceptions among Benefit Control personnel as to the frequency of violence in s.63 (b) investigations. Some long- serving staff said they had never or rarely come across it. General comments were that it had not turned out to be a problem in practice for the Department as it was seen rarely. Some investigators expressed concerns that alleged violence within the relationship should not be used as an excuse for benefit fraud.

In contrast one investigator said her experience was that violence was not uncommon in s. 63(b) investigations and another estimated she saw it in 30-40 % of s. 63(b) cases that she investigated. These two investigators had backgrounds in social work and police.

When asked how they recognised it they referred to women wearing long sleeved clothes, polo neck clothes and dark glasses in inappropriate

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<sup>33</sup> The Department points out that if guilty pleas are entered when they should not be then it is a matter for others, i.e. law society.

weather, looking bruised, scarred and with an overly aggressive or passive and dejected manner.

When asked what they do when they see such women they said they try to elicit information about the violence from the woman, be empathetic and give her advice about options for leaving, social support etc. They do not send such cases to prosecution although if they have been in a 'marriage-type-relationship' an overpayment will nevertheless be established. They did not indicate they reviewed the case against the marriage indicators to see if the facts altered them.

The Department says that it is quite likely that geographical differences would account for different experiences of levels of violence. While this may be so to a limited extent it is not accepted that it would create such differences in perception.

The main reason given as to why no training on violence to women had been undertaken with frontline staff is that it is not perceived as being necessary given its rarity and given the other urgent training demands – particularly to ensure they understand and can apply the complexities of the social security system.

Personnel in Benefit Control were generally very receptive to training on violence to women.

**(b) Refuge worker perspectives<sup>34</sup>**

Refuge workers at the Putaruru November 2000 hui of the Central Region Collective of Independent refuges indicated that, "heaps" of women in refuges were paying back overpayments which had been 'slapped on them' by the Department since 1996. The women had been claiming the DPB because they were receiving financial support from the male partner who spent money on himself and gave her nothing. They were now 'loaded down' with overpayments. Examples were given of a \$5000 fine and overpayments of \$10,000 and \$38,000 respectively

When asked if any of these women had been for a review workers did not know but some said the women often do not know they have an overpayment for some time. One said the woman did not know for 6 months<sup>35</sup>.

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<sup>34</sup> The Department points out that these are emotive statements with no evidence to back them up. While this is true it is nevertheless important to consider the understandings and perspectives of people who are working directly with women in violent relationships and who are mostly also 'clients' of the department. At the least the negative reported perspectives indicate the need for better community relationships between the department and some regions. It is also pointed by the writer that some refuge workers spoke very highly of departmental employees in their regions, calling them fair and helpful.

<sup>35</sup> The Department finds it extremely difficult to believe that the client did not know of the overpayment for 6 months. However if the client was living with stress following a violent relationship and moving address frequently it does not seem to the writer that unlikely that she may have missed departmental correspondence.

For those who had access to a lawyer (because they went to court for the overpayment) they were advised by their lawyers there was no possibility of getting the overpayments stopped or reduced. Workers claimed that the lawyers assigned to the women on legal aid knew nothing about the social welfare system.

Strong complaints were made about cold calling and letters which asked the woman to come in and discuss the benefit. It was reported that the women had not known, before the interviews what the purpose of the interview was or that their benefit could be cut off. They had no time to prepare for the interviews and had not bought support people<sup>36</sup>. They could not think straight at the interviews because of the fear of having their benefit cut off. They were usually very stressed in their lives anyway. Following those interviews they ended up with fines and huge debts.

Once they have overpayments they lose other benefits such as relocation expenses or extra money when an emergency arises. The officers just say “no – you have a debt”. In one area the workers said women with overpayments which were cutting heavily into their benefit were living at the refuge for long periods of time because they could not afford to leave<sup>37</sup>.

Refuge workers believed that many women in Arohata prison on benefit fraud have been in very violent relationships where they were getting no support from the man<sup>38</sup>.

The workers said they would not expect all women in violent relationships to tell the WINZ case worker or investigator because of a fear that they would be giving their power to the Department and it could be used against them.

Some refuge workers said they had excellent relationships with local Departmental offices. The staff were fair and helpful and the workers had success advocating on behalf of refuge women. Some had started to have meetings with local Departmental officers but these had been only one-off meetings and the good will on both sides did not last. They would like to have regular meetings with local WINZ office staff.

Others described Departmental staff in their region as very intimidating and who would not listen or change their decisions, no matter what they said. They complained that women are not told of their entitlements. Three examples were given of women on the benefit taking in children of someone who could not care for them or who had gone to jail and not being able to access any extra money from the Department to care for them.

### **(c) National Collective of Independent Women’s Refuges**

Research<sup>39</sup> indicating that one in 7 New Zealand women have experienced family violence and 21% of men have admitted to physically assaulting their

<sup>36</sup> The Department comments that “all clients are given the offer to bring support people by letter”.

<sup>37</sup> The Department says relocation monies are given without question where violence exists.

<sup>38</sup> The Department says that most clients receive suspended sentences and very few are in Arohata.

female partners is referred to in a Collective publication<sup>40</sup>. Family violence is the fifth leading cause of death for women and 50% of female homicides are committed by a woman's partner or former partner.

The Collective describes "Battered Women's Syndrome"<sup>41</sup> as a *psychological term used to describe the experience of women who are subjected to long-term family violence (most often partner violence)*... While it says the term has been useful in assisting a better understanding of the effects of battering, it has also been counterproductive as it suggests a common set of symptoms and reactions where, in reality, the experiences and reactions of battered women are varied.

The refuge uses the 'Power and Control' model of violence which, while encompassing some of the original theories of BWS ensures that attention is directed toward the abusive behaviour that leads to the battered women's response. It reports that there is a desperate need to develop a model based on women's realities that recognises diversity of experience, particularly for Maori women.<sup>42</sup> These women are often likely to respond to violence aggressively and so do not fit into the traditional idea of a 'passive victim' who has 'learned helplessness'.

#### **(d) Financial abuse**

Financial abuse is said to be a feature of many violent relationships. In a survey<sup>43</sup> of 27 Maori women in violent relationships in refuges, published in 1999, many women had reported that their income was the only financial source used to maintain the household. The male partner bought nothing into the household but spent money on himself including food, alcohol, marijuana, cigarettes etc, despite the immediate needs of the woman and her children for food, clothing, healthcare, household expenses and education etc. Some partners had demanded that the women provide them with extra money to support their lifestyles. When they refused demands were enforced with physical violence. One woman said she had 'defrauded' Department of Work and Income as a result of the financial abuse.

The report recommended<sup>44</sup> that both Department of Work and Income and the National Collective work collaboratively for the best interests of victims/survivors of family violence. Suggestions of how to do this included national protocols concerning policy changes affecting Maori women; family

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<sup>39</sup> Collective submissions to Law Commission in response to its August 2000 discussion paper No 41, Battered Defendants.

<sup>40</sup> The Department points out these figures relate to all violence, not extreme *Ruka* violence. This is true but to determine whether the violence has reached a level where it impacts upon the 'emotional commitment' indicator of a marriage type relationship all violence needs to be identified and considered.

<sup>41</sup> From Collective information and training material 2000.

<sup>42</sup> *Supra* 23

<sup>43</sup> Maori Women and Work, The effects of Family Violence on Maori Women's Employment Opportunities, Tania Pouwhare, The National Collective of Independent Refuges Inc. 1999

<sup>44</sup> The Department says it is "unaware of any report".

violence training for Department staff and Department funding for refuges to deliver and/or properly resource Women's Education Programmes.

**(e) Beneficiary Advocacy Perspectives**

Beneficiary groups say that violence is a common feature of relationship cases where they have advocated for the beneficiary. They believe the Department ignores violence until the matter gets to prosecution where, only at that stage it may be taken seriously and a prosecution dropped although the overpayment will remain.<sup>45</sup>

They report experiences of officers and Review Committees being disinterested in the effect on benefit entitlement of violence in the beneficiary's relationship. They reported information about violence being dismissed or ignored and not taken into account in considering whether this has had an effect on the marriage-type-relationship tests. They believe the Department attitude is seriously inadequate in this area.

**(f) Beneficiary Advocacy File reviews**

A review of BAS and CBU files of 12 s. 63(b) investigations revealed violence as an aspect of 7 relationships. In most the woman had raised the violence either at the first interview or later in a letter or follow up telephone call. In no cases did the fact of violence result in further interviews or investigations or analysis. In none did it alter the decision to establish an overpayment. In two files letters sent by the beneficiary shortly after the overpayment was established, disclosed serious violence including threats and gestures to kill and unsuccessful attempts to leave. Three case examples, after the *Ruka* decision was released, are given below.

**Case #1<sup>46</sup>**

After one cold call interview an overpayment of \$14,524.34 was established against a woman in a violent relationship of one year's duration. From early on she had tried unsuccessfully to leave and the financial support was almost non-existent. In that interview, after a discussion of the indicators with the investigator, she had accepted that she had not been a single person and as such, not entitled to receive the DPB. She had however told the officer that she had not been able to leave the relationship though she wanted to.

She wrote a long letter asking for an 'appeal'. She explained that for the year that she had lived with him, she had been trying to cease the relationship,

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<sup>45</sup> The Department rejects this as "totally untrue" and says that violence is not ignored by its officers or Benefit Review Committees

<sup>46</sup> The Department says that questions remain about the degree of violence in this case and a decision from the Appeal Authority is pending. Regardless of the outcome of the appeal however the point is that no investigations were undertaken of the violence e.g. with the police to whom she refers in her letter, family members who one might expect may be aware. The letter suggests a prima facie case of an absence of emotional commitment and financial support in the relationship which warranted investigation at that stage.

due to his violence. She had moved house to get away from him but he followed her. Also that they did not intermingle their finances. She wrote: *Financially during this time, rather than divide everything<sup>47</sup> evenly (impractical if not impossible) I paid the rent and all other household bills, and in return X paid for the groceries – considering he ate three cooked meals a day, well in excess of what my children and I eat combined. ..As far as I was concerned I was not receiving the benefit fraudulently, in respect of financial support.*

*I finally found my present home and shifted – only X came too. From the shift until ..... I repeatedly asked X to leave, on a weekly/fortnightly basis. I couldn't maintain a constant stand, as the tension becomes intolerable for myself as well as my children. When the subject of police intervention came up I received verbal abuse and threats. Bearing in mind X's aggressiveness, the times the subject of leaving was brought up had to be picked carefully – the importance of this is highlighted by an instance in May where I was forceably kept in a room for around half an hour – at times with his hands on my neck, held down on a bed ( and statements of 'if I have to leave you my life is over so I might as well take you with me – I've nothing to lose), when I was let up, I moved rooms, then he held a knife at me before changing focus, blaming himself and leaving the house with several knives. ... The police eventually removed X that night. Yes I could've sought a trespass order, but that would be adding fuel to an already well burning fire – and the police agreed with me when I informally discussed it with them. I am essentially by myself with two young children, if X broke the trespass order it would likely be an all or nothing attitude, and the state of tension awaiting his next move – well it's hard on the nerves. The police are twenty minutes minimum away from here.*

The officer did not undertake further investigation or change its position after the letter. The officer's letter to the Benefit Review Hearing last year recommended the decision to establish the overpayment stand. Of the violence the only reference was that she had been able to have him removed by the Police the day she was told her benefit would cease if she did not. (and so by implication should have done it earlier).

