



Report

Date: 2 July 2021

Security Level: IN CONFIDENCE

To: Hon Carmel Sepuloni, Minister for Social Development and Employment

This report contains legal advice and some content which is legally privileged. It should not be disclosed on an information request without further legal advice.

Review of MSD's information gathering powers in Schedule 6 of the Social Security Act 2018

Purpose of the report

- 1 This report outlines our findings on Schedule 6 of the Social Security Act 2018 (in response to the Privacy Commissioner's recommendation that the Ministry of Social Development (MSD) review the legislation) and recommends no immediate change to Schedule 6.

Executive summary

- 2 In October 2018, the Office of the Privacy Commissioner (OPC) started an inquiry into MSD's use of its statutory powers in Schedule 6 of the Social Security Act 2018 when investigating fraud (section 11 of the Social Security Act 1964 at the time of OPC's inquiry). OPC publicly released their final report on 16 May 2019. In the report the Privacy Commissioner stated that Schedule 6 powers are wide, potentially intrusive and lack judicial oversight and recommended that MSD review the legislation.
- 3 We have identified three possible options to respond to the Privacy Commissioner's concerns.
 - 3.1 Focus on the Code of Conduct which governs the Schedule 6 powers as the most effective approach to support our practice.
 - 3.2 MSD becomes an enforcement agency under the Search and Surveillance Act 2012 (SaSA) (which means it can issue production orders which have judicial oversight).
 - 3.3 MSD uses production orders but does not become an enforcement agency.
- 4 We believe that focusing on the Code of Conduct is the best way forward. The Code has been developed in consultation with the OPC and outlines the processes and checks and balances that must be used by fraud staff. We have already updated and strengthened the Code. This included a range of changes to strengthen internal oversight and processes and procedures. The use and updates to the Code is also supported and underpinned by new ethics and assurance frameworks.
- 5 OPC have suggested that MSD should become an enforcement agency under the SaSA. They believe this is necessary to provide judicial oversight of MSD's fraud investigations.
- 6 9(2)(h)


- 7 Our current Code includes that the practice and application of the Code is regularly reviewed by an external and independent auditor/reviewer. We will review the new Code within 12 months, and then continuously every three years. The reviews would indicate whether there would be any value in making any changes to Schedule 6 in the future.

Recommended actions

It is recommended that you:

- 1 **note** that the Ministry of Social Development has updated and strengthened the Code of Conduct, alongside developing an ethics framework, an assurance framework and developing and updating policies, procedures, guidelines and training
- 2 **agree** to not make any changes to Schedule 6 of the Social Security Act 2018 at this stage
- 3 **note** that future reviews of the Code of Conduct will indicate whether there would be any value in making any changes to Schedule 6 of the Social Security Act 2018 in the future.

Agree/Disagree


Hayley Hamilton
General Manager
Employment and Housing

02/07/21
Date


Hon Carmel Sepuloni
Minister for Social Development and
Employment

25/7/21
Date

The OPC has investigated MSD's information gathering powers

- 8 In October 2018, OPC started an inquiry into MSD's use of its statutory powers in Schedule 6 (section 11) of the Social Security Act 2018 when investigating fraud. OPC publicly released their final report on 16 May 2019. OPC stated that MSD:
- issued too many section 11 notices
 - exercised a blanket policy of approaching third parties
 - collected information that appears to have no relevance to fraud investigations.
- 9 In the conclusion to the report the Privacy Commissioner expressed concern at 'the wide scope of section 11 powers, which stand out among public sector agency powers for their potential intrusiveness and lack of judicial oversight'.
- 10 The Privacy Commissioner's statement indicates that his view is that Schedule 6 puts too much power in the hands of MSD and that this power cannot be sufficiently regulated by a Code of Conduct. Consequently, in a letter to the Chief Executive of MSD in October 2020 he suggested that we use production orders¹ under the SaSA when making requests for telecommunications and banking information (OPC did not suggest this in the Inquiry report).
- 11 To respond to this recommendation we undertook to assess the powers MSD has under Schedule 6, outline how the current provisions function to provide safeguards, assessed what powers are provided to other agencies, and looked to comparable agencies in overseas jurisdictions (our findings are presented in detail in Appendix 1).
- 12 In summary we found that:
- Schedule 6 provides that MSD can compel information release through notices issued from within MSD. The Schedule 6 information gathering powers are governed by a Code of Conduct.
 - There are a number of safeguards in the Bill of Rights Act, the Social Security Act 2018, the Public Service Commission guidelines and information privacy principles which limit use of the Schedule 6 power.
 - Some government agencies can also compel information release through notices issued from within the agency, while others must use court orders in the form of search warrants or production orders. Some agencies use mostly voluntary provision of information.
 - The powers in Schedule 6 are not unusual in the context of other agencies' powers both here and overseas.

