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**DEBT RECOVERY UNDER THE SOCIAL
SECURITY ACT 1964: AN ANALYSIS OF THE
CHIEF EXECUTIVE'S DISCRETION**

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ABSTRACT

The Social Security Act 1964 provides for discretion in the recovery of debts due to the Crown. The discretion is vested in the Chief Executive of the Ministry of Social Development. This paper investigates the administrative law backdrop of the Chief Executive's discretion and proposes a range of considerations that should be taken into account whenever the discretion is employed. In order to place the discretion into context, this paper analyses the factors the Chief Executive would have to balance in relation to a hypothetical fact scenario. The scenario presented supposes the facts of the case *Ruka v Department of Social Welfare* [1997] 1 NZLR 151 occurred in a marriage instead of a de facto relationship. This hypothetical scenario is used to explore the kind of balancing of considerations that the Chief Executive would be required to perform.

Word Length

The text of this paper (excluding the abstract, table of contents, footnotes and bibliography) comprises approximately 15,500 words.

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I INTRODUCTION

The scheme of the Social Security Act 1964 provides for discretion in the recovery of debts due to the Crown.¹ The discretion is vested in the Chief Executive of the Ministry of Social Development. This paper will consider the obligations incumbent on the Chief Executive when exercising the discretion to recover due debts. The overriding concern is to ensure that any exercise of the discretion is sound in administrative law.

The author will therefore propose some considerations the Chief Executive should take into account whenever called upon to make a decision. These considerations arise as a consequence of the intersection of administrative law and social security law in the Chief Executive's decision-making sphere. In some instances, the different considerations will conflict. This tension is the natural consequence of the Chief Executive's fiscal accountability on the one hand and social responsibility on the other. The considerations to be taken into account are as follows: the self-imposed requirements of the Ministry's service charter; the scope of the Ombudsman's jurisdiction to investigate departmental decisions; the public finance dimension, which behoves chief executives to act in an efficient and fiscally responsible manner; and, finally, the nature, purpose and values of the Social Security legislation.

The initial focus of this paper will be a broad discussion of the theoretical nature of discretionary decision making followed by an analysis of the relevant

¹ *Director-General of Social Welfare v Attrill* [1998] NZAR 368, 382 (HC) Doogue J.

debt-recovery provisions of the Social Security Act. Once the statutory criteria have been set out, the author will discuss the framework for statutory appeals from the Chief Executive's decision and also investigate the possibility of judicial review of the exercise of the discretion.

The exact content of the discretion will be analysed in relation to a particular fact scenario. The hypothetical scenario will be used as a case study by which the full implications of the Chief Executive's discretion can be explored. The scenario involves a situation where a person has improperly received a benefit whilst living in a relationship that involves extreme domestic violence. As the focus of this analysis is primarily to explore the administrative and social security law obligations on the Chief Executive, the case study will be limited to a comparison between the import of extreme violence in a de facto relationship, and the same level of violence in a marriage.

The assessment involved in the case study requires careful consideration of two factors: the extent and level of violence in the relationship and the legal status of the debtor's relationship. The concern will be whether the Chief Executive can take into account domestic violence in the decision as to whether or not the debt should be recovered. The factual situation in the case of *Ruka v Department of Social Welfare*² will provide the benchmark for extreme violence. The overriding question will therefore reduce to whether the Chief Executive is able to sidestep the legal status of the relationship in determining whether or not to recover a debt.

² *Ruka v Department of Social Welfare* [1997] 1 NZLR 154 (CA).

The analysis of the case study will flesh out the factors that the Chief Executive should take into account when exercising the discretion. The thesis of this paper is that proper consideration of all of the relevant considerations will result in the discretion being employed in an administratively correct manner.

II THE DEBT SITUATION

The Ministry has estimated that the debt owed by ex-beneficiaries is increasing by approximately \$30 million a year.³ Approximately 40% of the debt owed is due to innocent overpayments, while approximately 30% is the result of fraud or abuse of the benefit system.⁴ The Ministry's 2004 Statement of Intent succinctly identifies the policy for collecting such debt:⁵

The collection of such debt takes into account the individual's ability to repay and the management of the Crown's fiscal risk. Due consideration is given to ensuring debt repayments do not cause undue hardship or jeopardise a client's ability to stay in employment through unrealistic debt repayment levels. The Ministry takes a 'whole of the organisation' approach to debt prevention and ensures its staff carry out their duties with due diligence and respect for the rights of clients.

The object of this paper will be to shore up this policy by providing a solid basis of administrative law considerations that can be drawn on when exercising the discretion.

³ Ministry of Social Development "Briefing to the incoming Minister – 9 July 2003" <<http://www.msd.govt.nz>> (last accessed 28 September 2005).

⁴ Ministry of Social Development "Briefing to the incoming Minister – 9 July 2003", above n 3.

⁵ Ministry of Social Development "Statement of Intent 2004" <<http://www.msd.govt.nz>> (last accessed 28 September 2005).

III DISCRETION

This paper is concerned with the legal framework within which the Chief Executive's discretionary powers are situated. However, it is important to acknowledge the vast theoretical backdrop against which any discussion of discretion takes place. K C Davis has defined discretion in the following way: "A public official has discretion whenever the effective limits of his power leave him free to make a choice among possible courses of action or inaction".⁶ Ronald Dworkin furthers this definition by acknowledging the limits that inevitably surround any discretionary power: "[D]iscretion, like the hole in the doughnut, does not exist except as an area left open by a surrounding area of restriction".⁷ Therefore, "in order to describe what discretion officials have it is necessary to refer to the rules which define their latitude for choice".⁸

Carl E Schneider⁹ identifies the relationship between rules and discretion as being finely balanced. The central problem is that the severity of some rules can to some extent be ameliorated by allowing administrators some discretion, yet this allocation opens up the potential for abuse.¹⁰ Schneider believes that lawyers tend to think of discretion as deriving from a *gap*. Relevant here is the gap in a statutory provision when "interpreted from the perspective of a regime of rules".¹¹ This conceptualisation is similar to Dworkin's analysis. It will be argued below

⁶ Roy Stainsbury "Administrative Justice: Discretion and Procedure in Social Security Decision Making" in Keith Hawkins (ed) *The Uses of Discretion* (Clarendon Press, Oxford, 1992) 297.

⁷ Sainsbury, above n 6, 297.

⁸ Sainsbury, above n 6, 298.

⁹ Carl E Schneider "Discretion and Rules - A Lawyer's View" in Keith Hawkins (ed) *The Uses of Discretion* (Clarendon Press, Oxford, 1992).

¹⁰ Schneider, above n 9, 47.

¹¹ Schneider, above n 9, 51.

that the provisions relating to debt recovery in the Social Security Act provide just such a gap.

The *gap* theory can be articulated in another way. Robert E Goodin¹² addresses Dworkin's theory and concludes that defining discretion as a hole in an doughnut is essentially a negative analysis in that it regards discretion as "a residual notion, defined in terms of its opposite: viz, official outcomes ... being strictly determined by rules and rules alone".¹³ On this analysis, "discretion refers to an area of conduct which is generally governed by rules but where the dictates of the rules are indeterminate. In short, discretion refers, negatively, to a lacuna in a system of rules".¹⁴ Again, the discretionary provision which provides the subject-matter of this paper can be viewed as being just such a lacuna.

D J Galligan¹⁵ addresses the question of the correct legal approaches to be taken in relation to discretionary powers. Galligan begins the discussion by posing a central problem:¹⁶

If legality implies the exercise of authority through general rules, together with a functional and institutional division of law-makers and adjudicators, then the implications are clear: that mode of law is in various respects incompatible with discretionary authority.

¹² Robert E Goodin "Welfare, Rights and Discretion" (1986) 6 Oxford Journal of Legal Studies.

¹³ Goodin, above n 12, 233.

¹⁴ Goodin, above n 12, 234.

¹⁵ D J Galligan *Discretionary Powers: A Legal Study of Official Discretion* (Clarendon Press, Oxford, 1986).

¹⁶ Galligan, above n 15, 85.

One solution to this problem would be for the law-makers to be more explicit when drafting rules (legislation). Another option, as identified by Galligan, would be for the state to reduce the amount of regulation it undertakes. This argument is based on the primacy of the rule of law. If, on the basis of the quotation above, the state cannot effectively regulate “without undermining legality” then the state should limit itself to regulation “which can be pursued in harmony” with the values that are implicit in the rule of law.¹⁷

Galligan points out that this argument is premised on the assumption that a strict rendering of the rule of law is “more important than the objects and values achieved by discretionary regulation”.¹⁸ Although this argument has merit, Galligan believes that it is too narrow a view to say that the rule of law should have primacy in every circumstance. As the learned author points out, “the positive objects of regulation may represent values upon which great importance is placed, and there is no justification for conferring automatic priority upon the rule of law”.¹⁹ It is argued that this is especially the case in the social security area, where strict observance of rules will inevitably create distinctions that are unjust. This point will be thoroughly examined below in relation to the Social Security Act’s treatment of different types of relationships in relation to debt recovery.

The reference to the *values* achieved by discretionary regulation is an important one. The question here is to what extent values are important in construing a *gap* or a *lacuna* in a statute which gives rise to a discretionary power. This question is the central concern of this paper. The following quote from

¹⁷ Galligan, above n 15, 85.