## Case #2

In March 1998 a debt of \$25,562.99 was established against a beneficiary in a very violent relationship with a man who slept with a slug gun by the bed and admitted raping her, hitting her, verbally abusing her and refusing to support her. She had told the investigator of the violence in the relationship. No further investigations or consideration was given to this. The Debt was disestablished in July 2000 after intervention by the Combined Beneficiaries Union.

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<sup>47</sup> If she had been able to prove this then clearly she would have been in a stronger position to argue they were not living as a couple.

**Case #3<sup>48</sup>**

On 24 September 1998 a beneficiary, a migrant, living in a violent relationship with a man who gave her no support, had a debt of \$27,923.17 established against her, with repayments from her benefit set at \$35.00 per week. This followed one cold call interview. She admitted to having married since being on the benefit and that he had gained employment some time after the marriage.

When asked why she had not declared her marriage she said because the man had no income and she needed the money to support them all. She was asked why she did not write on the form that she was married and she replied:

*no explanation ..because I needed the money to support my son and pay bills.... my frame of mind wasn't right and I didn't think it was important at the time.*

When asked if she had anything else to add she said:

*I have been under a lot of family pressure in the past 3-4 years. I have, become like a blank at times.*

Five weeks later, in November 1998, after the overpayment had been established she wrote a two page letter to the officer which commenced:

*I am writing to you my statement on what really happened in the time I was married and still receiving the DPB.*

She set out detailed information about the violence she was subjected to. Her statement included the fact that her mother had witnessed the violence. She said that her husband was extremely violent and never supported her financially in any way. Further she had left him and gone to live with her mother early on in the marriage. She described a severe mental and emotional decline after one particular incident of violent abuse. She concluded:

*The truth is I was still a single parent, supporting my son and myself' ..I am a young mother, trying to raise my son on my own for nearly 7 years, life is hard enough without large debts of \$27,923.17 put on me.*

The letter appears to have been ignored and repayments of the debt continued until intervention by CBU after which time, in August 2000, it was reversed. It was accepted she had never been receiving financial support and had left her husband and gone to live with her mother shortly after the marriage. She had said she agreed to pay the amount of \$35 per week, because she was told that if she paid a high amount she would not be prosecuted.

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<sup>48</sup> The Department says the letter was not given to the Department until May 2000, when the Combined Beneficiaries Union took the case over from a Community Law Centre. This is accepted but the case nevertheless illustrates the dangers of investigators making decisions that a beneficiary was ineligible for a benefit on the basis of one cold call interview where there is an admission. Further it shows again a very scant investigation – a lack of follow up of statements which may have lead to the disclosure of violence “I have been under a lot of family pressure in the past 3-4 years. I have, become like a blank at times”.

## 10 Significant Issues for the Department arising out of the review

### A The validity of overpayments established between October 1996 to 2000.

Because of the operation of a number of factors outlined in B to G below the validity of overpayments established in relation to section 63(b) cases, between October 1996 and mid 2000 is in doubt.

### B Applying the incorrect legal test

The writer finds that there is clear evidence that all staff were not applying the correct legal test. It is highly probable that a significant majority of investigators were applying the 1991 *Excell* test up to late 1999/2000.

This is evident from the fact that up to the year 2000 the policy documents disclosed in several Official Information Act requests and which were said by departmental officers to have been relied upon in determining marriage-type-relationships contained the *Excell* indicator list. On most of the overpayment files reviewed the documents being used to assess the relationship were indicator lists published in 1993 and updated in 1994 or outdated pamphlets which stated the law in *Excell*. In one file reviewed the list had words and ticks alongside the factors. A Departmental report to a Benefit Review Committee hearing in 1998 indicates clearly that the *Ruka* formulation was not being applied.

In some areas *Excell* indicator lists and pamphlets were still being used at the time of this review.<sup>49</sup> Two investigators handed the writer this list and pamphlets they used to discuss with beneficiaries whether they were in a marriage. Not only did these not comply with *Ruka* they also did not comply with Justice Tipping's formulation in the 1994 case of *Thompson* which set a prerequisite mental ingredient –an emotional commitment for the foreseeable future.

The Department, via Benefit Control Management, comments that though investigations post *Ruka* became more complex the only real change was how, in fact, "Battered Women's Syndrome" came into play, with emotional commitment and financial interdependence. This wrongly states the effect of *Ruka*. Such statement; which is disconcerting,<sup>50</sup> demonstrates the necessity and importance of strong legal input into the guidelines and practices of the Benefit Control Unit.

The Department, via its own legal services, recognises that *Ruka* had a wider impact than stated above. It describes the effect of *Ruka* as having 'expanded' the section 63 (b) concept of a marriage type relationship, rather than overturning *Excell* and

<sup>49</sup> In October 2000 two investigators handed me copies of the sheets they were then using and they were *Excell* lists last updated in July 1994.

<sup>50</sup> It is also surprising in that it contrasts so significantly with the 1996 interpretation taken by the Department of the effect of the decision on its work. At that time the impact was considered so significant as to be unworkable for the department.

*Thompson*. Regardless of how the change is expressed there can be no doubt that the difference between the *Excell* test and *Ruka* test is significant, not semantic. *Ruka* requires prerequisite factors of financial interdependence or a willingness to support if the need arose, plus co habitation and continuing emotional commitment (*Thompson* factors). It is the *Ruka* test which must be applied.

The *Excell* test required proof of a blend of some only of a list of factors. A Marriage Type Relationship could be established in *Excell* without reference to financial interdependence and ongoing emotional commitment at all. An application of each of *Excell* and *Ruka* to the same facts may well result in a different decision. For example Ms Ruka herself was convicted on the *Excell* test but discharged under the *Ruka* test. While it is to be expected that many decisions made between November 1996 and mid 2000 based on the incorrect *Excell* test would not have altered under a proper application of the *Ruka* test, a number will.

The Department, via legal services, adopts comments from a student's essay along the lines that *Ruka* has not resulted in great changes for beneficiaries, perhaps because 'human relationships are too complex and variable'<sup>51</sup>. However the fact is that it cannot yet be said whether *Ruka* has resulted in great changes for beneficiaries because until the latter half of 2000 it had not been applied by the Department. In fact of those tiny proportion of cases (0.07%) where the beneficiary appealed against the Department finding a Marriage Type Relationship to have existed, the Department decision was overturned partially or wholly in 62% of cases<sup>52</sup>. Another concern is the unit's apparent application of the financial interdependence criterion. From discussions with departmental interviewees it is being applied in situations where there is evidence that the *beneficiary* had supported the other person i.e. provided meals, paid rent etc. It did not matter that there was no evidence of the other person supporting the beneficiary. This is contrary to the approach the Court took in *Ruka*.<sup>53</sup> To find interdependence established on the basis of the fact only that the beneficiary supported another person while she was on the benefit is also contrary to the purpose of the legislation which is to provide financial support for persons with no other means of support.

A final comment relative to the application of the test is that though the change rendered by *Ruka* is significant it is workable. Instead of taking an overview of a blend of factors as in *Excell*, investigators must focus on seeking evidence establishing two prerequisite factors – financial interdependence and emotional commitment. Where violence is part of a relationship then an assessment has to be made as to whether and how it affects the prerequisite criterion of continuing emotional commitment.

Of course since the *Thompson* decision in 1994 investigators should have been looking for one of the two prerequisite factors in any event. (emotional commitment).

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<sup>51</sup> 3Edited version of an essay submitted for the LLB(Hons) degree, Determining a Relationship in the Nature of a Marriage: the Impact of *Ruka* on the Department of Work and Income's Conjugal Status Policy, Jessica Wiseman, March 2002

<sup>52</sup> See footnote 17 and comments at p 17

<sup>53</sup> P 162 line 46 The primary focus should be on financial commitment which was non-existent – at least in favour of Ms Ruka who seems to have been required to assist Mr T from time to time.

Indeed if they had been then the doubt as to the reliability of overpayments that now exists through the non application of *Thompson* would not be so strong.

The conclusion that the majority of investigating staff at least were not applying the *Ruka* formulation is consistent with other facts set out below.

- *Lack of written notification of changes to staff.*  
Individual staff never received any written documentation relating to the law change or how it would affect their work.

The department advised that the only written document ever prepared in house following the *Ruka* decision and its effects, Information Bulletin 1996/087, was never sent to individual staff but to each site where it was used for training.

- *No amendment of written guidelines, instructions and other documentation relied upon.*
  - The Core Topics manual for front line staff was amended to take account of the *Ruka* decision and distributed to staff in late 2000/early 2001.
    - The investigation manual for benefit control investigators was amended to take account of the *Ruka* decision and distributed to staff in late 2000/early 2001.
    - Pamphlets for beneficiaries (used also in investigations) explaining the department's view on marriage type relationships were amended in mid 2000.
    - A revised indicator list was distributed to some offices in 1999 but was incorrect.

Prior to these amendments staff were using instructional material last updated prior to the *Ruka* decision. Pamphlets issued to the public and beneficiaries contained misleading information as to benefit entitlement. Manuals used by front line staff, including case managers and persons on 0800 help lines gave misleading information on benefit entitlement.