The Ministry is working to address OPC's concerns

- 13 MSD has developed a three-tier approach to fraud management consisting of:
- Early Intervention (making it easier for clients to do the right thing)
 - Facilitation (providing clients with an opportunity to do the right thing)
 - Investigation (protecting the integrity of the benefit system).
- 14 On 15 April 2019, we implemented changes to fraud practices to ensure that we are only requesting information from appropriate third parties, that requests are appropriately focussed and that when information is collected only relevant

¹ The production order regime was introduced when the SaSA came into force. The SaSA provides an 'enforcement officer' with the option of applying for a production order instead of a search warrant. The regime provides a streamlined process for obtaining documents that are evidential material in an investigation.

information is retained. These changes addressed some of the key issues OPC identified.

- 15 On 13 May 2019, we implemented the OPC's first recommendation, which was to change the Ministry's policy concerning approaching third parties directly before making requests to clients for high risk cases. We now make a case-by-case decision against defined criteria before going to third parties, otherwise we will go to the client first. We record the rationale for this decision in a specifically created note in our investigation system that enables us to monitor and report on the application of the new policy.
- 16 The actions above responded to the highest priority recommendations from the OPC's Report and made immediate changes to address core issues raised. Subsequently, a Client Information Management (CIM) project was established to deliver on the remaining recommendations from the OPC's Report, to monitor whether these have been implemented as intended, and to manage our operational response to the Report. The CIM project is divided into a number of work-streams:
 - develop an overarching Ethical Framework for the conduct of Fraud Investigations
 - a review of the Code of Conduct
 - develop policies, standards, guidelines and training
 - develop an oversight and assurance approach to ensure that once the above points are implemented the practices are consistent with expectations
 - revise the allegation triage process, in particular review the use of the Decision Support Tool
 - review the Schedule 6 power under the Social Security Act.
- 17 On 1 March 2021, we implemented a new Code of Conduct, supported by an ethical framework, policies, standards and an assurance framework. We have also implemented new sign-off procedures for the issuing of Schedule 6 notices under which sign-off must be at a minimum of manager level. Our Information Privacy and Security team also conduct additional checks of higher risk cases (the new procedures are detailed in Appendix 2 and a summary of the Ministry's response to OPC's recommendations is in Appendix 3).

Options to respond to OPC's concerns about Schedule 6

- 18 As noted above and in Appendix 1, the powers in Schedule 6 are not unusual in the context of other agencies' powers (paragraphs 14 – 18 of Appendix 1 discusses the powers of other comparable agencies). In addition, we have not identified any specific problems with Schedule 6 that would meet the threshold for changing legislation. Despite expressing concern about Schedule 6 powers, OPC's report also does not identify any specific issues with the legislation.
- 19 OPC recommended that the review of Schedule 6 should be undertaken "in light of developing legal and administrative precedents". We have looked at relevant court decisions and found that these impact the Code of Conduct more than the powers contained in Schedule 6.
- 20 We have identified three options to respond to OPC's concerns:
 - Option 1: Focus on strengthening the Code
 - Option 2: MSD becomes an 'enforcement agency' under the SaSA which means we can issue production orders.
 - Option 3: MSD uses production orders but does not become an enforcement agency.