¹⁸ Galligan, above n 15, 85.

¹⁹ Galligan, above n 15, 86.

Galligan can be read as the theoretical sibling of the legal analysis of the debt recovery provisions in the Social Security Act which will follow:²⁰

The view taken here is that there is no fundamental and irreducible legal idea or principle, but rather that law and legal institutions are part of the political and social composition of a society, and that they can be made instrumental in upholding values several and diverse. What those values are depends on the political theory and practice of a society, and once any particular value had been identified as important in this way, consideration can then be given as to how it is to be achieved effectively, and as to its relationship with other, possibly conflicting values.

It is to these concerns, albeit in a legal discourse, that this paper will continually return.

IV THE SOCIAL SECURITY ACT 1964

Section 85A of the Social Security Act 1964 (the "Act") provides that overpayments of a benefit or wrong payment of a benefit constitutes a debt to the Crown. Section 86(1) outlines what the Chief Executive may do in order to recover a debt referred to in s 85A, there being three options: proceedings brought in the name of the chief executive; deductions from benefits or student allowances; and, deductions from grants of special assistance made under an approved welfare programme.

Section 86(1A) states that s 86(1) is subject to subsections (9A) and (9B), and to any regulations made under s 132G. Importantly, s 86(1) provides that in

²⁰ Galligan, above n 15, 89-90.

order to recover a debt referred to in s 85A, the Chief Executive *may* employ one of the three modes of recovery. The implication is that the section does not require the chief executive to take one of the three options or indeed any recovery proceeding at all. This approach was affirmed in the *Attrill* decision, where Doogue J, in referring to the word “may”, stated the following:²¹

[The word may] of itself shows that there is no statutory obligation upon the [chief executive] to take one or other of the courses defined in the various parts of ss 86(1)-(1)(D) against the recipient of an overpayment. It is impossible to read into the particular provisions a statutory obligation upon the [chief executive] to take either of the courses of action identified in each of the subsections.

Two further High Court cases considered the discretionary nature of s 86(1), both of which ultimately agree with *Attrill*. In *McConkey v Director-General of Work and Income New Zealand*,²² Goddard J believed that the fact that the discretionary nature of the establishment and recovery of debts under the Act was “beyond doubt”.²³ Her Honour agreed with Doogue J in *Attrill* that given the estoppel provision in s 86(9A), which essentially prohibits the chief executive from recovering in specified circumstances, the discretion under s 86(1) was not completely unfettered. Factors such as “insolvency or uneconomic commercial return”²⁴ could also have the potential to force the arm of the chief executive into not recovering the debt. Similarly, Young J in *Moody v Chief Executive of the Department of Work and Income*²⁵ recognised the discretionary nature of the Act

²¹ *Director-General of Social Welfare v Attrill* [1998] NZAR 368, 382 (HC) Doogue J.

²² *McConkey v Director-General of Work and Income New Zealand*, High Court, Wellington, AP277/00 (14 August 2002).

²³ *McConkey*, above, n 22, 9 Goddard J.

²⁴ *McConkey*, above, n 22, 9 Goddard J.

²⁵ *Moody v Chief Executive of Work and Income* [2001] NZAR 608 (HC) Young J.

in asserting that there “is no obligation in law on the Department to recover overpayments”.²⁶

We can therefore proceed on the assumption that the Chief Executive has a power, not an obligation to recover debts. This power under s 86(1) is subject to s 86(9A) which prohibits the Chief Executive from recovery if four circumstances are satisfied: first, the overpayment was caused by an error to which the debtor did not intentionally contribute; secondly, the debtor received the sum in good faith; thirdly, the debtor changed his or her position in reliance of the assumed validity of the overpayment; and finally, that it would be inequitable to order recovery.²⁷ After the 2002 Amendment, it is clear that the word “error” in s 86(9A) refers to an error committed by a departmental officer. This was the view taken earlier by Tipping J in *Southern District Review Committee v Baird*.²⁸ The Social Services Select Committee report on the 2002 Amendment argued that the definition of ‘error’ that the High Court laid down in *Moody*, as encompassing any overpayment, was inconsistent with the intent of the original legislation.²⁹

This analysis differs from the view given by Mackinnon in the Social Welfare edition of *The Laws of New Zealand*.³⁰ Mackinnon’s interpretation of s 86 is that the Chief Executive can only write-off the debt where s 86(9A) comes into play. The argument advanced here is that s 86(1), whilst being subject to s 86(9A), is still a discretionary provision in itself. That is, it is conceivable that

²⁶ *Moody*, above, n 25, 615.

²⁷ Social Security Act 1964, section 86(9A).

²⁸ *Southern District Review Committee v Baird* [1993] NZAR 280 (HC) Tipping J.

²⁹ Social Services Select Committee Report on the Social Security (Working Towards Employment) Amendment Bill 2002 (27/05/2002) 10. <<http://www.clerk.parliament.govt.nz>> (last accessed 28 September 2005).

³⁰ *The Laws of New Zealand* (Butterworths, Wellington, 1994) Social Welfare, para 42.

there will be situations in which the Chief Executive will not wish to recover the debt, yet the facts of the situation do not fit within the s 86(9A) estoppel criteria. This argument is based on the decisions in *Attrill*, *McConkey*, and *Moody*.

A *Overpayment Due to Error: Section 86(9A)*

This estoppel-like provision will come in to play in the second scenario illustrated above, where there has been an overpayment of a benefit due to an administrative error. *Owens v Chief Executive of the Ministry of Social Development*³¹ is the most recent inquiry as to the elements of s 86(9A) before its amendment in 2002. In this form, the provision read:

the [chief executive] may, [in the chief executive's discretion], authorise the provisional writing-off of a debt which arose as a result of an error not intentionally contributed to by the debtor if the [chief executive] is satisfied that the person receiving the amount so paid in error did so in good faith and has so altered his position in reliance on the validity of the payment that it would be inequitable in all the circumstances, including his financial circumstances, to require repayment.

Owens concerned a client of the Ministry who did not disclose a property interest on a benefit application form. The client was receiving rent from the property interest while at the same time receiving an accommodation supplement. The property interest had the effect of disentitling the client from receiving the benefit. Miller J considered whether negligence on the part of the beneficiary

³¹ *Owens v Chief Executive of the Ministry of Social Development*, High Court, Wellington, CIV 2003-485-2763 (10 March 2005) Miller J.

could be taken into account as a factor determining the use of the discretion, negligence in this case meaning “carelessness or inattention”.³²

His Honour was of the opinion that the error and good faith requirements were simply “pre-requisites to the exercise of the discretion” and that upon the discretion arising “the subsection does not expressly limit the circumstances that may be taken into account in determining whether repayment would be inequitable”.³³ Therefore, factors extraneous to the elements of the provision, such as negligence on the part of the beneficiary, may be taken into account. His Honour then considered the relative meaning of “inequitable” in so far as it related to the Chief Executive’s decision whether or not it would be inequitable to recover the debt. Drawing on the decisions in *Karl v ACC*,³⁴ *National Bank of New Zealand v Waitaki International Processing*,³⁵ and *MacMillan Builders Limited v Morningside Industries Limited*,³⁶ it was held that the word “carried the connotation of ‘unfair or unjust’, which allowed the Court to consider relative fault”.³⁷

B 2002 Amendment

The amended version of s 86(9A) now reads:

³² *Owens*, above n 31, para 40, Miller J.

³³ *Owens*, above n 31, para 42, Miller J.

³⁴ *Karl v ACC*, High Court, Wellington, CIV 2004-485-800 (9 September 2004).

³⁵ *National Bank of New Zealand v Waitaki International Processing* [1999] 2 NZLR 211.

³⁶ *MacMillan Builders Limited v Morningside Industries Limited* [1986] 2 NZLR 12.

³⁷ *Owens*, above n 31, para 43, Miller J.

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

(a) the debtor –

(i) received the sum in good faith; and

(ii) changed his or her position in the belief that he or she was entitled to that sum and would not have to pay or repay that sum to the chief executive; and

(b) it would be inequitable in all the circumstances, including the debtor's financial circumstances, to permit recovery.

At first blush there appears to be quite a significant difference between this amended provision and the former one. The language “may not recover” in the amended provision is ostensibly more restrictive than the wider ambit given in the original. However, it is argued that for all material purposes the Chief Executive's discretion still exists in its entirety. This conclusion is reached by deconstructing the statutory language. The elements of not intentionally contributing to the error, of acting in good faith, and of alteration of position in reliance are, in the words of Miller J in *Owens*, merely “pre-requisites” to the exercise of discretion that occurs in subsection (b). Therefore, a beneficiary needs to establish that they conform to all the formative elements in order to be in a position where the Chief Executive can balance the equities of their case. It is this balancing exercise that the Chief Executive should have recourse to the relevant considerations canvassed below.

V THE ADMINISTRATIVE LAW CONTEXT

Disgruntled debtors have both appeal and review options open to them if they are unsatisfied with any decision concerning the recovery of a debt. The appeal mechanism in the Act has several layers. The first option is to request the Ministry convene a benefit review committee, which is constituted under s 10(3) of the Act and comprises one person appointed by the Minister to represent the community and two officers of the Department appointed by the Chief Executive.