Investigation manuals instructing investigators in how to determine marriage-type-relationship were not altered. Neither were indicator sheets, until, in some places, new lists appeared around 1999. These however were flawed because they did not make it clear what the prerequisite factors are. They simply provided a list of factors with the statement that the manifestations of a relationship *might include them*. The List also begins with a misleading statement:

*People outside the relationship see the manifestations of the commitment and it is on these factors that Department of Work and Income must decide the matter.*

- *Lack of oversight by lawyers of investigation practices*  
While lawyers in the unit, at least those employed at the time of the *Ruka* decision would have been well aware of the decision, their involvement with the work of investigators in establishing overpayments appears to

have been minimal, outside of preparing a case for prosecution.<sup>8</sup> One lawyer advised she regularly spoke to investigators about the need for more thoroughness in investigations coming through for prosecution. It is only since 2000 that dedicated benefit control lawyers have been attached to the units. Though legal training for investigators on the *Ruka* decision was undertaken in 1996 there appears to have been no specific group training on it since then.

The Department via legal services comments that until the change in structure in Legal Services in 2000, lawyers were not attached to Benefit Control Units, nor were they working exclusively in the Benefit Control area. Training for Benefit Control staff had not been the responsibility of Legal Services, who had, however, worked with Benefit Control on these issues when required. Since the attachment of lawyers to individual Benefit Control Units, part of their role is to undertake training of the Investigators when required.

The Department, via Benefit Control management, has responded to the writer's conclusion by saying it accepts that it did not update the written documentation used by staff when granting benefits and investigating benefit crime. This was an oversight. However it maintains nevertheless, that staff knew the correct marriage-type-relationship test and would have been applying the proper legal test. Staff did not just rely upon documentation such as the 'Excell indicator list'. It says there is a very small turnover in benefit control and the rules and regulations are firmly implanted in people's minds, not in a circular. A change that has impacted on day to day operations is part of everyday life.

However it is difficult to see how the new rules and regulations could be said to have been firmly implanted in investigators (including senior investigator's) minds and impacted on day to day operations when there was absolutely no written documentation in their possession to which they might refer to direct them to the correct legal test. Further the documentation they did rely upon all referred to the incorrect test. Two investigators specifically indicated they applied the written guidelines in their day to day work. Added to this is the review of the sample of files (though small) but which indicted on the record in most cases that investigators had used the *Excell* test in both documentation and in the question and answer interview format.

It is clear there was one-off group training conducted in late 1996. No materials were produced from it however or given to staff as part of it. There is an annual staff turnover of 13% by which it can be calculated that by November 1999 40% of the staff would not have received the 1996 training. However the Unit management says its turnover is very low (compared to the department as a whole). No specific statistics for unit turnover are available at the time of the report, though figures show 75% have between 5 to 10 years service.

However, regardless of what percentage of investigators had received the 1996 training, its impact would have reduced from thereon as investigation work

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continued using outdated documentation. Another factor likely to have the effect of de-emphasising the correct test in investigator's minds was that for much of this time the Conjugal Status Bill which proposed to overturn the *Ruka* decision was before the House of Representatives.

Despite strong assertions from the Benefit Control Unit management that there would not have been reliance on documentation to the exclusion of application of the correct *Ruka* test the writer concludes otherwise. A clear impression was gained from interviewing investigators and reviewing files that the *Excell* test indicators played a significant role in investigations and their outcome. Also of course the Department has itself disclosed, in Official Information Act requests between 1997 and 2000, *Excell* material and indicated it was being relied upon to determine the existence of marriage-type –relationships.

### **C Taking account of Violence to Women<sup>55</sup> in benefit fraud investigation and benefit entitlement decisions**

There has been no staff training at all on the nature of violence to women and how that might be recognised and specifically related to benefit entitlement. This is in spite of the Court of Appeal holding that where it exists it affects the marriage-type-relationship test. Apart from two particularly sensitized officers most Departmental employees said it was not an issue in their work and arose rarely if at all. If there was a violence issue then it was not drawn to their attention and so they could do little about it.

The writer found a major discrepancy<sup>56</sup> between the predominant Departmental perception (gained from interviews) of the incidence of violence in benefit fraud investigations and the experiences of others of its own employees and other information, particularly statements of refuge workers; research statistics (one woman in seven has been a victim of domestic violence); and beneficiary advocate groups' experiences.

The Department puts the stated discrepancy down to area differences. It is the writer's view that while there may be area differences the difference in perception between violence being 'rare' in benefit fraud investigations and it arising in 40% of the cases investigated cannot be explained by area differences.

The department comments that violence is not often raised by women. It is not appropriate for it, apart from asking the question, to tell the women or "hassle them about violence". There is little they can do if the women does not wish the department to know. Having said that the department accepts that an assessment must be undertaken to see whether the evidence of violence is to the level where it affects a MTR test of cohabitation, financial interdependence and emotional

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<sup>55</sup> The phrase *Violence to Women* is used in preference to Battered Women's Syndrome. As Thomas J recognised in *Ruka*, knowledge in this area is evolving. The national Collective of Independent Refuges find it unhelpful and counterproductive to define the situation in terms of whether a woman suffers BWS as the syndrome does not explain all the experiences of women who are battered and these, and their responses.

<sup>56</sup> The Department does not accept there is a major discrepancy. It says that its perception that violence is different for those working in some areas is correct. It comments further that Beneficiary Advocacy Groups and Women's Refuge reports are anecdotal.

commitment. As of March 2000 it had already organised training in recognising violence.

In some cases reviewed, there was evidence that serious violence had been explicitly raised by the beneficiary and there had been no or inappropriate follow up. Either the matter has been ignored completely or an ill informed assessment made of the relevance of it. While it is acknowledged the sample of files reviewed was small nevertheless at least in some situations the matter is not simply one of women not raising violence and leaving the department unable to take account of it.

The general approach, when the matter was raised with a majority of departmental interviewees seemed to be that violence cannot be used as an excuse for benefit fraud. While this is true in itself, a careful assessment nevertheless must be undertaken by the investigator to see whether it effects the marriage-type-relationship test of cohabitation, financial interdependence and emotional commitment. A departmental practice that trained all investigators to recognise symptoms of a violent relationship and then refer the case to senior investigators with additional training and experience for follow up investigation offers much more prospect of the department accurately assessing the situation than has existed to date.

In case #1 letters from the beneficiary disclosed serious issues which needed to be investigated against the *Ruka* formula. For example, the question needed to be asked: Could there be said to be emotional commitment for the foreseeable future when she was repeatedly asking him to leave and was afraid of his violence should she enforce her request?. As was recognised in *Ruka* separation is the most dangerous time for a woman in a violent relationship. Women often plan carefully for a long time when to leave so as to minimise the risk to the safety and lives of themselves and their children. The comment in the officer's report showed no appreciation of this<sup>57</sup>.

Likewise, in these circumstances, was there really financial interdependence? In *Ruka* financial interdependence is viewed in terms of whether the partner was supporting the beneficiary and not vice versa. There was no joint property, finances etc.

Again the small sample is acknowledged. These are from cases where the beneficiary found her way to a beneficiary advocacy service. These advocacy groups maintain that what they see is representative of most s.63(b) investigations and that there is no reason to believe other beneficiaries cases are handled any differently by Departmental officers. The Department disagrees and says there is no reason to believe that other cases not dealt with by advocacy services are handled incorrectly. However it is the writer's view that while there was no training of employees on violence to women and no amendment of written resources as to the changes that *Ruka* brought about there is reason to believe there may be similar cases that have not been detected.

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<sup>57</sup> See p 41,k last sentence, #case 1.

Consistent with the effects of violence to women many beneficiaries who are subjected to violence are poor advocates for their and their children's rights. Many will not have taken the steps these women did.

Besides there being evidence of not applying the *Ruka* formula to the facts, there seems little awareness as to how a battering relationship can affect a beneficiary's interactions with the Department and how these effects may impact upon the interview for benefit fraud and the accuracy of the information collected from the beneficiary and others, particularly outsiders. The Department via Benefit Control Management said that there is a good awareness of how a battering relationship can affect interaction with the department. Power and Control concepts were well known within the department and brought up at most training sessions. While the perception on management in this area is not disputed it is important to note that the power and control that a battered women experiences at the hands of her battering partner is different to the power and control beneficiaries experience when dealing with employees of the department.

While Departmental officers indicated general sympathy for Ms Ruka and were of the view that she should not have been prosecuted for benefit fraud, no Departmental analysis that the reviewer is aware of was undertaken as to how it was that she came to be prosecuted. In her case there was no overt disclosure but nevertheless indicators were present as early as the first interview with the investigator. She had an unusual readiness to accept blame and blame herself<sup>58</sup>.

Ironically,[in a prosecution for benefit fraud] the investigating officer's perception of Ms Ruka's unusual readiness to self-blame and self-accuse was that she was a *very honest person*. This is of course true in that she informed the Department whenever she found employment and arranged for her benefit to be stopped. However far from her responses being proof of admission of guilt, they were a symptom of someone suffering the effects of very serious violence and focussed on self blame and appeasing the authority figure.

Where cases have been referred for prosecution one departmental lawyer said that if there is any hint of violence they are very wary now of prosecuting the case. This is not a desirable response. All departmental officers need to apply the *Ruka* test of a marriage-type-relationship to any alleged relationship and assess if and to what extent violence altered the presence of these factors. It may be that in many cases the violence will not be at a level where it has affected the marriage test factors. Further, awareness of violence among prosecutors does not impact upon the 96% of cases where an overpayment is established against the beneficiary but which are not referred for prosecution.

An important issue for the Department is what to do once it becomes aware there is a violent relationship in existence, whether the result of the investigation is that a marriage-type-relationship within the *Ruka* parameters, exists or not. Policy guidelines need to be developed in consultation with refuge collectives which would provide such women with information, support and counselling as to their options, etc. As indicated previously, specialist senior investigators should ideally be referred

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<sup>58</sup> See the psychologist's comments about the interview: pp 27 - 28

such cases to investigate, particularly to conduct the interviews with the beneficiary. However, all investigators need training on violence as they are the screening net through which violence is identified to the Department.

If a woman is legitimately on the benefit, i.e. she is not in a relationship in the nature of a marriage further to s. 63(b) though she has a relationship with a violent man, it is suggested that it is not appropriate for the Department to cancel her benefit and place her for a short term on the emergency maintenance allowance<sup>59</sup>. To do that is to punish her for his violence. If she has an entitlement to a benefit then that cannot be taken away from her because she is in a violent relationship. She has no means of support and to remove her benefit is to place her under greater stress than she is already under.

The research is clear that it takes a period of time for a woman to effectively and permanently separate from a violent relationship. Often the problem is not her leaving him but effectively keeping him out of her home. The average number of times a woman leaves a violent relationship is five. The time of separation is the most dangerous of all times for a woman in a violent relationship.