We recommend focusing on the Code of Conduct

- 21 We consider that focusing on the Code is the best way forward. We have already implemented a revised Code. Future changes to the Code can be achieved relatively quickly and easily (the Social Security Act enables the Chief Executive to review and issue a new Code in consultation with the Privacy Commissioner). As noted above, the new Code was accompanied by ethics and assurance frameworks as well as updated policies, procedures, guidelines and training. We have already made changes to policy and practice which significantly address the Privacy Commissioner's concerns.
- 22 In addition, the Code is the most appropriate area for change because information collection concerns details or technical matters which may need regular updating. One of the Privacy Commissioner's key concerns was that the Code has not kept up with the scope and availability of personal information able to be collected by the Ministry.
- 23 Our assurance plan includes an external independent review of the process and outcomes of MSD's internal review of the Code which includes consultation with the Privacy Commissioner. It is also a requirement in the new Code that it is reviewed 12 months after it comes into effect and then at three-yearly intervals. These reviews will indicate whether there would be any value in making any changes to Schedule 6 in the future.
- 24 Our view is that updating and strengthening the Code, alongside development of an ethics framework, an assurance framework and developing and updating policies, procedures, guidelines and training comprehensively addresses the Privacy Commissioner's concerns.

OPC recommends MSD become an 'enforcement agency'

- 25 OPC want more judicial oversight of our decisions. They are concerned that the Code has not kept up with legal precedents and information technology developments. They are also concerned that we do not have the right mechanisms in place to ensure that we are complying with the Code.
- 26 Consequently, OPC have suggested that MSD should become an enforcement agency under the SaSA (option 2). Under option 2, MSD could generally collect information on a voluntary basis using the provisions of the Privacy Act 2020 (the Privacy Act). If this approach does not produce the required information and where the Ministry believes there is benefit fraud occurring, then the Ministry could have access to coercive powers under the SaSA to issue production orders which would have judicial oversight.
- 27 For MSD to be an enforcement agency that can apply for production orders, we would need a legislative search power (ie an MSD enforcement officer may obtain and execute a search warrant to search for evidence of an offence against the Social Security Act 2018). That search power would then need to be included in the Schedule of the SaSA.
- 28 Use of production orders would be resource intensive for MSD and the Courts. The inclusion of MSD as an enforcement agency may also create friction between Schedule 6.2 and the search power, as well as impose additional requirements on MSD concerning the use of search and surveillance powers. This would result in further work being required in order to assess when and how to use the power and developing new reporting processes.
- 29 A legislative change would be required to include MSD in the SaSA. The SaSA is administered by the Ministry of Justice so the change would need to be made using a Ministry of Justice bill. The Ministry of Health (MoH) informed us that they have been attempting to become an enforcement agency for some time without success.

- 30 Classifying MSD as an 'enforcement agency' might also be seen as a negative approach given the direction we are moving towards with welfare overhaul and Te Pae Tawhiti².

It is not practical for MSD to use production orders without becoming an enforcement agency

- 31 Under option 3, MSD would use production orders but not become an enforcement agency. This would mean that we would have to obtain production orders through the Police. This is a time-consuming process which is unlikely to be practical given the volume of cases we work with.
- 32 The options are summarised in the table below.

Option	Comment
Option 1: Focus on strengthening the Code	Recommended option. MSD implemented a new Code on 1 March 2021, as well as new ethics and assurance frameworks. The Code is appropriate for details or technical matters that need to be updated on a regular basis. The Code will be reviewed every three years.
Option 2: MSD becomes an 'enforcement agency' under the SaSA which means we can issue production orders.	Provides judicial oversight. Resource intensive for MSD and the Courts. Would require legislative change. Could be seen as inconsistent with MSD's focus and direction. Introduction of enforcement activities in an agency has wide reaching operational impacts.
Option 3: MSD uses production orders but does not become an enforcement agency.	Provides judicial oversight. MSD's ability to compulsorily collect information would be restricted because we would have to go through Police to get production orders (which could take up to six months for each order). This would not be practical given the volume of cases MSD works with.

Consultation

- 33 We have consulted with the following agencies: Inland Revenue, the Commerce Commission, the Financial Markets Authority, Ministry of Business, Innovation and Employment (MBIE), the Serious Fraud Office, New Zealand Police, MoH, ACC, Crown Law Office and the Office of the Privacy Commissioner. We also consulted with the National Beneficiaries Advocates.

Crown Law advice

- 34 Crown Law have provided the following advice:

9(2)(h)



² Te Pai Tawhiti is MSD's strategic direction.