Section 12A of the Act establishes the Social Security Appeal Authority (the "Appeal Authority"), which, under s 12I has the ability to act as a judicial authority for the purpose of hearing appeals. Section 12I(2) provides that "in hearing and determining any appeal [the Appeal Authority] shall have all the powers, duties, functions and discretions that the Chief Executive had in respect of the same matter".³⁸ Appeals to the Appeal Authority can be brought under s 12J. If the appellant is dissatisfied with the Appeal Authority's decision, s 12Q provides a right of appeal to the High Court by means of a case stated appeal on a point of law only.

It is worth noting here that John Hughes³⁹ has levelled strong criticism at the appeal process provided for by the Act. Hughes points out that the problem of a lack of independence at the benefit review committee stage is acute. The two departmental officers, Hughes argues, "are generally close colleagues of the decision-maker, given that each office operates its own committee".⁴⁰ This can have the effect of rendering the "community representative" superfluous as s 10A(6) provides that the finding of the committee is constituted by the decision of

³⁸ Social Security Act 1964, s 12I(2).

³⁹ John Hughes "Social Security: Time to Review the Reviewers" (2001) ELB 133.

⁴⁰ Hughes, above n 39, 134.

any two members. Furthermore, there is no requirement for expertise in social security law “of any of the committee members and the departmental committee members are not specialists”.⁴¹ Hughes concedes the independence of the Appeal Authority, yet labels this process as “cumbersome, complex and – in some cases – long drawn out”.⁴²

The Act therefore provides for a structured process of appeals from decisions of the Chief Executive to recover debt. However, it is also possible for the debtor to make an application for judicial review of the decision of the Chief Executive, the benefit review committee or the Appeal Authority. The avenue of judicial review exists alongside the right of appeal given in the Act as it derives from the “High Court’s inherent jurisdiction to rule on the legality of public acts”⁴³ and can therefore not be supplanted by a simple statutory appeal right.

In the social security area, the distinction between appeal and review was briefly dealt with in *Gould v Chief Executive of the Department of Work and Income*.⁴⁴ In that case the appellant sought to have reinstated judicial review claims relating to a decision of the Appeal Authority that had previously been struck out on the grounds that they were out of time. Master Venning declined to reinstate the judicial review proceedings on the basis that they were seeking to challenge the merits of the Appeal Authority’s decision and not its procedure. The Master pointed to the availability of the appeal mechanism in s 12Q of the Act as

⁴¹ Hughes, above n 39, 134.

⁴² Hughes, above n 39, 134.

⁴³ Philip Joseph *Constitutional and Administrative Law in New Zealand* (2ed, Brookers, Wellington, 2001) 733.

⁴⁴ *Gould v Chief Executive of the Department of Work and Income*, High Court, Auckland, AP19/02 (18 July 2003) Master Venning.

a “particularly material factor in the exercise of the discretion as to whether or not the Court may grant the remedy of judicial review”.⁴⁵ The implication of the judgement is that the grounds of review must add something that cannot be dealt with on the appeal on a point of law under s 12Q of the Act.

The authors of the *Laws of New Zealand* characterise the distinction between appeal and review as follows:⁴⁶

Review is concerned with the legality of the decision, whether it was reached “in accordance with law, fairly and reasonably”. The Court asks whether the decision should be set aside or allowed to stand. Appeal, by comparison, entails adjudication on the merits and may involve the Court substituting its decision for that of the decision-maker.

In *Mercury Energy Ltd v Electricity Corp of New Zealand*,⁴⁷ Lord Templeman cited with approval the speech of Lord Brightman in *Chief Constable of North Wales Police v Evans*,⁴⁸ as setting out the proper function of the courts on review:⁴⁹

Judicial review is concerned, not with the decision, but with the decision-making process. Unless that restriction on the power of the court is observed, the court will ... under the guise of preventing the abuse of power, be itself usurping power.

However, the question for the court on review is to what extent it can go to in order to ensure that the decision was made in accordance with law and was fair

⁴⁵ *Gould*, above n 44, para 20, Master Venning.

⁴⁶ *The Laws of New Zealand* (Butterworths, Wellington, 2003) Constitutional Law, para 114.

⁴⁷ *Mercury Energy Ltd v Electricity Corp of New Zealand* [1994] 2 NZLR 385 (PC).

⁴⁸ *Chief Constable of North Wales Police v Evans* [1982] 1 WLR 1155, 1173.

⁴⁹ *Mercury Energy*, above n 47, 389 (PC) Lord Templeman.

and reasonable. Joseph argues that a “continuum can be drawn between procedural impropriety at one end (review of the process of decision-making) and irrationality at the other (merits-based review), with illegality lying somewhere in between”.⁵⁰

The courts have and will entertain applications for judicial review against chief executives of government departments.⁵¹ An example of this is *Ngai Tahu Maori Trust Board v Director-General of Conservation*,⁵² where the Court of Appeal heard an application for judicial review on the basis that “the Director-General ought to have consulted Ngai Tahu interests before” granting a whale-watching permit.⁵³ A further example is *Patel v Chief Executive of the Department of Labour*,⁵⁴ which concerned the refusal of the New Zealand Immigration Service to grant a residence permit.

It now falls to determine what grounds of judicial review are relevant to the exercise of the Chief Executive’s discretion to recover debt. Implicit in this inquiry is the question outlined above – to what extent may the court go in assessing the merits, rather than the procedure of the Chief Executive’s decision. Of particular relevance here is the statement in the dissenting judgment of Thomas J in *Waitakere City Council v Lovelock* that “it is certain that the Courts will

⁵⁰ Philip Joseph *Constitutional and Administrative Law in New Zealand* (2ed, Brookers, Wellington, 2001) 736.

⁵¹ Joseph, above n 50, 748.

⁵² *Ngai Tahu Maori Trust Board v Director-General of Conservation* [1995] 3 NZLR 553 (CA).

⁵³ *Ngai Tahu*, above n 52, 556, Cooke P.

⁵⁴ *Patel v Chief Executive of the Department of Labour* [1997] 1 NZLR 102.

respond in the application of administrative law principles to the changing needs, perceptions and expectations of the community”.⁵⁵

A Procedural Impropriety

This ground of review holds the decision-maker to the requirements of natural justice. This ground of review “is pre-eminently about the decision-making process, and adheres most closely to the appeal/review distinction”.⁵⁶ A subset of this ground of review is the doctrine of legitimate expectation, which was first coined by Lord Denning in *Schmidt v Secretary of State for Home Affairs*.⁵⁷ The doctrine of legitimate expectation is potentially relevant to the Chief Executive’s discretion in relation to the standards Work and Income imposes on itself by way of its service charter. This point will be explored further below.

B Irrationality or unreasonableness

In *Associated Provincial Picture Houses Ltd v Wednesbury Corporation*⁵⁸ Lord Greene MR agreed that if a decision-maker made a decision “that no reasonable could ever have come to” then the courts could interfere with that decision.⁵⁹ However, His Lordship stated that “to prove a case of that kind would

⁵⁵ *Waitakere City Council v Lovelock* [1997] 2 NZLR 385, 399-400 (CA) Thomas J dissenting.

⁵⁶ Joseph, above n 50, 736.

⁵⁷ *Schmidt v Secretary of State for Home Affairs* [1969] 2 Ch 149 (CA).

⁵⁸ *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223.

⁵⁹ *Wednesbury*, above n 58, 230 (CA) Lord Greene MR.

require something overwhelming".⁶⁰ Joseph points out that in New Zealand the courts have, over time, lowered the *Wednesbury* threshold.⁶¹

Of relevance here is the related ground of substantive unfairness. This doctrine was recognised in *Thames Valley Electric Power Board v NZFP Pulp & Paper Ltd*,⁶² which Cooke P labelled as a "legitimate ground of judicial review, shading into but not identical with unreasonableness".⁶³ This ground goes beyond the procedure of a decision and looks at its quality in order to determine whether or not it was unfair.⁶⁴ Dr Rodney Harrison QC⁶⁵ argues that substantive unfairness as a ground of judicial review is wider than legitimate expectation as it is "by definition not dependent on the existence of any legitimate expectation, and would appear to permit the Court to have regard to a much broader assessment in terms of overall fairness".⁶⁶

*Carmichael v Director-General of Social Welfare*⁶⁷ directly dealt with some of these administrative law concepts in a social security context. The case concerned overpayment of national superannuation. The Appeal Authority found that, in the main, the requirements of s 86(9A) were satisfied however the money should still be repaid because of additional capital the appellants possessed. Smellie J considered that the appellants claim of unreasonableness was not

⁶⁰ *Wednesbury*, above n 58, 230 (CA) Lord Greene MR.

⁶¹ Joseph, above n 50, 836.

⁶² *Thames Valley Electric Power Board v NZFP Pulp & Paper Ltd* [1994] 2 NZLR 641 (CA).

⁶³ *Thames Valley*, above n 62, 652, Cooke P.

⁶⁴ Philip Joseph *Constitutional and Administrative Law in New Zealand* (2ed, Brookers, Wellington, 2001) 739.