The Department does not accept the writer's view that it is appropriate to continue the woman on the domestic purposes benefit and considers it is not appropriate to pay a woman a sole parent benefit when she is living with a partner. This response does not take account of the fact that the 'partner' at issue is giving her no financial support and in the financial sense she is a sole parent. It is nevertheless acknowledged that the issues raised are difficult ones for the department to handle fairly. If it leaves her on such benefit it faces criticism that by doing so it is supporting the violent relationship. However against this it can be said that there are undoubtedly other beneficiaries on other benefits supported by the state who are in violent relationships.

Further consideration may have to be given to this difficult issue but the end point must be that the woman has financial support for her and her children for as long as she has no other means of support and is left to make a decision as to when to try separate from a violent partner based on her assessment of her safety and not because her benefit has been stopped. The particularly dangerous separation period for a woman in a violent relationship must be kept in mind at all times.

The Department, via legal services, have commented on difficult policy decisions which must be made as to the level of violence which needs to be proved before the s 63(b) test is affected. It suggests emotional abuse will not be sufficient and refers to objective criteria such as domestic violence protection orders. However the only way to proceed is to consider each case on its own particular set of facts and the questions in that case whether the circumstances of the violence negate what might otherwise be evidence of a marriage-type-relationship. It will not work if objective

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<sup>59</sup> This was the policy behind the Conjugal Status Bill and guidelines under 1996/087, though there is no evidence this was ever acted upon in situations where a woman was not in a relationship in the nature of a marriage. However in one situation where she was in a marriage type relationship one investigator said she put a woman who was not entitled to a benefit on the EMA until she could leave her situation.

levels of violence are established for all cases to be considered against. It should be noted that in Ms Ruka's case, despite extreme violence over many years she had never involved the Police or took out a protection order.

It is the writer's conclusion that the benefit fraud unit personnel have not been trained to have the necessary skills to be able to identify violence in relationships and to apply the s.63(b) test to the facts appropriately. There is evidence that even when raised its impact on the marriage-type-relationship test was ignored. Training is now being organised to rectify this error.

#### **D Weaknesses in checks on decision making**

It is of concern that the overpayments created since October 1996 have been created by officers exercising wide discretions with minimal checks and balances on such exercises. An officer decides autonomously that a beneficiary is in a marriage-type-relationship and the date it commenced and whether to impose a penalty.

Errors made by an investigator applying the *Excell* test will not have been picked up in the random audit as seniors used the same Departmental documentation. Neither is it likely that they will have been corrected at the Benefit Review stage, for those beneficiaries who went to review, because of the major input Department personnel have into decision making (2 out of 3 members are Departmental employees and the third is a layperson generally reliant on the Department for advice as to the correct law.)

#### *Inadequate investigations*

A review of 12 files between 1997 and 2000 left real concerns about the adequacy of interviews and investigations<sup>9</sup>. Some could be described as scant. Interviews are characterised by leading questions and an absence of follow up of ambiguous answers.

From the Question and Answer forms, the answers of which often themselves led to the creation of overpayments, it was clear investigating officers were paying inadequate attention to matters such as the financial arrangements of the couple and whether they had future plans. Importantly there was very little probing questioning which may have clarified many ambiguous answers.

In many cases where the beneficiary has gone to an advocacy group after receiving notice of the repayment and the full picture explained, the overpayments have been removed entirely or substantially reduced. However it is estimated that less than a fifth of beneficiaries with overpayments seek advice from any adviser or help from an advocate and only about 10% seek this from a specialist advocacy group.

The general standard of those reviewed was below the threshold needed when far reaching administrative decisions will follow from answers given. Case #4 below is an example of a seriously inadequate interview on which a decision to immediately

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cancel a benefit and establish an overpayment was made. It is not an isolated instance. The interview did not touch on either emotional commitment or financial interdependence. In fact it is seriously inadequate even under the *Excell* test. The Q and A interview took place during a cold call. An allegation had been received that the beneficiary was living with a partner.

#### Case #4

After administering a caution:

Q *What is your relationship with X?*

A *Um he is the father of my baby – we haven't been going out that long but we are trying to work things out for the sake of the baby*

Q *Where does he live?*

A *xxxx but he stays here more than there – that's his mum's address*

Q *Why does he have that address*

A *Because his mother said we could use that address until we sorted out our problems because he is on such a low wage*

Q *Was the reason so you could keep getting the benefit?*

A *Um yeah and we didn't think we could live on his wage and we are going through a rough patch at the moment*

Q *How long have you been living with X?*

A *A couple of months before birth of baby ..last year*

Qu: *Why did you not tell us about the fact x was living with you?*

A *Cause his mother said that we could use her address and plus I don't know if we will still be together*

Qu: *Did you know you should tell us?*

A: *Yes, But I didn't know what to do because I don't know if we'll be together*

Qu *You recently filled in a form to renew your benefit – do you remember that form?*

A *Yep*

Qu *What was your answer to the questions about your marital status?*

A *Whats that mean?*

Qu *Did you tell us on the form that you were single?*

A: *single I put*

Qu *: And was that true?*

A *Well, we're not partners but we haven't split up – it's a sort of off and on relationship so its sort of true, sort of not*

Qu *Do you have anything else you want to add to the interview?*

A *Oh no*

After that cold call interview the officer went back to work and arranged for the beneficiary's benefit to be cancelled immediately. He gave the file to the technical officer to establish an overpayment, from two months before the birth of her baby, and three days later wrote a letter to the beneficiary telling her there was an overpayment of \$13,529.17, and she had to fill out a form and commence repayments within 14 days.

The letter advised her that legal action could be taken against her, quoted s 127 of the Act, that it had been the officer's intention to impose a penalty of \$5000.00 on her but in view of the high level of the debt that would serve no purpose. In any

future occasion prosecution action would be taken against her. She was to fill in a form to pay the debt back and recommence that in 14 days.

The Department agrees that this particular case had a poor investigation and says the staff member is no longer employed by the Unit. It says however, that it does not accept that 12 files out of 15,000 is 'any indication of a major problem especially when they did not have all the correct information and would have been handpicked by Advocacy Groups'.

The writer acknowledges the smallness of the sample, reports that she was given a larger sample of files in both offices but chose to restrict her comments to those where there was clearly a full file of departmental activity, obtained mostly via the Official Information Act but otherwise via a paper trail. It is accepted that Beneficiary Advocacy Groups will hold files only where the beneficiary is unhappy with the department's actions and to this extent they will be skewed. However it is also considered that the groups receipt of cases is otherwise random, though geographically limited to areas where there are advocacy groups.

It is also accepted that many files will show more detailed and better quality investigations. (However even on these the difficulty caused by the predominant application of the *Excell* rather than *Ruka* test remains).

Accepting the limitations of this review it remains the writer's view that there are real concerns at the adequacy of the interviews conducted by investigators. It was largely or wholly on the basis of these interviews that decisions were made that beneficiaries were living in relationships in the nature of a marriage.

It is noted that the quality of interviews in the periods at issue – November 1996 – mid 2000 has also formed the basis of criticism from two Chairpersons of the Social Security Appeal Authority.

#136/97 Judge Middleton concluded an appeal which was allowed:

*We make the observation that during this week we have heard two appeals of this nature(63(b) in different districts. In each case the Department has received an allegation from an outside person against the appellant and has thereafter appeared to pursue an investigation with a view to establishing the correctness of that allegation. In neither case did we consider that the Department's investigations have been pursued with the purpose of obtaining a fair decision. It appears to us that in each case the Department has accepted documentary evidence which appears to support the allegation and has acted on that without investigating further the explanations given by the respective appellants. We consider that where the Department has to exercise a discretion which can result in a very heavy penalty for the beneficiary who loses a benefit, the evidence must be examined with great care and all explanations should be investigated and considered before a decision is made.*

Case 86/2000 July 10, 2000. Chairperson Wallace, in allowing an appeal in part:

*There are some unsatisfactory aspects of the record of interview and written statement taken from the appellant. .... the record of the interview does indicate*

*something of a tendency on the part of the investigators to simply ask questions which were focussed on obtaining answers to prove that the x was living with her husband in accordance with a list of indicia rather than a more general discussion to determine the nature of the relationship between (them).*

The Department has also commented that the random sample of 10% of the investigator's work by a senior would have picked up any problems and it does not accept that errors would not be picked up. However these comments from the authority confirm that inadequate investigations were not being picked up by seniors, at least in these cases. These cases would have been reviewed by senior investigators and also by departmental lawyers. If the investigation unit culture included a tendency to accept allegations of others and not independently test explanations then review by a senior would change little. Likewise if the guidelines used were incorrect then review by a senior would change little.<sup>61</sup>.

#### *Admissions and cold call interviews*

As indicated above decisions were and still often are made during or after an investigation which involves only one or two interviews.

The Department's position is that the element of surprise is very important to its ability to obtain a clearer picture of the facts. It says that the client is given every opportunity to give their side as it is a full discussion, and the client has to agree to the interview taking place in the first place. The writer does not share the department's confidence that it is in any stronger position to obtain a clearer factual picture in such circumstances. There has been no opportunity for the beneficiary to prepare ahead for the interview, or to bring into her or his mind all the relevant facts.

Further, cold calling catches beneficiaries off guard, unprepared and without notice. Their consent to the interview cannot be said to be fully informed in these circumstances. When cold calling goes in tandem with an admission from the beneficiary, then the legitimacy of the admission is weakened. Cold calling is still undertaken by investigators on a regular basis but since 2000 they hand a letter to the beneficiary which advises them in writing of their right to defer the interview. Clearly this is an improvement but concerns remain about the fairness and reliability of information collected from persons during cold calls.

Of particular concern in this review are those overpayments established on the basis of an admission following a cold call interview where the beneficiary was shown the Excell indicator list and asked to acknowledge she was in a relationship.

Interviewees advised the writer that a common response was for a beneficiary to say she did not consider she was in a relationship but she supposed, based upon the list, that she must be. This was then considered to be an admission and no further questions were asked. Arrangements were then made for the cancellation of the benefit and/ or the establishment of the overpayment as appropriate.

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<sup>61</sup> The Department comments that the authority has given positive feedback also.

A number of investigators emphasised the consensus style approach they adopt. (though this was lacking in case #4.) They said they were trained to do this. It was said that the indicator sheets were usually used by investigators in the course of their interviews with beneficiaries to jointly determine whether the beneficiary was in a marriage-type-relationship. Other files showed this approach had been taken and officers generally advised it is their modus operandi.