9(2)(h)

35

36

Next steps

- 37 We will report back to you should reviews of the Code of Conduct indicate that there is value in making any changes to Schedule 6.

File ref: REP/21/7/698

Appendix 1

Schedule 6 gives MSD relatively wide information gathering powers

Schedule 6 powers do not have judicial oversight

- 1 MSD collects personal information about its clients in three main ways:
 - directly from the client on application forms or during interviews
 - through informal inquiries made of clients or of other people with authorisation of the client
 - by using statutory powers.
- 2 Under the statutory powers in Schedule 6 (6.2) any person may be required to provide, without charge and within five days of a written request, any information, documents, or records to enable the Chief Executive of MSD to:
 - determine a person's claim for, or past or present entitlement to, a benefit or payment (including the rate that is or was applicable), or entitlement card
 - conduct, review or check certain means assessments
 - determine the amount a person is required to pay towards the cost of home-based disability support services supplied to that person
 - establish the financial circumstances and location of someone who owes a debt under the Social Security Act, the Child Support Act 1991 or under a maintenance order; or
 - carry out any functions concerning any benefit or welfare programme.
- 3 There is no judicial oversight for written notices issued by MSD.

Schedule 6 powers are governed by a Code of Conduct

- 4 In 1997, Parliament recognised that the powers given to MSD to compulsorily obtain information can be intrusive and decided that they should be balanced with a Code that governs the way in which those powers are to be exercised. The Code is legislated for in schedules 6.8 to 6.12.
- 5 The 1997 Social Security Amendment Act set the requirement for a Code and ensured that it included:
 - that in all cases where the Ministry initiates a section 11 investigation after a benefit has been granted, the Ministry must first seek the information from the beneficiary
 - that the Ministry must notify the beneficiary before making requests to third parties and allow the beneficiary time to provide verification details or to consent to the Ministry making requests to verify information provided by the beneficiary, unless to do so would prejudice the maintenance of the law, or it would not be practicable to do so.
- 6 The first Code was developed in 1998. The Code is treated as though it were a code of practice issued under Part 6 of the Privacy Act and failure to comply with the Code is deemed to be a breach of the Privacy Act. The Code does not affect the rights that MSD officers have to ask for information from any person (informal requests). Informal requests must comply with other laws such as Information Privacy Principles 1, 3, and 4 of the Privacy Act.
- 7 The Code provides that information should first be sought through a 'preliminary request'. This is an informal process which gives beneficiaries the opportunity to provide the information themselves rather than having it sought from others. This provides some privacy protection as well as ensuring that the beneficiary is kept informed about the enquiries being made about them. There is no legal obligation to comply with a preliminary request (although Schedule 6.1 imposes a duty to answer questions asked by MSD relevant to benefits). If the beneficiary does not provide the

information after a reasonable time MSD can give a schedule 6 notice to a third party who holds the information.

- 8 The Code also provides that authorised staff may obtain information only when they are permitted to do so by law, and they are obliged to maintain the security and confidentiality of all information that they receive as a result of their duties. Information cannot be disclosed to other agencies except where required or permitted by law and any staff making unauthorised requests or disclosures of information would be subject to disciplinary action and possible criminal prosecution.

In 2012, changes were made to the Code to speed up investigations

- 9 In 2012 the Associate Minister for Social Development advised Cabinet that the Code could lead to significant delays in investigations. Cabinet agreed that officials make amendments to the Code to speed up the process for fraud investigations. This was done by simplifying the 'maintenance of the law' definition in the Code so that it could be used more widely for fraud investigations.
- 10 OPC's view at the time was that simplifying the definition of maintenance of the law did not affect the legal rights of individuals and said "The Ministry will still need to demonstrate that application of the provision would be likely to prejudice the prevention, detection etc. It is not sufficient to argue that the investigation prosecution etc is taking place." OPC also said in relation to FAQs drafted for the change: [the FAQ] "must not represent the change in definition as a change to the Ministry's legal obligations or as legally enabling changes to the Ministry's practice."