⁶⁵ Dr Rodney Harrison QC "Judicial Review: Recent Trends" (1999) NZLJ 264.

⁶⁶ Harrison, above n 65, 268.

⁶⁷ *Carmichael v Director-General of Social Welfare* [1994] NZFLR 769 (HC).

improperly motivated and was highly relevant to the case. His Honour held the following:⁶⁸

I have reached the conclusion that the ... decision which the SSAA upheld on appeal ... was both unreasonable and unfair in the restricted administrative law sense. ... The requirements of s 86(9A) had all but been satisfied. In all other respects it would have been inequitable (unjust) to require repayment. No reasonable person could then sensibly take the view that solely because of the applicant's modest home and limited savings the opposite conclusion was justified.

This reasoning demonstrates that the courts will not accept decisions about debt recovery based solely on technical, narrow interpretations. The emphasis must be broader and appeal to a range of considerations, including overall fairness. This point will be addressed in more detail below.

C *Illegality*

This ground of review is the most pertinent to the Chief Executive's discretion. Joseph identifies two situations in which illegality can be pleaded:⁶⁹

The deciding body may enter an inquiry beyond its statutory purpose (error of law at the outset), or it may commit a procedural error or fail to address mandatory relevant considerations or be influenced by irrelevant ones (error of law in the course of its inquiry).

⁶⁸ *Carmichael*, above n 67, 777, Smellie J.

⁶⁹ *Joseph*, above n 64, 737.

The relevant aspects of illegality here are the concepts of acting for an improper purpose, the duty to act consistently and the question of relevant and irrelevant considerations.

1 Improper purpose

This subset of illegality concerns the delegation of the discretionary power given by the statute. Therefore, a “power granted for one purpose must be used for that purpose and not for some unauthorised or collateral purpose”.⁷⁰ The authors of the *Laws of New Zealand* point out that no “authority has an unfettered discretion in the exercise of a power” and that powers “must be used to promote the policy and objects of the empowering statute”.⁷¹ This point was clearly made by the House of Lords in *Padfield v Minister of Agriculture, Fisheries and Food*.⁷²

The limit of the Chief Executive’s discretion then is the purpose of the Social Security Act. This analysis can draw on the discussion of the wider nature and purpose of social security as discussed below, but it equally involves a strict legal assessment of what Parliament was trying to achieve by enacting the legislation. An example of this approach was the High Court’s assessment of the then Accident Compensation Act 1982 in *New Zealand Society of Physiotherapists v*

⁷⁰ Joseph, above n 64, 789.

⁷¹ *The Laws of New Zealand* (Butterworths, Wellington, 2003) Administrative Law, para 33.

⁷² *Padfield v Minister of Agriculture, Fisheries and Food* [1968] AC 997. See Joseph, above n 64, 790.

Accident Compensation Corporation.⁷³ It is worth setting out a passage from Quilliam J's judgement in order to demonstrate the kind of analysis required.⁷⁴

In my view, when construing this statute it is necessary at all times to bear in mind the purpose for which it was passed. It was to provide, in substitution for previously existing rights to claim damages or workers' compensation, an obligation on the State ... to compensate those injured on a comprehensive basis and without reference to fault. It was, as I have understood it, a form of statutory insurance.

Another example of the courts determining the bounds of a statute in reference to an administrative decision comes from the case *Southern Ocean Trawlers Ltd v Director-General of Agriculture and Fisheries*.⁷⁵ In that case Cooke P was prepared to inquire whether a decision was "within the policy and spirit of the Act".⁷⁶ It is argued that this is a significant extension of simply looking at the purpose of an act. If one is to look at the *spirit* of the Act, then not only parliamentary purpose but also the values of the subject-matter generally can be imputed into the determination as to whether a particular decision is within the bounds of the statute.

2 *The duty to act consistently*

The duty involves both procedural and a substantive elements in that "decision-makers must be consistent in the procedures and criteria they apply

⁷³ *New Zealand Society of Physiotherapists v Accident Compensation Corporation* [1988] 1 NZLR 346 (HC).

⁷⁴ *New Zealand Society of Physiotherapists*, above n 73, 353, Quilliam J.

⁷⁵ *Southern Ocean Trawlers Ltd v Director-General of Agriculture and Fisheries* [1993] 2 NZLR 53 (CA).

⁷⁶ *Southern Ocean Trawlers Ltd*, above n 75, 61, Cooke P.

(procedural consistency), and that like cases ought to be decided alike (substantive consistency)".⁷⁷ In *Pharmaceutical Management Agency Ltd v Roussel Uclaf Australia Pty Ltd*⁷⁸ the Court of Appeal considered the question whether, as the respondent had asserted, the appellant had "failed to act even-handedly" which resulted in the respondent's contention "that it did not receive equal treatment".⁷⁹ Thomas J, adopting as correct a passage from de Smith, Woolf & Jowell,⁸⁰ stated that "consistent application of the law possesses a value in its own right – that of ensuring that all persons similarly situated will be treated equally by those who apply the law".⁸¹ His Honour went further, believing that "the notion that like should be treated alike has been an essential tenet in the theory of law".⁸²

3 *The taking into account of relevant and irrelevant considerations*

Joseph states the principle thus:⁸³

The exercise of a discretionary power, even for a proper purpose, may be invalid if the decision-maker is influenced by considerations that ought not to be taken into account, or if the decision-maker fails to take account of relevant considerations.

It has been established that s 86(1) and s 86(9A) provide for a discretion but do not give any indication, or factors that the Chief Executive should take into

⁷⁷ Philip Joseph *Constitutional and Administrative Law in New Zealand* (2ed, Brookers, Wellington, 2001) 798.

⁷⁸ *Pharmaceutical Management Agency Ltd v Roussel Uclaf Australia Pty Ltd* [1988] NZAR 58 (CA).

⁷⁹ *Pharmaceutical Management*, above n 78, 71-72, Thomas J.

⁸⁰ S A de Smith, Harry Woolf, and Jeffery Jowell *Judicial Review of Administrative Action* (5ed, Sweet & Maxwell, London, 1995) 577.

⁸¹ *Pharmaceutical Management*, above n 78, 72, Thomas J.

⁸² *Pharmaceutical Management*, above n 78, 72, Thomas J.

⁸³ Joseph, above n 77, 793.

account when exercising the discretion. In situations such as this, where no criteria are given, "considerations relevant to the exercise of discretion must be construed from the subject-matter, scope and purpose of the Act".⁸⁴ In *Keam v Minister of Works and Development*⁸⁵ Somers J made it clear that the court is not concerned with the conclusion reached by the decision-maker, but that they appropriately balanced the correct factors.⁸⁶

In light of this administrative law backdrop, especially in respect of the fact that the Act does not provide any plain criteria to aid the Chief Executive's discretion under s 86(1) and s 86(9A), it is necessary to discuss what some of the relevant considerations entail. The following analysis, of necessity, will draw on both legal principles and more general values that attach to the existence and operation of the Act. It is in this analysis that the potentially conflicting obligations of the Chief Executive are borne out.

VI RELEVANT CONSIDERATIONS IN THE EXERCISE OF THE DISCRETION

It is argued that if the following factors are taken into account by the Chief Executive any use of the discretion to recover debts would be sound in administrative and social security law.

A The Department of Work and Income Service Charter

⁸⁴ Joseph, above n 77, 794.

⁸⁵ *Keam v Minister of Works and Development* [1982] 1 NZLR 319 (CA).

⁸⁶ *Keam v Minister of Works and Development*, above n 85, 327-328, Somers J.

Work and Income's own Service Charter was developed collaboratively with community and advocacy groups, other government departments, clients and staff.⁸⁷ The preamble to the Charter explains to clients that the Department aims to provide them with the highest level of service. The Charter is addressed to clients and sets out what they can expect from the Department. Under the heading "We will" are listed ten aspects of the Department's functions. Of relevance here are the following undertakings: to give prompt and efficient service; to give the client the assistance they are entitled to; to explain the client's rights and obligations; to be understanding and caring about the client's needs; and, to be professional in the way the Ministry serves the client.⁸⁸

Following this is another subheading entitled "You have the right to", under which eleven *rights* are set out. Of relevance here are the rights to be given correct information and entitlements, and also the right to make a complaint or ask for a review if the client disagrees with the Ministry's decisions.⁸⁹

The assurances set out in the Charter do not have the force of law. However, it is clear that the Department has gone to some lengths to produce the document and must by implication see itself as at least morally bound by its terms. The question is to what extent, if any, the Charter binds the Department in administrative law. An argument is made here that the terms of the Charter create a legitimate expectation that they will be adhered to.

⁸⁷ The Department of Work and Income Service Charter <<http://www.workandincome.govt.nz>> (last accessed 28 September 2005).

⁸⁸ The Department of Work and Income Service Charter, above n 87.

⁸⁹ The Department of Work and Income Service Charter, above n 87.