The investigator shows the beneficiary the sheet and they go through the factors together. It must be accepted that the beneficiaries would accept the sheet they were shown as accurately stating the law. In some files reviewed beneficiaries are recorded as saying words to the effect that they had not thought they were in a relationship. On the basis of what was said in the indicator lists and by the officer they sometimes indicated words to the effect that though they did not think they were they supposed they must be<sup>62</sup>.

The fact beneficiaries made admissions after a 'cold call' interview does not assist. Typically the beneficiary will have been approached at her or his home off guard. She or he would have had no time to take advice or to reflect upon the issue and mentally organise all relevant facts. Sometime in the course of the interview the beneficiary would have been told they were at risk of having their benefit cut off, if they were still on it, and a prosecution for benefit fraud, though the officer did have the power to take the lesser step of simply establishing an overpayment. In such a situation the beneficiary is more likely to be compliant and say what they thought the officer wanted to hear. In these interviews the officer often gave an opinion, after discussion, that they thought the beneficiary was in a marriage-type-relationship.

Comments were seen on beneficiary letters about their fear and shock during the interview. Note also Ms Ruka's statements about her fear that the benefit would be cut off and her excessively compliant response.

In all the circumstances set out above it is not safe to accept admissions that a beneficiary was in a marriage-type-relationship as proof of the fact that she or he was in one as defined by law. It is also not safe to accept overpayments established on the basis of one interview with a beneficiary, without there having been further investigation or interview with her. She was in an interview without notice and under pressure. Added to that she was applying her mind to the wrong legal test.

While there is likely to be less error in cases that did not rely on an admission and have been investigated more fully, nevertheless in these cases the investigators were mostly applying the wrong test and so doubt must remain in relation to these files also.

### *Benefit Review Committees*

There was very strong criticism of the Benefit Review Committees by advocacy groups. They were considered to be far from independent. The Department advised

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<sup>62</sup> The Department, via Benefit Control management, comments that in the majority of interviews the elements of relationship are discussed, not as stated on a sheet and that it was not a common response for beneficiaries to say she did not consider herself to be in a relationship but she supposed she must be.

that the Committees have been restructured last year with significant input from Beneficiary Advocacy Groups. These comments relate to the situation prior to that restructure.

Criticisms included that the lay member was said to be 'captured' by the Department because of a lack of comparative knowledge. The person who is appointed usually has no prior knowledge or experience of the benefit system. Some advocates said they have felt constantly dismayed and discouraged by frequent statements made by committee members which showed a predetermination of the issues and an antagonistic attitude towards the beneficiary. One reported a committee member saying she did not accept *Ruka* was right. Some advocates felt they could not win at review. The Department disputed this and said some lay people had built up a very good knowledge and understanding of policy and legislation. It denied there was any predetermination.

Departmental interviewees strongly disagreed with the advocate's perception and spoke of their experience in having their decisions by committees overturned and how annoyed they could feel about it – but that they just had to accept it. It was suggested that the Committees are more likely to be harder on the Department than the beneficiary. The statistics also suggest a greater degree of independence than that perceived by critics. 24% are favourable or partially favourable to the beneficiary.

Nevertheless some of the weaknesses of the Committees are obvious in that there is the potential for bias. Usually one of the members is drawn from the benefit control team at the local office where the investigator who made the decision works as a colleague.

Even if they are not aware of and have not discussed the case beforehand, there is opportunity for them to have done so. With open plan offices the chances of an investigator knowing something of the case are increased. Such an arrangement also places undesirable unconscious pressure on the member who is reviewing the colleague's decision. The Department does not accept this and says there is very little opportunity for investigators to have anything to do with a case that is not their own as they are present in the office at different times. (Because of the nature of their field work).

A high success rate for the Department at the BRC hearing is one of the performance measures for investigators. The Department sees this as proof that they have done their work well beforehand. However this performance measure can also be seen to create unconscious pressure on the two department members of the committee to find against the beneficiary<sup>63</sup>. Again the Department rejects this and says the performance measure is not one that favours underhand behaviour. The writer's point was not intended as a criticism of the integrity of individual employees. There does not need to be underhand behaviour for there to be unconscious pressure influencing decision making.

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<sup>63</sup> They are usually from the same office as the investigator and one from the Unit and so a colleague.

Further the number of overpayments that go to review is tiny. Having reviewed a number of decisions it is the writer's view that the quality of decision making and delivery of reasons is at best patchy and can be very poor. There appears also, to be inadequate understanding of procedural fairness and natural justice.

Beneficiary groups complained that many beneficiaries are discouraged from taking a decision to review by the investigator. Standard letters ask the client to contact the investigator before applying for review. The Department, via Benefit Control Unit, has taken particularly strong exception to these comments and said clients are never discouraged from reviewing departmental decisions.

Another reported concern was that beneficiaries were afraid that they may be disadvantaged by the Department if they sought a review and end up with a penalty or be prosecuted. They felt relieved that the investigator has decided not to prosecute them and so felt the best thing was to keep their head down. Later, when the burden of the overpayments started affecting their day to day life, they were out of time for review<sup>64</sup>. They must seek a review within 3 months of the decision unless there are exceptional circumstances.

## **E A need to refocus towards a dual emphasis in Benefit Crime Initiatives**

It is vital that the integrity of the social security system is protected so that it remains an insurance policy for all New Zealanders when they have lost all other means of support. Protecting its integrity is a two fold task one of which involves ensuring that New Zealanders in receipt of social security are treated with dignity, respect and equality as is afforded all other citizens. The other is to create an effective system to prevent, discourage, detect, investigate and create sanctions for those persons who are engaging in benefit fraud. A balance must always be retained between these tasks. In the pursuit of one the other must not be compromised as to compromise either threatens the integrity of the social security system.

Persons honestly in receipt of social security are invariably caught up in the net cast to detect benefit fraud. For every one person caught doing 'benefit fraud' three other honest persons have been 'dobbed in' and subject to an investigation. The 0800 line also provides an avenue for anyone with a grudge to anonymously subject a person to a benefit fraud investigation.

All aspects of a beneficiary's private life can be opened to the scrutiny of the officer in the investigation process, from how they behaved at a family funeral, to a form they filled in for a school trip, hire purchase, what they spend and where they spend it, who they socialise with, sleep with, have sex with, go on picnics with etc.

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<sup>64</sup> They must seek a review within 3 months of the decision or they are out of time and can only obtain a review in exceptional circumstances

*The Department must be constantly alert to the fact that its wide powers invade other's privacy and are at risk of isolating and marginalising all beneficiaries, including the large majority honestly in need of income support and against whom an allegation has been made. These factors must be taken into account in all benefit fraud investigations, and prevention and detection initiatives. Protections must be built into them.*<sup>65</sup>

## **F More education for prevention needed**

The Department manual speaks of 'blatant fraud' and 'opportunistic fraud'. Those engaging in blatant fraud are prosecuted. This averages at 4%. The other 96% are not prosecuted but nevertheless face severe consequences - their benefit being often being cancelled, and a debt established for the period they are deemed not to have been eligible for the benefit. In some cases they have had a penalty put on top of the overpayment.

These cases are not prosecuted because the Department does not consider that it can prove that they intended to mislead the Department for the purpose of obtaining a benefit. The Department made additional comments that it "does not prosecute huge numbers because of the time and resource needed to take the investigation to Court. All of those engaging in blatant fraud are not prosecuted for these reasons."

Nevertheless there is an enormous gulf between 4% and 96% and it must be assumed that a large majority would never be able to be successfully prosecuted. In many of the files reviewed and in discussions, there was confusion as to where the line was - whether a beneficiary can have a boyfriend at all. Some thought they could for three nights per week. Some who did not receive financial support thought this alone meant they were not in a relationship<sup>65</sup>. Many considered they were still in the stage of 'trailing' a new relationship – but found the Department officer considered them to have already 'entered' into a marriage-type-relationship. Many considered their relationship not to have been serious or committed.

Departmental officers perceive that, where overpayments had been established, the 'offending relationship' started developing 8 or so weeks after the benefit had first been granted. This perception could be developed into some hard data via an analysis of s. 63(b) files where overpayments have been established. The information obtained could then form the basis for a comprehensive education for prevention programme.

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<sup>65</sup> The Department comments that it is aware of its powers and uses them responsibly and clients are treated with dignity and it tries to be as least invasive as possible.

<sup>65</sup> The questions was what was the basis of the financial independence. If there is evidence of a willingness to support should the need arise then the criteria is made out even though there may not be actual intermingling.

The educational information available to beneficiaries as to what is a 'marriage-type-relationship' has always been fairly scant. The most recent pamphlet, published in 2000 and which complies with the *Ruka* test, is even more scant on practical information than previous ones. It is acknowledged that as each case is different the Department cannot be prescriptive. However, case studies are a good means of educating people as to what the practical implications of a law might be.

Besides providing more specific information on relationships there is additional information which would be helpful for women and men raising children alone to have access to. This could include resources for further training and education, violence – what to do etc, parenting assistance, budget advice, assertiveness training – even health education etc. Much of this information would also assist the Department in its mission of putting independence within the reach of all New Zealanders.

It is recommended that the Department develop an education programme for all new beneficiaries in receipt of the domestic purposes benefit, for the primary purpose of ensuring they fully understand what a relationship in the nature of a marriage means. It should involve some educational action at the 8 week stage. It is recommended that such educational material include a series of case studies of marriage-type-relationships so as to better inform beneficiaries where the parameters of the relationship test are.

Consideration also needs to be given to providing further specialist information, particularly on matters relating to violence to women.

## **G Community Relationships**

Good community relationships are vital to the maintenance of the integrity of the social security system.

While the unit appeared to have good staff morale and enthusiasm it appeared to the writer to be somewhat internally focussed. The department has responded that the Unit does 500 community talks per year. It is unknown how many of these are to its 'client' groups. This is the area most in need of relationship development.

A positive and enthusiastic external focus is essential to the necessary dual emphasis in benefit crime initiatives. It is noted that the Blueprint Key Roles includes 'Networking with Service Centre staff, with external agencies and within the community' though this does not appear to be in a current Key Performance Indicator.

There was evidence that some individual investigators have very good relationships with advocacy groups and are well respected. However the overall community relationships appear, at best, patchy. In some areas there appears to be an unhealthy degree of tension and mistrust between the Department and advocacy groups. For example note the comments from central refuge regional hui. Both groups will need to work to improve their

relationships so as to serve the interests of beneficiaries. However, it is for the Department to initiate and work towards better relationships.