There are safeguards on the use of Schedule 6 (in addition to the Code)

- 11 There are several safeguards in legislation and SSC guidelines which limit use of the Schedule 6 power. These safeguards, which operate alongside the provisions in the Code of Conduct, are:
 - the information privacy principles - for example information privacy principle 4, information must not be collected by unfair or unlawful means
 - the Social Security Act - evidence obtained from illegal questioning can be excluded
 - the Bill of Rights Act (BORA) - Section 21 of the BORA provides that everyone has the right to be secure against unreasonable search or seizure
 - SSC Information Gathering Model Standards which provide a set of expectations for government agencies.

Schedule 6 sits alongside the statutory legal authority of many agencies to compel information release

- 12 There are 51 information gathering powers available to agencies under a variety of statutes. The powers in these statutes range from being able to ask anybody about anything, to relatively restrictive powers which only allow information gathering from a particular group of people about a particular subject area or areas.

MSD has relatively wide powers relative to some other comparable agencies

- 13 Looking at the agencies with information gathering powers that MSD is most comparable with confirms the Privacy Commissioner's view that MSD's powers are wide in scope compared with some other agencies.
- 14 Inland Revenue (IR) is covered by section 17 of the Tax Administration Act 1994 (the Tax Administration Act) which gives it relatively strong powers. The Tax Administration Act enables the Commissioner of Inland Revenue to require any person to provide information or produce documents for inspection which the Commissioner considers necessary or relevant for the administration or enforcement of any of the Inland Revenue Acts or any other function of the Commissioner. IR can give a notice (production notice) to any person, but in the majority of cases, requests for information are directed to the taxpayer (rather than a third party) and are voluntary.

- 15 The immigration division of the Ministry of Business, Innovation and Employment (MBIE) has the power to prepare a certificate requiring production of address information if an officer has good cause to suspect that a person may be, or may become as a result of investigations, liable for deportation. Immigration officers are enforcement officers under the Search and Surveillance Act and can therefore also apply directly to a judge for a search warrant or production order.
- 16 MoH uses some voluntary provisions under the Privacy Act, but for compulsion in criminal investigations it must rely on production orders issued under the SaSA. MoH must obtain its production orders through the Police because its investigators are not enforcement officers under the SaSA. This process can take up to six months and therefore restricts MoH's information gathering activities. MoH must abide by the Health Information Privacy Code rules.
- 17 ACC mainly relies on voluntary provision of information through consents which are built into their forms. The consents give ACC the ability to seek information from third parties. This information collection comes under the provisions of the Privacy Act. In a very small number of cases (less than ten a year) ACC uses production orders which like MoH must be obtained through the Police.
- 18 Other departments that use production orders include the Department of Internal Affairs and the Ministry for Primary Industries. Examples of how they are used include:
 - in a child pornography investigation, to obtain the IP address of a suspect
 - in an animal welfare investigation, to obtain the animal's health records from the suspect's veterinarian
 - in a fisheries investigation, to obtain the bank records of a person suspected of illegally selling fish.

Information release through a notice issued from within an agency

- 19 A number of agencies can compel information release through notices issued from within the agency. These include MSD, the Commerce Commission, the Financial Markets Authority (FMA) and the Serious Fraud Office (SFO). The Commerce Commission is more likely to go direct to a third party than IR, but also seeks to use voluntary provision where possible. The FMA routinely seeks information from a third party first. The SFO can compel information provision from anyone about anything.

Some agencies must use court orders to compel provision of information

- 20 Court orders to obtain information are generally in the form of search warrants or production orders. The production order regime provides an 'enforcement officer' with the option of applying for a production order instead of a search warrant. The regime provides a streamlined process for obtaining documents that are evidential material. It was envisaged that production orders would provide a more efficient way of obtaining customer records from service providers such as banks and telcos.
- 21 A production order requires a person to provide specified documents that are in their possession or control to a particular enforcement officer. It is an offence for the person to refuse to comply with the order without reasonable excuse. An issuing officer may make a production order if there are reasonable grounds:
 - to suspect that an offence has been, is being, or will be committed; and
 - to believe that the documents sought:
 - constitute evidential material in respect of the offence; and
 - are in, or will come into, the possession or control of the person against whom the order is sought.
- 22 New Zealand Police and some other government agencies with law enforcement functions use production orders. New Zealand Police do most of their information gathering using voluntary provisions covered by the Privacy Act. They can apply for a production order or warrant from a Judge (these can be turned around in 24 hours).