1 *Legitimate expectation in public law*

Legitimate expectations in public law were first given effect to in *Schmidt v Secretary of State for Home Affairs*.⁹⁰ As Joseph points out, a “legitimate expectation trips the requirements of natural justice (or fairness) before a decision may be made that affects one’s rights or interests”.⁹¹ The essence of the doctrine is that a public body or official cannot “defeat a legitimate expectation without affording interested parties ... the rights to be informed or heard”.⁹² Importantly, a legitimate expectation “may arise from assurances or promises given” and from “[p]ublic statements of policy by word or deed”.⁹³

In *A-G (Hong Kong) v Ng Yeun Shiu*,⁹⁴ the Privy Council considered a change of immigration policy implemented by the Hong Kong government. The plaintiff argued that he had not been able to put forward his case as to why he should not be deported. Lord Fraser held that as part of its policy, the government had created a legitimate expectation for people in the position of the plaintiff. In recognising the concept was legally relevant, his Lordship stated:⁹⁵

The justification for it is primarily that, when a public authority has promised to follow a certain procedure, it is in the interests of good administration that it should act fairly and should implement its promise, so long as the implementation does not interfere with its statutory duty.

⁹⁰ *Schmidt v Secretary of State for Home Affairs* [1969] 2 Ch 149 (CA).

⁹¹ Philip Joseph *Constitutional and Administrative Law in New Zealand* (2ed, Brookers, Wellington, 2001) 850.

⁹² Joseph, above n 91, 851.

⁹³ Joseph, above n 91, 851.

⁹⁴ *A-G (Hong Kong) v Ng Yeun Shiu* [1983] 2 AC 629 (PC).

⁹⁵ *A-G (Hong Kong)*, above n 94, 638 (PC) Lord Fraser.

In cases such as *Ng Yeun Shiu*, where a right of hearing is given, the courts will uphold this as legitimate. Simon France has argued that the same requirement can equally apply to cases where a benefit is promised, as "what gives rise to the legitimate expectation is the express undertaking".⁹⁶ This view is supported by Sales and Steyn,⁹⁷ who further assert that the doctrine extends to "the procedure which the decision-maker will adopt before taking the decision how to exercise its discretionary power".⁹⁸

A material concern of the present discussion is whether the doctrine can apply if the claimant in question was unaware of the practice, promise, or statement of the public body or person. Joseph notes that the courts are divided on this point. In *Lawson v Housing New Zealand*,⁹⁹ it was held that a person wishing to invoke a legitimate expectation must be aware of the information that allegedly gives rise to it. However, the High Court of Australia in *Minister for Immigration and Ethnic Affairs v Teoh*¹⁰⁰ took a different approach. The question in that case was whether an international human rights instrument had the ability to create a legitimate expectation that its provisions would be followed. The Court answered in the affirmative. Mason CJ and Deane J relevantly held:¹⁰¹

⁹⁶ Simon France "Legitimate Expectations in New Zealand" 14 (1990) NZULR 123, 139.

⁹⁷ Philip Sales and Karen Steyn, "Legitimate Expectations in English Public Law: an Analysis" (2004) P L 564.

⁹⁸ Sales and Steyn, above n 97, 565. See the authors discussion of *R v Devon CC Ex p. Baker* [1995] 1 All ER 73 in footnote 6, where reference is drawn to Simon Brown LJ's fourth classification of legitimate expectation. Here "the claimant may have a legitimate expectation that a particular procedure, not otherwise required by law in the protection of an interest, must be followed consequent upon some specific promise or practice".

⁹⁹ *Lawson v Housing New Zealand* [1997] 2 NZLR 474 (HC).

¹⁰⁰ *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273 (HCA).

¹⁰¹ *Teoh*, above n 100, 291, Mason CJ and Deane J.

It is not necessary that a person seeking to set up such a legitimate expectation should be aware of the Convention or should personally entertain the expectation; it is enough that the expectation is reasonable in the sense that there are adequate materials to support it.

Given this brief summary of the doctrine, the issue here is whether the assurances the Department sets out in its own Charter create legitimate expectations that the client can have. A decision made by the chief executive under either s 86(1) or s 86(9A) of the Act to recover debt will clearly affect the rights and interests of the debtor concerned. Furthermore, the act of making the decision will of necessity trigger certain *obligations* the chief executive has by virtue of the Charter.

Alternatively, recourse may also be had to the illegality ground identified above. As Wade points out, it "has several times been held that a non-contractual undertaking may bind a public body".¹⁰² In *R v Liverpool Cpn ex p. Liverpool Taxi Fleet Operators' Association*,¹⁰³ a taxicab licensing authority was held to an undertaking it made regarding the issuing of licences. The idea that an authority can bind itself by its own publicised standards or procedures has become entrenched to the extent that a "breach of an undertaking may lead to inconsistent and unfair action amounting either to an abuse of power or else to a breach of the principles of natural justice".¹⁰⁴

In *Chiu v Minister of Immigration*¹⁰⁵ Fisher J acknowledged the potential for illegality if a decision-maker misinterprets or improperly applies self-imposed

¹⁰² William Wade *Administrative Law* (6ed, Clarendon Press, Oxford, 1988) 380.

¹⁰³ *R v Liverpool Cpn ex p. Liverpool Taxi Fleet Operators' Association* [1972] 2 QB 299.

¹⁰⁴ Wade, above n 102, 380.

¹⁰⁵ *Chiu v Minister of Immigration* [1994] 2 NZLR 541 (CA).

rules. His Honour was of the opinion that in “the majority of cases the misinterpretation will vitiate the decision upon the ground that it constitutes an error of law ..., produces unreasonableness in the administrative sense ..., [or] frustrates a legitimate expectation”.¹⁰⁶ Gallen J in *Northern Roller Mining Co Ltd v Commerce Commission*¹⁰⁷ echoed a similar sentiment in stating that a decision may be erroneous either for misdirection or irrationality if “the decision-making authority has indicated the criteria which will be taken into account in arriving at [a] decision, but proceeds on some other basis”.¹⁰⁸

For the purposes of this paper it is not necessary to answer these questions directly, except to say that it is *possible* that such findings could be made. Fisher J’s decision in *Chiu* is good authority on this point. In light of this possibility, the real point to be made here is that the requirements of the Charter must be a consideration in the Chief Executive’s mind when a decision is made as to whether or not to recover a debt.

B Ombudsmen Act 1975

Where a client feels aggrieved by the Ministry’s conduct in any matter, it is open to that person to make a complaint to the Ombudsman under the Ombudsmen Act 1975. The relevant provisions are sections 13, 18, and 22. Section 13 empowers the Ombudsman to investigate “any decision or recommendation made, or any act done or omitted ... relating to a matter of

¹⁰⁶ *Chiu*, above n 105, 550, Fisher J.

¹⁰⁷ *Northern Roller Mining Co Ltd v Commerce Commission* [1994] 2 NZLR 747 (HC).

¹⁰⁸ *Northern Roller Mining Co Ltd v Commerce Commission*, above n 107, 754, Gallen J.

administration and affecting any person or body of persons in his or its personal capacity".¹⁰⁹ Section 18 enables the Ombudsman to "hear or obtain information from such persons as he thinks fit, and may make such enquiries as he thinks fit".¹¹⁰

Section 22 details the procedure for the Ombudsman's report after the completion of his or her investigation. The Ombudsman has the power to examine any decision or recommendation to determine whether or not it was "unreasonable, unjust, oppressive, or improperly discriminatory".¹¹¹ Relevantly, subsection (2) provides:

The provisions of this section shall also apply in any case where an Ombudsman is of the opinion that in the making of the decision or recommendation, or in the doing or omission of the act, a discretionary power has been exercised for an improper purpose or on irrelevant grounds or on the taking into account of irrelevant considerations".

Under subsection (3), the Ombudsman is also empowered to investigate and make recommendations to the effect that any law or practice which a decision was predicated upon should be re-evaluated.¹¹²

On the basis of this statutory framework, the Ombudsman has the ability to investigate any decision or recommendation made by the Ministry, and write an opinion making such recommendations as thought fit. It is important to note that in the exercise of this function, the Ombudsman has the ability to comment on

¹⁰⁹ Ombudsmen Act 1975, section 13.

¹¹⁰ Ombudsmen Act 1975, section 18.

¹¹¹ Ombudsmen Act 1975, section 22(1)(b).

¹¹² Ombudsmen Act 1975, sections 22(3)(d) and (e).

both administrative actions and the state of the law upon which those actions were taken. Doogue J in *Chief Executive of the Department of Work and Income v Scoble*¹¹³ acknowledged that recourse to the Ombudsman can be had in the wake of decisions concerning benefit entitlement.¹¹⁴

Therefore, when exercising the discretion whether or not to recover a debt due, the Chief Executive should consider the potential for an adverse finding by the Ombudsman in the event that a complaint is made. Two things should be borne in mind here: first, the bases for the decision to recover (or not); and secondly, the reasonableness or the clarity of the law upon which the decision is made. If there exists any uncertainty in the law, through conflicting precedent or inconclusive interpretation, the Chief Executive should be aware of any anomaly and seek to make a reasonable decision in light of that. The author will come back to this point in relation to the case study.

C The Public Finance Dimension

Another important consideration the chief executive should have in mind when exercising the discretion is the obligations owed to the public purse. These obligations manifest themselves principally through three Acts of Parliament: The Public Finance Act 1989 (sections 34-37), the Public Audit Act 2001 (section 16), and the State Sector Act 1988 (section 32).