Careful thought needs to be given to how the considerable expertise investigators have about relationships and social security issues per se can be used in community networking without endangering the necessary relationship of trust required between them and community members. For example in most situations they will not be able to wear their investigative hat and to do so at the same time as they network will damage rather than assist community relationships.

Beneficiary advocacy groups play a vital role in supporting the Department in the fair and equitable administration of the social security system. They are the only agencies outside of government with a body of expertise in administration of social security. Indeed it was these groups, and not any unit within the Department itself which, three years on, alerted the Department to the fact that all of its documentation contained the wrong legal test for a marriage-type-relationship. Given their vital community role their survival should be supported and fostered. In a co-operative environment they would have a valuable input into training needs and improved policies and administrative practices.

## **H Lack of independent advice and support for beneficiaries**

New Zealand welfare law is very complex. There is only one university law school in the country which teaches it. Very few lawyers practice in this area due to client's lack of means to pay for legal services. Where a lawyer does become involved it is usually on a one off basis and so consequently the lawyer will not be as skilled or experienced or so able to as effectively challenge the Department as she or he will be in other areas of work.

Beneficiary advocacy services generally have developed a high level of expertise in this area and know a great deal about entitlements and the practical application of welfare law to people's everyday lives<sup>67</sup>. However such groups generally exist in cities or large provincial centres and have a precarious financial existence. They have no resources to conduct outreach educational programmes. Where they do exist it is hit and miss as to whether beneficiaries who are experiencing difficulties with the Department find out about their services. Beneficiary advocacy groups say that they deal with only the tip of the iceberg of beneficiaries who experience difficulties with the Department.

## **I Influence of monetary targets for performance assessment.**

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<sup>67</sup> The Department, via Benefit Control management, says that advocates are not all experts – a few only have built up an expertise. There is no evidence that they are dealing with the “tip of the iceberg”. Most clients would be aware of their existence and how to contact them. Advocates do little to acknowledge or assist to stem the problem of fraud.

Monetary targets have been a fundamental part of the culture of the Unit since the restructure of the Department's benefit investigation activities into the 'Benefit Crime Unit' in 1996.

In 1987 when benefit investigation units were first established within the Department the purchase agreement with the government required them to return \$1 for every \$1 spent. Since their restructure in 1996 the value of the dollar return requirement has increased dramatically. That year it was set at \$2 for every dollar spent. In 1998 that figure increased to \$3 for every dollar spent.

Performance pay was introduced based entirely upon the amount of money benefit crime investigators managed to take back from beneficiaries. The culture was not just reflected in performance pay. A 'million dollar' club was open to all investigators who could collect a million dollars or more from beneficiaries in any one year. Investigators who collected this level of money were publicly affirmed and valued by management at the Unit's annual conferences.

It would be wrong to ignore the very real potential this culture had to unconsciously influence investigators when exercising their broad discretions to decide whether there was a marriage type relationship in existence and the date at which it commenced. Such an influence could explain the corresponding dramatic increase in the level of overpayment per beneficiary in s. 63(b) cases since the Unit was established.

The Department says there are good reasons for the increase in performance over this time and these are: restructure and realignment of management, which brought about a clear focus and strategic direction; staff dedicated to Benefit Control; staff mobility and technology capability; staff development, support and training; media campaign and its affects on overpayments; data match being centralised.

It says that the 10% performance payment contributed to driving the targets up. However it believes that the drive for monetary targets, which has always been part of the Unit, does not impact on the integrity of those doing the job and emphasises that it has never been acceptable for quality to be compromised.

These comments do not however relate to the integrity of investigators and no reflection is cast upon them by these comments. The issue is whether a systemic bias is created in favour of the establishment of large overpayments by the predominant emphasis upon monetary targets. Interviews conducted with investigators left the writer with the clear impression the targets were perceived as an operative influence, not necessarily on them as individuals but on others of their colleagues.

In any event there is an inherent serious conflict in setting monetary targets as a performance assessment measure where the performance required is the exercise of a series of statutory discretions as to whether money needs to be collected back from

a beneficiary at all and how much it should be<sup>68</sup>. More so when the discretions are exceptionally wide and the exercise can impact in the most drastic way on adult beneficiaries and their children.

Benefits can be cancelled 'on the day' without any prior review of the employee's decision or prior notice to the beneficiary. Large civil debts are often established against beneficiaries which in many cases will result in them remaining indebted to the Department when they die. Monetary targets were the source of strong criticism from advocacy groups who referred to them as a 'bounty hunting scheme'<sup>69</sup>.

It is a fundamental principal of fairness that a public servant exercising statutory discretion should be free from enticements or encouragement to exercise the discretion in any particular direction. It is critical that the employer not be seen to be providing inducements which could potentially derogate from the duty to be impartial. While a Million Dollar Club may be an appropriate way for a private sector company to encourage its Sales Managers to sell more product it has no place in a core public sector Department which is required to apply and enforce the law in an impartial manner.

Performance should be assessed on the fair and thorough application of the law to the decision making. Consequently the Department should review its Key Performance Indicators.

Last year the emphasis on monetary targets was decreased and quality of work increased. However investigators salary is still set at 10% for performance and 40% of the performance measure relates to reaching monetary targets.

## **J Non allowance for 'Notional entitlement'.**

In many of the overpayments established there has been no allowance made in debt calculation for the fact 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.

Until last year there had been no consistent Departmental practice of deducting from the overpayment what the beneficiary would have been entitled to if she had not been on the domestic purposes benefit. For example, although a beneficiary had been in receipt of a domestic purposes benefit when she was not entitled to one, (as she had commenced a relationship in the nature of a marriage), she may nevertheless have been entitled to a married person's unemployment benefit if her partner was unemployed and not in receipt of a benefit.

The decision whether to deduct 'notional entitlement' from the debt was left up to the discretion of the individual officer. However, in some offices the practice appears to be that no allowance was made for notional entitlement. Within the Department the issue has been a controversial one with strong views expressed on either side. In fact

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<sup>68</sup> Determining the date the marriage type relationship commenced sets the amount of the overpayment.

<sup>69</sup> The Department has commented that this is an emotive term

it appears that probably most officers did not deduct for notional entitlement. If notional entitlement were taken into account then the debt would often be reduced substantially.

By not allowing for notional entitlement the Department is clawing back considerably more money than it would have been entitled to had there been no benefit fraud. In this sense it exaggerates the quantum of the fraud. This is in addition to any penalty that may be added to the debt.

One of the Department's stated reasons for not deducting for notional entitlement up to this year was that any entitlement is untested at the time by an application. It was therefore unsure it had the statutory powers as a benefit cannot be granted retrospectively. The Department has maintained this position in spite of the fact that since 1996 when it put this argument to the Social Security Appeal Authority (13/96) it has been told that it did have the power under section 81 of the Act.

In that case the Authority directed the Department to determine the rate of unemployment and supplementary benefit to which the parties were entitled for the specified periods and reduce the overpayment accordingly. Despite the direction in this and other cases since then the Department has resisted instructing its investigators to do so until mid last year and then not in cases of 'blatant fraud'. Further the said change of policy was recorded in a minute at a management meeting only, there are no published guidelines and there is no auditing as to whether and how it is actually being put into operation.

Hence if a beneficiary had the resolve and support to take an appeal against an overpayment between 1996 and 2000 she or he would have had their overpayment reduced by their notional entitlement, even if they had been unsuccessful in disestablishing the debt. In many cases this will have made a large impact upon the debt. For the vast majority who never reached the Appeal Authority a deduction from their overpayment of the amount they would have been eligible for if they were on the correct benefit has never been made.

In the closely related matter of whether notional entitlement should be taken into account when advising of the amount of benefit fraud for sentencing purposes<sup>70</sup> the High Court took a most unfavourable view of the Department not making allowance for 'notional entitlement'. This of course was in a case of 'blatant fraud'. 96% of overpayments do not constitute 'blatant fraud' and so the equity arguments are presumably stronger. Justice Robertson described the Department's arguments that it did not have the legal power to grant a benefit retrospectively and so could not take 'notional entitlement' into account, as 'semantic purity'.

In that case, *Ioane v Department of Social Welfare* 1994 11 CRNZ489, the Department had advised the court that the debt owing was \$49,956.66. This was the gross amount of payment which had been paid to Mr Ioane for domestic purposes, accommodation and special benefits and included taxation, i.e. the taxation deduction payments made by the Department to the Inland Revenue Department. It

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<sup>70</sup> The severity of the sentence is calculated by the seriousness of the offending. The greater the amount of fraud the greater the sentence handed down by the Court

did not take account of the fact that for relevant periods Mr loane and his wife would have been eligible for a married person's unemployment benefit. Justice Robertson said that the relevant figure was *the amount which was paid, which but for the criminal activity would not have been made.*

Deducting notional entitlement from the debt more than halved it to \$22,668.09<sup>71</sup>. Mr loane was sentenced on the basis of this amount.

He also commented that he appreciated there may be administrative problems in determining what an entitlement might have been but this was: *not a barrier to doing justice in a fair manner. Many exercises required to be taken in administration have difficulties. That is no basis for not grappling with the problem so a fair and equitable solution is found.*

As it has turned out, in a High Court decision released early this year<sup>72</sup> Justice Young has confirmed the Department's contention that section 81(3) does not permit the retrospective crediting of benefits, although he found an alternative statutory route to write off the entire beneficiary debt of \$32,324.39 (s 86(9A)). He found the overall merits of the particular case 'overwhelmingly in favour of the beneficiary.

In relation to the practice of not deducting other 'notional' entitlements he echoed the sentiments of those referred to above when he said:

*My instinctive reaction is that the liability of the beneficiary to the department cannot exceed the extent of the overpayment, that is the difference between what the beneficiary received less the amount that the beneficiary was entitled to.*

It is disconcerting that, from 1996 to 2000 the Department declined to apply the law as articulated by the Authority 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 the beneficiary would have been entitled to other departmental assistance.

In any situation where it felt it had good reason to resist the legal interpretations of the Authority then the proper action was to take a case stated or seek a declaratory judgment from the High Court so as to clarify its legal obligations. Alternatively it could seek parliamentary clarification. Other than that it must, like any other government Department, comply with the law, until the law is changed by a higher court or Parliament.