- 23 The table below summarises the information gathering powers of MSD and some comparable government agencies with regard to third parties and whether collection is by a notice from within the agency, or a judicial order.

Agency	Legislation	Requirements re third parties	Notice or order?
MSD	Social Security Act, Schedule 6, Code of Conduct	Information must first be sought from beneficiary (except if compliance would prejudice maintenance of the law)	Notice from within agency
Inland Revenue	Tax Administration Act 1994, s17	Notice (information demand) can be given to any person	Notice from within agency
Ministry of Health	Health Act, s22G (inspection of records of defined providers only)	Can collect from a third party when its necessary to enforce the law	Production order must be obtained through the Police
ACC	No legislative powers to obtain information	Production order can be given to any person	Production order must be obtained through the Police
MBIE (Immigration)	Immigration Act 2009, s274-281	Certificate can be given to range of govt agencies and private orgs listed in s275	Notice from within agency, can also apply for order

Our counterpart agencies in Australia and the United Kingdom have coercive powers

The Department of Human Services (DHS) in Australia

- 24 Australia has legislated coercive information gathering powers within social security law. These may be used to compulsorily obtain information from current beneficiaries, former beneficiaries and third parties to answer questions about a person's qualification and eligibility for welfare payments (past and/or current).
- 25 Most DHS (DHS is the equivalent of MSD) enquiries are directed (at the investigator's discretion) to third parties 'as it is necessary to independently review a person's payability and qualification.'
- 26 Coercive powers are only used against beneficiaries in limited circumstances. DHS would generally only use these powers where subsequent prosecution action is unlikely (the 'right to silence' and privilege against self-incrimination risks the admissibility of evidence gathered by coercion) and they cannot get the necessary information from any other source.
- 27 Information obtained using coercive powers can be transferred to a subsequent criminal investigation and prosecution (subject to use limitations relating to self-incrimination). Coercive powers cannot be used directly for criminal investigation purposes.

The United Kingdom Department for Work and Pensions

- 28 When the Department for Work and Pensions (DWP) are investigating benefit fraud they have powers to require information from a wide range of third parties by a written notice. The third parties that information can be gathered from are listed in s109 of the Social Security Administration Act 1992 (Social Security Administration Act). A failure to provide information when required under the Act is a criminal offence.

- 29 DWP can only require information using the powers in Section 109B where they can identify a person by name or description and there are reasonable grounds for believing that the identified person to whom it relates is:
- a person who has committed, is committing or intends to commit a benefit offence; or
 - a member of the family (which is defined).
- 30 The intrusive powers contained in the Social Security Administration Act are covered by a Code of Practice on Obtaining Information. The Code provides that "before an Authorised Officer requests information from an information provider consideration must be given as to whether the information could have been obtained directly from the claimant (without jeopardising the investigation). Authorised Officers require full documentation of the steps taken by investigators to seek the information by less intrusive means before requesting information from an information provider."
- 31 The Data Protection Act 2018 (DPA) allows DWP to request data from an employer etc. for the purposes of:
- the prevention or detection of crime
 - the apprehension or prosecution of offenders, or
 - the assessment or collection of a tax or duty or an imposition of a similar nature.
- 32 The difference between the powers is that DWP can request data under the DPA but require it under Social Security Administration Act 1992. In general, DWP use the DPA which is a less intrusive power first, then if required they use the more intrusive powers in section 109B of the Social Security Administration Act.

Appendix 2

First line assurance

Issue Schedule 6 Request Direct to Source (bypassing client)

- 1 Staff must get approval from their Fraud Manager and the Operations Manager for any direct to source requests as a result of prejudice of the maintenance of the law.

Telecommunications Sector

- 2 Any request sent to Telecommunications sectors (either after asking the client for it first or after establishing it would prejudice the maintenance of the law to ask them first) must be approved by an Area Manager (note that the Fraud Manager would firstly approve this request).

Police Request to Client

- 3 The Code requires that this is approved by an Area Manager before a notice is given. It is not a requirement to seek approval before asking the client to provide the information from New Zealand Police, however a Fraud Intervention Services (FIS) Manager should approve any requests to the client that include seeking New Zealand Police information. This check should involve the Fraud Manager checking that the reasonable cause test (that is there is reasonable cause to suspect that NZ Police would hold information) has been correctly applied.