¹¹³ *Chief Executive of the Department of Work and Income v Scoble*, High Court, Wellington, AP 58/01 (3 August 2001).

¹¹⁴ *Scoble*, above, n 113, para 40, Doogue J.

Although these statutes primarily address the requisite fiscal responsibility of the Chief Executive, the State Sector Act also betrays some of the tension between fiscal accountability on the one hand and wider social obligations on the other. It is submitted that this is particularly the case in relation to the Chief Executive of the Ministry of Social Development, where the social responsibility incumbent in the job is clear cut. An example of this tension as reflected in the legislation comes from the long title to the State Sector Act, which relevantly provides that its purpose is to:¹¹⁵

- (a) ensure that employees in the State services are imbued with the spirit of service to the community, and
- (b) promote efficiency in the State services, and
- (c) ensure the responsible management of State services

In addition to this is s 32 of the State Sector Act, which is directed specifically at the Chief Executive, and provides that they shall be responsible for “[t]he efficient, effective, and economical management of the activities of the department”.¹¹⁶

The responsibility of the Chief Executive goes beyond the tension identified and extends to the duty of loyalty to the government. Palmer characterises the position thus:¹¹⁷

Chief executives have a difficult balancing act to maintain – satisfying their legal responsibilities, meeting their accountability requirements, and fulfilling public

¹¹⁵ State Sector Act 1988, Long Title.

¹¹⁶ State Sector Act 1988, s 32(d).

¹¹⁷ G W R Palmer and Matthew Palmer *Bridled Power: New Zealand's Constitution and Government* (4ed, Oxford University Press, Auckland, 2004) 101.

expectations while remaining loyal to the government of the day and maintaining the trust of ministers.

In his Ministerial Review of the Department of Child, Youth and Family Services¹¹⁸ Judge Michael J A Brown found that there was a “conflict between the Chief Executive’s responsibilities under the Children, Young Persons and their Families Act 1989, and the Public Finance Act 1989”.¹¹⁹ In assessing this conflict, Judge Brown believed that the Department operated on the basis that:¹²⁰

where the Chief Executive is unable to meet statutory expenditure obligations she may be in breach of her statutory duty but the duties under the Public Finance Act are paramount in any conflict between her statutory responsibilities.

Judge Brown’s study is an illuminating one, as the Chief Executive in the debt recovery situation under the Social Security Act must negotiate a similar tension. In *Chief Executive of the Department of Work and Income v Vicary*,¹²¹ Gendall J reflected on this problem:¹²²

The concern and purpose of the Act is to aid those who truly are in need of financial assistance in a way that is administratively efficient and not wasteful of public funds. Those considerations have to be balanced.

¹¹⁸ Michael J A Brown *Care and Protection is About Adult Behaviour: The Ministerial Review of the Department of Child, Youth and Family Services* (Report to the Minister of Social Services and Employment, the Honourable Steve Mahary) December 2000.

¹¹⁹ Brown, above n 118, 21.

¹²⁰ Brown, above n 118, 24-25.

¹²¹ *Chief Executive of the Department of Work and Income v Vicary*, High Court, Wellington, AP 158/00 (11 April 2001).

¹²² *Vicary*, above, n 121, para 25, Gendall J.

In *Hall v Director-General of Social Welfare*,¹²³ McGechan J believed the decision maker “should be proactive in seeking welfare, and not defensive or bureaucratic”.¹²⁴

This paper makes no attempt to reconcile the tension between the social objectives of the legislation and the fiscal responsibilities incumbent on the Chief Executive. Such reconciliation is an impossible task in the abstract, as every situation will involve a different factual matrix and therefore it is best left to be judged on a case-by-case basis. It is enough that the tension is acknowledged. The principal concern is that the Chief Executive is aware of the very onerous financial obligations and that these are taken into account when considering questions of debt recovery.

D The nature and purpose of social security

Unlike the Social Security Act 1938, the 1964 statute does not contain a preamble or statement of principle. The Report of the Royal Commission of Inquiry into Social Security 1972¹²⁵ found that the “Act did not lay down a clear set of community values and principles. Instead it prescribed some administrative techniques to define benefit categories and establish benefit levels and the method of financing them”.¹²⁶ The Royal Commission acknowledged the distinctly pragmatic approach New Zealand has taken to social security, and thus believed

¹²³ *Hall v Director-General of Social Welfare* [1997] NZFLR 902 (HC).

¹²⁴ *Hall*, above n 123, 912, McGechan J.

¹²⁵ *Report of the Royal Commission of Inquiry into Social Security in New Zealand* (Government Printer, Wellington, 1972).

¹²⁶ *Report of the Royal Commission of Inquiry into Social Security in New Zealand*, above n 125, 55.

that the system should not pursue romantic ends but rather operate as a practical, viable system which is "directed at the achievement of objectives rather than serving dogma".¹²⁷

As such, the Commission concluded that the aims of the social security system should be a combination of the following: sustaining life and health; to ensure, within reason, that "everyone is able to enjoy a standard of living much like the rest of the community"; to improve the quality of life by income maintenance and other means; and, a need to co-ordinate "taxation, wages, employment, economic development, education, health, housing, social services, and cultural policies" with social security cash benefits.¹²⁸ It is submitted that in light of the social outcomes of that the economic reforms of the late 1980s, early 1990s have had on New Zealand life it is necessary to locate a more contemporary statement of principle.¹²⁹

The introduction of the Social Security Amendment Bill¹³⁰ to the House of Representatives by the Honourable Steve Maharey, Minister of Social Services and Employment, sounds a 'third-way' chord.¹³¹ The Minister's speech emphasised that the Government's approach to beneficiaries was not punitive, but

¹²⁷ *Report of the Royal Commission of Inquiry into Social Security in New Zealand*, above n 125, 55.

¹²⁸ *Report of the Royal Commission of Inquiry into Social Security in New Zealand*, above n 125, 55.

¹²⁹ See Penelope J Brook Cowen "Neo-Liberalism" in Raymond Miller (ed) *New Zealand Politics in Transition* (Oxford University Press, Auckland, 1997) 345-349 for a discussion of the economic theory of the New Zealand reforms. See also Jane Kelsey *The New Zealand Experiment* (Auckland University Press, Auckland, 1995) 271-296 for a discussion of what the author terms the "social deficit" that was produced by the reforms.

¹³⁰ (12 September 2000) NZPD 5450.

¹³¹ See Paul Dalziel "Third Way Economics: What Might This Mean in New Zealand?" in *The New Politics: a Third Way for New Zealand* (Dunmore Press, Palmerston North, 1999) for a discussion of 'third way' principles.

rather stressed the time-honoured adage of balancing incentive to work with the provision of support where necessary.¹³² As such, the speech gets us no further than the Royal Commission. The statement of Gendall J in *Vicary*, as cited above, reflects the pragmatic attitude to social security. That is, assistance should be available where there is an established need, but the assistance is to be distributed in a manner that is “administratively efficient and not wasteful of public funds”.¹³³ The author adopts Gendall J’s characterisation of social security as accurately reflecting the New Zealand position.

VII THE CASE STUDY

The author will now pose a particular hypothetical fact scenario in order to contextualise the Chief Executive’s discretion. The scenario concerns clients of the Ministry who improperly receive benefits whilst living in either a marriage or in a relationship in the nature of marriage. Here the debt is beyond dispute, however the question which needs to be addressed is whether the impact of extreme domestic violence can have any impact on the Chief Executive’s determination as to whether or not to recover the debt under s 86(1) of the Act. In assessing this question emphasis will be placed on the status of the relationship and how this effects recovery considerations. This inquiry will involve an examination of the extent to which the Social Security Act (a combination of s 63(a) and (b) and s 86(1)) differentiates between battered debtors involved in de facto relationships and battered debtors who are married.

¹³² (12 September 2000) NZPD 5451.

¹³³ *Chief Executive of the Department of Work and Income v Vicary*, High Court, Wellington, AP 158/00 (11 April 2001).

The analysis here will proceed on two fronts. First, an extensive argument will be made that the discretion bestowed on the Chief Executive under s 63(a) to regard as unmarried any married person for the purposes of benefit entitlement can and should be invoked if the hypothetical scenario were in fact to arise. This argument will be based on an assessment of the living apart criterion in s 63(a) (see below). If this position is accepted, then as of consequence there is no debt as the married person would be entitled to the benefit. Such a result would bring into line marriage and de facto relationships in cases of extreme violence.

If this argument is not accepted, then an alternative argument is that the Chief Executive could decide under s 86(1) to not recover the debt. Such a decision would be the consequence of an appropriate balancing of all of the relevant considerations canvassed above. The special nature of this particular scenario would also call for some additional factors to be taken into account. These factors will be dealt with below. The primary concern for the Chief Executive here would be the realisation that a person in a de facto relationship who had suffered the same facts would, on the basis of *Ruka*, be entitled to the benefit and therefore incur no debt. It will be argued that the recovery of the debt of a married person in this position would amount to possible discrimination at law and therefore the Chief Executive would be entitled to not recover the debt.