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<sup>71</sup> This was a sentencing case where the amount of the overpayment was relevant in determining the length of the prison sentence. Having recalculated the debt to take account of notional entitlement and consequently reducing it by half the judge also reduced the prison sentence from 7 months to 3.

<sup>72</sup> On the facts of the case, *Moody v Chief Executive of the Department of Work and Income* No AP 38/00 12 March 01, the department had mistakenly paid the beneficiary the domestic purposes benefit for 2 ½ years. Her son was in the care of the Director General over this time though he spent much time with her also. She had not acted dishonestly and would have had other benefit entitlements had she not been on the domestic purposes benefit. The department was seeking back from her the full amount of \$32, 324.39 representing the 2 ½ years she had been on the benefit. Young J wrote off the entire debt further to section 86 (9A) of the Act. This section allows the Director General a discretion to write-off overpayments arising through no fault of the beneficiary where it is unreasonable to expect the beneficiary to refund the money. The Authority had deducted the amount she would have received further to section 81 of the Act which left her with \$7156 owing.

The Department has responded to these criticisms by saying that its view had been that *loane* is restricted to the assessment of criminality and this is endorsed by the judiciary who are not infrequently heard to tell those convicted that the figure used for sentencing does not mean that the Department is precluded from recovering the total amount. Also the Criminal Justice Act allows a civil action for retrieval of additional amounts. It says that the question for the Department is always going to be weighing up the competing claim of the taxpayer who has been the victim of fraud and entitled to be reinstated to their former position, and the convicted person who may have a large debt to repay. Most New Zealanders seem to favour the former. As an aside it says it has a number of case stated appeals before the High Court on precisely the notional entitlement point.

It is true, as the Department says, that Justice Robertson's highly critical comments of its practice in this area were made in a criminal case and therefore strictly applied only in that area. However they have an obvious relevance and application to the establishment of overpayments where there has not been criminal activity. In fact arguably more relevance due to the absence of criminal intent. Also this does not explain why the Department chose to ignore the Authority but take no other action to clarify the law for over three years.

The comments do not address many other aspects of this important issue. First is the matter of simple fairness which has been raised by the authority and courts as well as other community groups several times in recent years. It seems this has fallen on deaf ears. Second it overlooks the fact that by not allowing for notional entitlement the taxpayer is being placed in a *better* position than they would be in if the overpayment had never accrued. This is not a matter of giving back to the taxpayer what the taxpayer has had taken from him or her but actually giving back more than what was taken.

Third, most overpayments which are accrued are *not* accrued as a result of fraud. The Department prosecutes only 4% of such cases for fraud. It suggests, the actual figure is higher but it lacks resources to prosecute more. Be that as it may there is a large difference between 4% and 96%. The large majority of overpayments will not be able to be said to have involved criminal fraud. Fourth, many 'debts' will never be paid back in the beneficiary's lifetime due to the size of them in relation to the relative income of the beneficiary. In these circumstances the taxpayer is not going to receive the money in any realistic sense. There is a real risk that such overpayments serve to maintain a person in poverty so they remain a greater burden to the taxpayer in the long term in any event.

Finally is it right that the Department takes upon itself the assessment and decision as to how 'competing interests' of beneficiaries versus taxpayers should be weighed. This seems to be a matter which belongs with the elected representatives.

There are difficulties in establishing an administrative system which allows for notional entitlement. Nevertheless this is no reason not to embark on the exercise. In fact it is understood that, in the months prior to the decision of Young J, the Department had developed a policy of allowing for notional entitlement in calculating overpayments. In relation to the Department's advice that there are a number of case stated appeals these are also acknowledged. However this is 2001, some 5 years since the first Appeal Authority decision ruling that notional entitlement should have been deducted. Between then and now the Department continued to act as though the decision had not been issued.

While the *Moody* decision makes it clear the Department cannot now, under the current statute, retrospectively assess other entitlements, the situation remains that a number of beneficiaries had overpayments established against them up to this time, which did not take account of any other entitlement they would have had when the Department could have taken account of it. The level of their debts would have been significantly reduced in many cases.

There is nothing in the *Moody* decision which can be taken as supporting the fact the statute makes no allowance for retrospective crediting of other entitlements. In fact his intimation indicated otherwise. The court notes the extreme complexity of section 81 of the Social Security Act. Young J comments on other anomalies and makes the comment that the problems that had been thrown up in this and other cases may point to the desirability of a general tidying up of the relevant statutory provisions.

The writer endorses these comments but recommends specifically that the policy issues relative to notional entitlement be assessed on an urgent basis with a view to clarifying section 81 via legislative amendment to provide the Department with the clear power to take account of the entitlement the beneficiary would have had to any other benefit, and it places an obligation upon the Department to do so. That the amendment apply retrospectively to those decisions which it is recommended, under this review, be reviewed.

## **K The level of overpayments**

Currently large numbers of beneficiaries are indebted to the Department for considerable amounts of money. Since 1995, 20,905 beneficiaries have had overpayments established against them because they were considered to be in relationships in the nature of a marriage. Last year the average overpayment per beneficiary found to have been in a marriage-type-relationship was \$10,876.10. Many debts are over \$50,000. Some are well over \$100,000.

At these debt levels many people will be indebted to the Department until they die. Even when they return to the workforce it is unlikely most will be able to free themselves of the debt for many years, if not for their lifetime. The only way for many beneficiaries, realistically, to be free of the debt would

be to become bankrupt, though as the Department has pointed out even here this may not always prevent the department from recovery.

A disconcerting feature of the level of debt is the fact that the average overpayment per beneficiary has increased by 63% in 5 years. It was \$6733.05 per beneficiary in 1995. The debt accrues from the date the relationship is deemed to be marriage like and the length of time between that date and the investigation or the date it ended. It is not clear why the level of overpayment should rise in s. 63(b) cases so drastically in 5 years.

It may be simply the result of more rigour in the investigations than there used to be. Also the practice of facilitation appears to have ceased during this period though it is still referred to in the manual. In facilitation a woman was given a small trial period to decide if her relationship would become one in the nature of a marriage. This may have served to increase the overpayment. However the unconscious influence of monetary targets and performance measures based upon them cannot, unfortunately, be discounted either.

The practice of accruing large debts for people with no means of paying them back in the foreseeable future is quite at odds with how the courts apply the principles of reparation to persons convicted of a criminal offence.

Departmental officers advised the writer that reparation orders are no longer sought from the courts when they prosecute beneficiaries for benefit fraud. Reparation orders are an aspect of fairly recent policy initiatives in the Criminal Justice System and reflect society's desires to recognise and meet the needs of the victims of crime. Under section 22 of the Criminal Justice Act 1985 the courts can require persons convicted of criminal behaviour to 'make reparation' to the victim for the loss suffered as a result of the criminal behaviour.

The reason the Department does not seek reparation orders against convicted beneficiaries is that as that they have more effective systems for obtaining reparation than the Justice Department has in enforcing court orders. In particular the Department has the power to deduct money from a beneficiary's benefit and that can be arranged via a simple internal administrative process. Likewise, there is the power to place attachment orders on wages of a person if they are working. That can also be done internally.

Hence without seeking a reparation order from the Court, the Department has the powers and facilities to claim back from a beneficiary or former beneficiary the full amount of an overpayment – whether it be \$1000, or \$100,000. The Department has a civil debt unit which manages the debts which beneficiaries and former beneficiaries owe it.

If the Department were to follow the approach which the Courts take in ordering 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 consistent 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.

The principles under which the discretion to make a reparation order should be exercised are set out in s 22. An order can be made where, among others, there has been 'loss or damage to property' as a result of the offence. Before making the order the court must be satisfied as to the 'value' of the loss or damage which is to be limited to the 'cost of replacement'; 'the means of the offender'; the 'nature and extent of the of the offender's existing financial obligations and the maximum amount that the offender is likely to be able to pay under a sentence to make reparation. Where an offender has insufficient means to pay the total value of the loss the court may direct the offender to make reparation for a lesser amount.

In *Rihari v Department of Social Welfare* CRNZ 1991, the High Court quashed a District Court reparation order against a convicted beneficiary that she pay the Department \$81,169.89 at a rate of \$15.00 per week. It substituted an order for \$1,500.00 repayable at the rate of \$10.00 per week. Justice Anderson had this to say of his decision:

*The appellant is now 39 years of age. The reparation order would be finally satisfied when the appellant would have a century of years in her sights. In R v Hooker unreported, 6 August 1990, CA 88/90, the Court of Appeal noted the inappropriateness of a reparation order which the malefactor was in no position financially to meet but where there would be exposure to enforcement procedures for non-payment of any instalment.*

*I take the view,...that the authority of the law is not necessarily maintained by the making of orders which cannot realistically be capable of compliance. Nor is it appropriate, in modern terms that people should effectively be bonded debtors throughout their lives. This is a case where a reparation order was appropriate, as a vehicle of compensation to the community which has suffered the dishonest deprecations of the appellant, particularly since instalments payable under the reparation order are presently automatically deducted from a welfare benefit received by the appellant, but the amounts to be repaid and the quantum of instalments should be realistic; it should be a reminder to the appellant, for an appropriate time, of the dishonesty she evinced.*

The Court of Appeal expressed similar sentiment in *Ruka*. Upon conviction Ms Ruka had been sentenced by the District Court to 150 hours community service and directed to make reparation of \$44,759.93 at the rate of \$10.00 per week. The sentences had no effect once the decision had been quashed but nevertheless critical comment was made in the majority judgment of the Court of Appeal about the existence of the reparation order. It was said to be inappropriate:

*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.*

While there is provision in the Criminal Justice Act for action for the recovery of a civil debt to continue, despite a reparation order for a lesser amount, it is disconcerting, in view of the strong views expressed by the High Court and Court of Appeal that the Department would continue to recover full overpayments from beneficiaries when there is no realistic prospect of payment within a very few years and many will be 'bonded debtors' for the rest of their lives. It is disconcerting that the Department continues a practice, without recourse to the Courts, when it appears that the Courts themselves would be likely to refuse to do it for them.

Further it must be kept in mind that the vast majority of persons against whom the overpayments have been established have never been prosecuted for benefit fraud. The Department has made a decision it would not be able to prove the necessary intent to commit fraud. Many are persons who 'drifted into' situations. Their crimes is described in the manual as 'opportunistic' rather than 'blatant' .