Police Request to the Source

- 4 Any request sent to New Zealand Police (either after asking the client for it first or after establishing it would prejudice the maintenance of the law to ask them first) must be approved by an Area Manager (note that the Fraud Manager would firstly approve this request).

Additional checks

- 5 All Schedule 6 requests made to clients or direct to source will be checked by the Fraud Intervention Services (FIS) Assurance Team for two random days per month.

Second line assurance

- 6 The second line assurance activity is carried out by the Information Privacy and Security team. The focus of their review is on cases where MSD bypasses going to the client first, or where requests are on sources with particular collection restrictions as follows:
 - Requests to Police (under the Police Records Request Protocol – Appendix B of the Codes)
 - Requests to Telco providers (under the Telecommunications Records Request Protocol – Appendix C of the Codes)
 - Requests to specified groups - Employers, Banks, Education Sector, Health and Disability Sector, Oranga Tamariki (Part 4 of the Codes - Limitations).
- 7 The review will confirm that the reason to go direct to source is documented, there is supporting evidence and/or a good reason to make the decision and that this provides a valid justification for going to the relevant source. It will also check that the decision complies with the code and/or the request complies with the protocols and/or limitations.

Appendix 3

OPC Inquiry Recommendations and Ministry Response

In October 2018, the Office of the Privacy Commissioner (OPC) commenced an Inquiry into MSD's use of Schedule 6 powers when investigating fraud. The OPC publicly released their final report on 16 May 2019. The report made five recommendations for MSD to address:

Recommendation 1	The Ministry immediately cease its blanket application of the 'prejudice to the maintenance of the law' exception when issuing Section 11 notices.	<i>This recommendation was implemented from April 2019.</i>
Recommendation 2	Without delay, undertake a comprehensive review of the Code in consultation with stakeholders and with consideration given to the findings of this report, including introducing accurate record keeping and limiting the scope and type of information requested under notice, in order to comply with the Bill of Rights Act. The Code should also be reviewed again within 12 months of this review.	<i>The revised Codes of Conducts (the Codes) along with supporting policies, standards, processes and guidelines, the Ethical Framework and Oversight and Assurance Framework were implemented on 1 March 2021. A further 12-month review of the Codes and associated artefacts is scheduled for March 2022.</i>
Recommendation 3	Without delay, and in consultation with this Office, develop training material and guidance for all fraud investigation teams. Training and guidance should include: <ul style="list-style-type: none"> • fraud investigators' obligations under the Code • general privacy awareness information • Bill of Rights Act obligations • natural justice and procedural fairness obligations. 	<i>Revised training and guidance were provided to Investigators to address key concerns raised in the Report as part of the immediate changes made in April 2019.</i> <i>Further training and guidance materials in line with the recommendation were developed in consultation with the OPC to support implementation of the revised Codes. Face to face workshops and online modules were delivered to relevant staff in February and March 2021.</i>
Recommendation 4	The Ministry undertake a review of Section 11, in light of developing legal and administrative precedents with a particular focus on the Bill of Rights Act and search and surveillance jurisprudence, including the Supreme Court decision in R v Alsford.	<i>This review has been undertaken by MSD Policy and is the subject of this paper.</i>

<p>Recommendation 5</p>	<p>The Decision Support Tool used to assess allegations of beneficiary fraud should be reviewed alongside the process for assessing internal allegations in line with the Ministry's requirement to take reasonable steps to assess the accuracy and completeness of information before use.</p>	<p><i>A review of the Decision Support Tool was completed following receipt of the inquiry report, and changes were made to ensure a person makes the final decision on which allegations are referred for early intervention, facilitation, or investigation.</i></p> <p><i>Cases referred for investigation are now assessed by an investigator and a Fraud Intervention Services Manager before a decision is taken to commence an investigation. The Ministry has a three-tiered response model for allegations of fraud, as part of its prevention focus. The majority of allegations are now triaged to non-investigative responses, based on the information provided.</i></p>
-------------------------	--	---

RELEASED UNDER THE
OFFICIAL INFORMATION ACT