In order to assess the impact that domestic violence has on the discretion, certain threshold questions need first to be addressed. These questions concern the nature and status of the relationship and also the requisite level of violence needed

before it can be considered a factor in the decision-making process. The threshold questions entail a variety of difficult issues. Therefore, they need to be examined in some detail. However, it is important to bear in mind that the following discussion should be read as an inquiry seeking to justify the decision to recover or not recover an established debt.

VIII THE FIRST ARGUMENT: EXERCISING THE DISCRETION UNDER s 63(a)

The argument advanced here is that in the specific scenario posed, the Chief Executive should consider such a person as unmarried and therefore eligible for the benefit under s 63(a). The result of this argument is that the prima facie fraud committed on the Ministry would not result in a debt due to the Crown under s 85. Section 63 of the Act provides:

For the purposes of determining any application for any benefit, or reviewing any benefit already granted ... the chief executive may in the chief executive's 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 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 the chief executive's discretion grant a benefit, refuse to grant a benefit, or terminate, reduce, or increase any benefit already granted, from that date accordingly.

As subsections (a) and (b) of s 63 require different considerations, they will be dealt with separately, beginning with relationships in the nature of marriage under subsection (b).

A *Section 63(b)*

The leading case concerning relationships in the nature of marriage is *Ruka v Department of Social Welfare*,¹³⁴ which amended the approaches hitherto taken on the basis of *Excell v Department of Social Welfare*,¹³⁵ and *Thompson v Department of Social Welfare*.¹³⁶ Miss Ruka suffered extreme violence at the hands of her partner, with whom she had shared a relationship spanning 18 years. The Court of Appeal accepted that Ruka suffered from battered woman's syndrome.¹³⁷ The High Court had convicted Ruka of benefit fraud on the charge that she had improperly received a domestic purposes benefit while living in a relationship in the nature of marriage, making her ineligible to receive the benefit. The Court of Appeal overturned the High Court's decision and quashed Ruka's convictions.¹³⁸

Barker J in the High Court employed the orthodox approach from *Thomson*, which listed a set of indicia that were relevant to the existence of a relationship in the nature of marriage. Factors include shared housing, sexual relations, emotional support, socialising, children, the sharing of domestic tasks,

¹³⁴ *Ruka v Department of Social Welfare* [1997] 1 NZLR 154 (CA).

¹³⁵ *Excell v Department of Social Welfare* [1991] NZFLR 241 (HC).

¹³⁶ *Thompson v Department of Social Welfare* [1994] 2 NZLR 369 (HC).

¹³⁷ *Ruka*, above n 134, 164, Henry and Gault JJ.

¹³⁸ See Bill Atkin "Challenging Conventional Understandings" in Andrew Bainham (ed) *The International Survey of Family Law 1996* (Martinus Nijhoff, London, 1996) 290.

household expenses, and whether the parties appear to outsiders as a couple.¹³⁹

The majority approach of the Court of Appeal in *Ruka* altered the orthodox approach by stating that such a relationship is:¹⁴⁰

an acceptance by one partner that (to take the stereotypical role) he will support the other partner and any child or children of the relationship if she has no income of her own or to the extent that it is or becomes inadequate. The commitment must go beyond mere sharing of living expenses, as platonic flatmates or siblings living together may do; it must amount to a willingness to support, if need exists. There must be at least that degree of financial engagement or understanding between the couple.

As Wiseman points out, in the majority's reasoning, emotional commitment must supplement financial interdependence:¹⁴¹

Where financial support is available nevertheless there will not be a relationship in the nature of marriage for this purpose unless that support is accompanied by sufficient features evidencing a continuing emotional commitment not arising from just a blood relationship.

This new two-pronged test absolved *Ruka* of benefit fraud in that the absence of financial support from her partner, coupled with the lack of emotional support "meant that [she] had not been living in a relationship in the nature of marriage".¹⁴² Therefore, under s 63(b), there was no basis for the Chief Executive to consider *Ruka* ineligible for the benefit and as such there was no debt to collect.

¹³⁹ *Ruka*, above n 134, 159, Richardson P and Blanchard J.

¹⁴⁰ *Ruka*, above n 134, 161, Richardson P and Blanchard J.

¹⁴¹ Jessica Wiseman "Determining a Relationship in the Nature of Marriage: The Impact of *Ruka* on the Department of Work and Income's Conjugal Status Policy" (2001) 48 VUWLR 978.

¹⁴² Wiseman, above n 141, 979.

A notable aspect of the decision is the weight given to the existence of violence in the relationship. As Hughes points out, “the presence of extreme violence over the relevant period ... could affect the question whether the parties were living in a relationship in the nature of marriage”.¹⁴³ This is a broad assertion, which needs qualification, as the Court was essentially divided on the issue. Blanchard and Richardson JJ for the majority believed that violence, or rather the existence of battered woman’s syndrome¹⁴⁴ is “a factor available to be taken into account in the determination of whether a relationship in the nature of marriage existed”.¹⁴⁵ Thomas J, concurring in the main with the majority, placed substantial emphasis on the violent nature of Ruka’s relationship, and the implications of the syndrome. For Thomas J, and presumably Blanchard and Richardson JJ, the violence “negated the basic mental and emotional commitment which is essential to a relationship in the nature of marriage”.¹⁴⁶

We can view this, then, as a subset of the second limb of the test given above: if in evidence the extent of the violence is deemed to be so bad that it negates the requisite emotional commitment, it must follow that a relationship in the nature of marriage cannot be established. This argument is inconsistent with the view given by Atkin that:¹⁴⁷

if an association was violent at its inception, then that might tell against the commencement of a marriage-like relationship, but if violence surfaces later in the

¹⁴³ John Hughes “Lone Parents and Social Security” (2005) 36 VUWLR 13.

¹⁴⁴ Battered woman’s syndrome as a legal concept will be discussed below.

¹⁴⁵ *Ruka v Department of Social Welfare* [1997] 1 NZLR 154, 163, Richardson P and Blanchard J.

¹⁴⁶ *Ruka*, above n 145, 179, Thomas J.

¹⁴⁷ Atkin, above n 138, 291.

association it is hard to see how it can negate an already existing marriage-like relationship.

On the majority's test it should not matter at what stage the violence occurs, as it can only have the one effect of negating the emotional commitment.

The findings of *Ruka* arguably set a precedent for exculpating people in de facto relationships who commit some type of fraud on the Ministry in order to receive a benefit. Exculpation comes in the form of removing from the equation the *prima facie* fraudulent behaviour in acknowledging the true circumstances of the situation – that is, in acknowledging that there does not a relationship in the nature of marriage in existence. The implication of this is that the Chief Executive has no grounds for recovering the debt, because the debt no longer exists. The question here is can this same logic be applied to marriage situations. (It is worth stressing again here that even if the logic cannot be applied to marriages then the Chief Executive would still be left with a discretion under s 86(1) as to whether or not to collect the debt. This point will be explored in detail below).

Blanchard and Richardson JJ acknowledge the connection with legal marriage in the reasoning process:¹⁴⁸

The expression 'relationship in the nature of marriage' necessarily requires a comparison with a legal marriage but that is not a straightforward exercise. A simple balancing of equivalent features is not possible because for married persons financial obligations are not voluntary: the dependent spouse has some *right* to maintenance. Furthermore, it is not

¹⁴⁸ Hughes, above n 143, 13.

to be thought that because certain negative features (e.g. physical abuse, lack of emotional commitment) are found in some de jure marriages, the same factors in a relationship between a man and a woman who are not married are to be disregarded in determining whether that relationship is in the nature of a marriage. The comparison must seek to identify whether there exist in the relationship of two unmarried persons those key positive features which are to be found in most legal marriages which have not broken down (co-habitation and a degree of companionship demonstrating an emotional commitment). Where these are 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.

Although this passage concerns de facto relationships, by implication it sets some crucial requirements that are arguably needed for a legal marriage (a right to maintenance, cohabitation and a degree of companionship demonstrating an emotional commitment). Atkin has argued that the reasoning of the *Ruka* decision creates an artificial distinction between de facto relationships and legal marriages:¹⁴⁹

[While] married spouses share mutual maintenance liabilities, financial interdependence is not necessary for a valid marriage. A marriage where there is no such interdependence may still be a valid marriage, and the couple may still 'live together'. In determining whether a married couple lives apart, a lack of financial support may be relevant but it is by no means decisive.

To investigate this distinction, it is necessary to move on to an analysis of the situation under s 63(a).

¹⁴⁹ Bill Atkin "Challenging conventional understandings" in Andrew Bainham (ed) *The International Survey of Family Law 1996* (Martinus Nijhoff, London, 1996) 291.

B Section 63(a)

Subsection (a) gives discretion to the Chief Executive to regard a legally married person as unmarried for the purposes of granting or reviewing a benefit, on the condition that this person is *living apart* from his or her spouse.¹⁵⁰ In *Sullivan v Sullivan*,¹⁵¹ traditionally viewed as the leading case in the area, the Court of Appeal held that living apart involved “two essential ingredients – a physical separation and a mental attitude averse to cohabitation on the part of one or both of the spouses”.¹⁵² The important thing in this statement is the unflinching view of physical separation. Turner J believed that “cohabitation and ‘living apart’ are mutually exclusive opposites” and that if “spouses are cohabiting, they are not living apart – and if they are living apart, they are not cohabiting. There can moreover be no possible intermediate stage”.¹⁵³

Regarding the physical element of living apart, Henry J in *Sullivan* had a slightly less rigid view of what was required. His Honour believed that “neither presence in, nor absence from, a particular house determines whether or not spouses are living apart. Physical separation and physical presence are each factors to be weighed in conjunction with other relevant facts”.¹⁵⁴ The mental

¹⁵⁰ See *The Laws of New Zealand* (Butterworths, Wellington 2004) Dissolution of Marriage para 19-21.