Further, where training is concerned, police practice may not be the most appropriate model to learn from. Police investigations are different to Department of Work and Income benefit crime investigations. Police investigations lead onto either a prosecution or the matter not being proceeded with. In contrast the vast majority of Department of Work and Income investigations do not lead to prosecutions but, a quarter have serious consequences - a debt being established against the person and often a benefit cancelled<sup>73</sup>.

It is also difficult to see how such a policy of establishing overpayments is advancing the Department of Work and Income mission of 'putting independence within the reach of all New Zealanders'.

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<sup>73</sup> The Department comments that "for every one person found to be caught with benefit fraud three others are investigated. For these three there is found to be no evidence to support the allegation".

## 11 Recommendations

### Introduction

Recommendations are made further to terms 2.4, 2.5 and 2.6 of the Terms of Reference. Recommendations 12 – 15 made at I, J and K raise issues which are not, strictly speaking, within the Terms of Reference. However, issues relative to them arose during the course of the review and I consider it important to formulate recommendations in respect of them.

The principal recommendation is that all decisions taken by the Department to establish overpayments against beneficiaries on the grounds that they were living in a marriage-type-relationship, between November 1996 and December 2000, be reviewed to ensure the evidence satisfies the *Ruka* legal test. The exceptions are those cases where the case went to the Social Security Appeal Authority or the beneficiary was prosecuted for benefit fraud.

It has been a combination of factors, all arising in the course of this review, which has led the writer to the conclusion that, of necessity, all such decisions are reviewed. At the heart of the matter are two key factors. First is the fact that the decision in *Ruka* was not an incremental change to the marriage type relationship test but a significant change. Second is the fact that decisions made that a beneficiary is or was in a marriage-type-relationship have far reaching effects on that person.

The principal influencing factors upon the conclusion that decisions should be reviewed are:

- The failure of the Department between November 1996 and mid 2000 to amend any of the staff manuals, guidelines or informational resources to reflect the correct legal test to be applied when determining whether a beneficiary was living in a relationship in the nature of a marriage,
- The failure of the Department after November 1996, to provide any written notification or documentation at all to benefit crime investigators specifically that their investigative practices and assessments had to be altered to reflect the legal changes.
- The absence of further training after November 1996 of benefit crime investigators about the changes the *Ruka* decision made upon their marriage type relationship investigations,
- The absence of any training at all on the nature of violence to women and how that might be recognised and related to benefit entitlement
- The lack of adequate legal oversight of the operations of the benefit crime unit from its inception to mid 2000 and the lack of adequate checks and balances on decision making up to 2000.
- The fact that, though the sampling was small, the review of files and interviews with departmental employees and beneficiary advocacy representatives disclosed strong evidence that the incorrect legal test had been applied.

There are other minor influencing factors which include:

- The predominant culture of the benefit crime unit from its restructure in 1996 to mid 2000 which valued and rewarded investigators on the basis of the level of monetary overpayments they established against beneficiaries.
- The general lack of independent advice and support for beneficiaries to challenge the decisions made, particularly outside main centres.

There is no present concern that the incorrect legal test is being applied. Considerable changes have been implemented throughout 2000 to strengthen the reliability and robustness of decision making in this difficult area of social security administration. The failures listed above are systemic ones and the writer does not suggest any deliberate wrongdoing on the part of any of the Benefit Fraud Investigators employed over the time at issue.

The Department's responses to the draft report are included in the body of the report. Some matters reported upon which impact upon the manner in which the Department undertakes investigations and prosecutions of marriage-type-relationship cases<sup>74</sup> also raise wider systemic issues as to how the Benefit Control Unit operates both internally and externally.<sup>75</sup> That said, the difficult and highly discretionary nature of marriage-type-relationship investigations requires particular ongoing care to ensure there are adequate checks and balances upon decision making.

## **A The soundness of overpayments established between October 1996 and December 2000.**

- 1 That the Department undertake a review of the basis of the decisions to establish overpayments further to section 63(b) of the Act, in all cases decided between 1 November 1996 and December 2000 except where the beneficiary has been prosecuted or an appeal considered by the Social Security Appeal Authority.

The review to consider whether the prerequisite factors of financial interdependence and emotional commitment had been established satisfactorily in each case and whether violence, where it was evident, had been assessed against those factors. The review also to consider and deduct any 'notional entitlement'.

The reviews to involve notification to beneficiaries and consultation with them where additional facts are required before assessment can be made.

## **B Application of the incorrect legal test**

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<sup>74</sup> Term of Reference 2.5

<sup>75</sup> The are reported on further to Term of Reference 2.6

- 2 The Department continue to update all staff resource documentation so as to give clear instructions to staff as to the correct legal test for a marriage-type-relationship. This will state clearly and unambiguously that there are essential requirements, which are financial interdependence, (meaning actual or a willingness to support if the need arose), co habitation and emotional commitment. Reformulated checklists can still be included in the context of identifying whether these essential requirements have been made out. In particular:

- The present indicator list must be amended as above.
- The draft chapter on conjugal status – September 2000 – should include a separate heading for Violence in a Relationship.
- Consideration is given to amending the relationships pamphlet to add case studies so as to give greater assistance to beneficiaries to understand what a Marriage-type-relationship might be.

- 3 That all staff resource documentation is independently audited on a regular basis to ensure compliance with legislation and with relevant rulings of the Social Security Appeal Authority and the Courts.

**C Taking account of Violence to Women in benefit fraud investigation and benefit entitlement decisions**

- 4 That training of all investigators be undertaken and that such training be prepared and delivered with the input of experts in the field. The training would be for the purposes of assisting staff to:

- Appreciate and understand the dynamics of domestic violence, particularly the power and control dynamic, which incorporates battered women's syndrome theories, and financial abuse as a characteristic of violence.
- Recognise signs and symptoms of a beneficiary who is experiencing domestic violence.
  - Assess whether there has been a marriage-type-relationship where violence has been present.
  - Understand Departmental policy in respect to handling of cases where violence to women is evident.

- 5 That the Benefit Control Unit develop a policy relating to the handling of investigations where there is suspicion or knowledge that violence is an aspect of the relationship. It is recommended that such cases either be directed to a senior investigator to determine if a marriage-type-relationship exists or a senior supervises all such investigations.

This policy would also provide that in all cases where violence has been a feature of the relationship the investigator must provide details of resources for the beneficiary including refuge contact details; counselling contacts, parenting support contacts, etc.

- 6 That all regional departmental offices establish a regular and ongoing liaison with local Women's Refuges so as to jointly review administrative practices in

their areas relative to issues affecting beneficiaries who are victims of domestic violence. Consultation also takes place with the National Collective of Independent Refuges Head Office where national policies and protocols need developing.

## **D Weaknesses in the checks on decision making**

Recommendation –

- 7 That more robust checks and balances continue to be put in place to check the soundness and fairness of investigator decision-making. Specifically:
  - (a) A senior investigator audit of all files where an overpayment of over \$4000 <sup>76</sup>is established.
  - (b) A monthly random 10% audit continue to be conducted by a senior of all other files.
  - (c) A benefit not be cancelled until a senior investigator has reviewed the file and the beneficiary accepts the decision made. Otherwise cancellation occur only after Benefit Review Committee review of the decision.
  - (d) That provision be made for urgency for Social Security Appeal Authority hearings once a benefit has been cancelled after review.
  - (e) The practice of cold calling be replaced by a system which notifies beneficiaries in writing of an appointment for an interview. The letter should advise that inquiries about benefit entitlement will be made at the interview and there is a right to bring an advocate or support person. Only in circumstances where the beneficiary does not respond should cold calling be undertaken.
  - (f) The letter notifying the beneficiary of the decision that a marriage-type-relationship was in existence, what the overpayment is and how much per week it is to be paid back should have enclosed with it an easy to read pamphlet setting out how to take a review, what happens during it and contact details of local advocacy groups.
  - (g) That legal training modules are developed and all members of the Benefit Control Unit undergo regular legal training based upon them. Topics should include the impact of decisions of the Social Security Appeal Authority and courts, and concepts such as natural justice and fairness.
  - (h) That the statutory power of the Department to impose a monetary penalty on a beneficiary be repealed. These punitive measures should

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<sup>76</sup> This figure is close to the median.

be administered in a court system where there are inherently stronger checks and balances in the administration of justice.

- (i) That an independent complaints officer be appointed to deal with complaints against the Department of Work and Income similar to the Insurance and Banking Ombudsmen, the current external agencies responding too slowly to be effective.

#### **E A need to refocus towards a dual emphasis in benefit Crime Initiatives**

- 8 That in its activities in the areas of benefit fraud investigations, staff training and community education it maintain a dual focus. This requires attention to the need to ensure all New Zealanders in receipt of social security are treated with dignity, respect and equality with other citizens as well as the need to create an effective system to prevent, discourage, detect, investigate and create sanctions for those persons who are engaging in benefit fraud.

#### **F More education for prevention needed**

- 9 That the Department develop an education policy and programme specifically for s. 63(b) benefit fraud prevention and take proactive steps with beneficiaries to ensure clearer knowledge of the boundaries of a relationship.
- 10 That the Department develop a well-publicised model based on the 'facilitation' process, as recorded in its manual, whereby beneficiaries commencing relationships are 'facilitated' through the transition from the benefit.

#### **G Community Relationships**

- 11 The Department initiates regular consultations with a view to building a co-operative approach with community groups to the administration of social security system. Particular attention be paid to relationships with specialist beneficiary advocacy groups and women's refuges.

#### **H (No recommendations)**

#### **I Influence of monetary targets for performance assessment**

- 12 That Key Performance Indicators be altered to focus on quality of investigations undertaken. Monetary target incentives be disestablished.

#### **J Non allowance for Notional Entitlement.**

- 13 The policy issues relative to notional entitlement be assessed on an urgent basis with a view to clarifying section 81 via legislative

amendment to provide the Department with the clear power to take account of the entitlement the beneficiary would have had to any other benefit when assessing an overpayment. Further that it places an obligation rather than a discretion upon the Department to do so and that it apply retrospectively to those decisions which it is recommended, under this review, be reviewed.

**K The level of overpayments**

- 14 That the Department develop a policy in relation to “debt burden” which removes the life time indebtedness which thousands of its beneficiaries, are currently living with. That it uses, as a guide, the principles underlying the concept of ‘reparation’ in the Criminal Justice Act and as enunciated by the judiciary.
  
- 15 At the same time, as a matter of fairness and justice, it bring before the Courts for prosecution all cases of blatant fraud, where persons can be appropriately tried and if convicted, sentenced.

Frances Joychild  
Barrister  
18 June 2001

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