¹⁵¹ *Sullivan v Sullivan* [1958] NZLR 912, 924 (CA).

¹⁵² *Sullivan*, above n 151, 924, Turner J.

¹⁵³ *Sullivan*, above n 151, 924, Turner J.

¹⁵⁴ *Sullivan*, above n 151, 934, Henry J.

element, an attitude averse to cohabitation by at least one spouse, is needed because “mere physical separation” is not enough on its own.¹⁵⁵

As the authors of the *Laws of New Zealand* point out, the corollary of mere separation not being enough is not that there has to be a “conscious formulation of an intention finally to end the marriage”.¹⁵⁶ The correct test is an objective one. The Family Court in *Williams v Williams*¹⁵⁷ championed an approach that took the *Sullivan* criteria as a baseline understanding, but supplemented this traditional approach with the “depth of insight that has since been acquired through the Family Court’s collegiate approach to matrimonial problems”.¹⁵⁸ The case involved the question whether an application for dissolution of a marriage could be ordered where the parties to the marriage were still cohabiting, or living under the same roof. In believing that it was possible, Judge Inglis decided the case by reasoning thus:¹⁵⁹

But to a reasonable outside observer, fully informed of the true situation between the parties, in a position to observe the state of affairs as it existed ... it would have been perfectly obvious that the marriage was doomed and the parties were then irreconcilable. The reasonable outside observer would have been left in no doubt that the marriage was no more than a shell ... The reasonable outside observer would have concluded that any failure on the part of either spouse expressly to acknowledge the true state of affairs was simply a failure to recognise reality, and of no significance in determining whether or not the parties had indeed crossed the threshold into a state of living apart.

¹⁵⁵ *Sullivan*, above n 151, 924, Turner J.

¹⁵⁶ *The Laws of New Zealand* (Butterworths, Wellington 2004) Dissolution of Marriage para 21.

¹⁵⁷ *Williams v Williams* [1988] 4 NZFLR 769 (FC).

¹⁵⁸ *Williams*, above n 157, 780, Judge Inglis.

¹⁵⁹ *Williams*, above n 157, 781, Judge Inglis.

Therefore, *Williams* makes it clear that the fact of living together (physical cohabitation) is not fatal to a claim that the parties to a marriage are in fact living apart. In another Family Court decision, *McBride v McBride*,¹⁶⁰ Judge Callaghan noted several points of law that were encountered in argument. Among them are the following:¹⁶¹

In considering whether or not the parties are living apart each case requires a careful consideration on its own facts. Physical separation and physical presence are to be weighed in conjunction with all other relevant facts

Any other indicia need not on their own be decisive and normally it is a matter of assessing the whole situation affecting the parties to decide whether a state of living apart exists

The content of the relationship needs to be examined where parties have remained living under the same roof and the Court must be conscious not to proceed on the basis of what the relationship ought to have included.

The above "Family Law" approaches to living apart can be contrasted with the approach taken in the High Court by McGechan J in *Director-General of Social Welfare v W*.¹⁶² In that case the wife was living abroad while the husband, who had suffered from a stroke, remained in New Zealand. The reason for the wife's absence was that she was endeavouring to obtain US citizenship. It was found that there was no intermingling of finances between the couple. The case arose in response to the husband's stroke, and the subsequent denial of a sickness benefit. As the husband was unsure of his wife's earnings in the US, and as he

¹⁶⁰ *McBride v McBride* [1999] NZFLR 651 (FC).

¹⁶¹ *McBride*, above n 160, 655-656, Judge Callaghan.

¹⁶² *Director-General of Social Welfare v W* [1997] 2 NZLR 104 (HC).

“did not consider the marriage was ended”, the “Social Welfare Department declined to regard him as ‘single’ under s 63(b)”.¹⁶³ McGechan J held that, in spite of the physical separation, the parties could not be considered as “living apart”. The primary reason for this was the husband’s evidence that he considered the marriage to still be extant.

At this stage it is sufficient to draw a basic conclusion. The Family Court has to a large extent reinterpreted the *Sullivan* baseline understanding in terms of living apart. Both *Williams* and *McBride* make it clear that physical cohabitation can, in particular circumstances, be consistent with living apart. In *W* the High Court reasoned that even in the event of physical separation, it was possible to consider parties to a marriage as not living apart because there was evidence that at least one party considered the marriage not to be at an end. The inference that can be drawn from this is that physical separation is merely an element, and not a pre-requisite, to the determination of whether a married couple are “living apart”.

If this argument is accepted, we can begin to develop some consistency between the debt situations of married and unmarried people. Where relationships are found to include elements of extreme violence and abuse it is unlikely that an unmarried woman would be regarded by the Chief Executive as being in a relationship in the nature of marriage under s 63(b). This is because of the second element of the *Ruka* test, which posits that, even if the relationship does involve financial interdependence, the violence, if bad enough, can negative the requisite emotional commitment. Correspondingly, if the same bad fact situation is

¹⁶³ *Director-General of Social Welfare v W*, above n 162, 105, McGechan J.

transplanted into a marriage, on the above interpretation of living apart, the recipient of the abuse could potentially be regarded as unmarried by the Chief Executive under s 63(a) by a combination of a mental attitude averse to cohabitation and an objective assessment of all the facts of the marriage (an evaluation of the level of violence required will follow below). This is a desirable result, as it avoids an anomaly between the categorisation of relationships. Otherwise, in virtually the same need situation, the married battered woman would incur a debt for all she had received whilst the unmarried battered woman would be deemed entitled to state assistance.

Hughes has made an analogous argument in relation to entitlement to the domestic purposes benefit:¹⁶⁴

... the existing categories of entitlement to the DPB represent essentially arbitrary divisions, based upon historical factors at the time of its introduction. The existence of a separate set of principles to be used when establishing eligibility for married and unmarried women respectively is one example. There seems to be no reason in principle why the same test – that developed by the Court of Appeal in *Ruka* – should not be applied to both situations.

The decision of Paterson J in *Creeks v R*¹⁶⁵ also provides support for the above argument. The case involved an appeal against conviction and sentence on charges of benefit fraud, namely, that the appellant had “dishonestly represented that she [and her husband] had ceased to live together as a married couple.”¹⁶⁶

Counsel for both parties submitted arguments concerning the appropriate test for

¹⁶⁴ John Hughes “Lone Parents and Social Security” (2005) 36 VUWLR 22.

¹⁶⁵ *Creeks v R*, Court of Appeal, CA26/04 (23 June 2004).

¹⁶⁶ *Creeks v R*, above n 165, para 6, Patterson J.

“living apart”. It was found that it was immaterial what test was applied as on either scenario the appellant and her husband would have not met the necessary requirements. In spite of this, His Honour acknowledged, obiter, that “there may be arguments for having the one test to apply to both subsections (a) and (b) of s 63, particularly in view of the recent changes in the Property (Relationships) Act 1976”.¹⁶⁷ This statement is a clear acknowledgement of the Court’s willingness to recognise anomalies in the law, particularly with reference to developments in social thinking as reflected in related statutes.

C Figuring the violence – what is needed?

The argument outlined thus far has sought to streamline the s 63(a) and (b) scenarios by reference to the impact of violence in the relationship. The streamlining focuses exclusively on violence and not financial interdependence because, as noted above, a marriage may still be valid even if there is no financial interdependence, so long as the parties live together. Therefore, the only way to fracture the legal edifice of ‘living together’ in respect of a marriage is by reference to the violence creating in the mind of the battered person a mental attitude averse to cohabitation. Naturally, the accompanying objective assessment of all the facts of the relationship would look to the question of financial interdependence, but given the conclusion drawn that a marriage can exist without such interdependence it is prudent given the scope of this paper to focus on violence alone.

¹⁶⁷ *Creeks v R*, above n 165, para 14, Patterson J.

It is therefore necessary to determine what level of violence is needed before the arguments will be accepted. In relation to s 63(b), it was posited that the violence negated the requisite emotional commitment required for a relationship in the nature of marriage. In relation to s 63(a), it was argued that the violence would count for the mental attitude averse to cohabitation, and that this, taken together with the approach of the Family Court, could render the situation as one of living apart.

The Law Commission report *Battered Defendants: Victims of Domestic Violence Who Offend: A Discussion Paper*¹⁶⁸ canvassed the history of the concept of Battered Woman's Syndrome ("BWS"), and explained how the condition is used in evidence. The syndrome was borne out of two theories that sought to explain the behaviour of battered women, the 'cycle of violence', and 'learned helplessness'.¹⁶⁹ Within the scientific community, there has been much debate concerning whether it is correct to view BWS as a diagnosable condition. The Commission sought to avoid the merits of that debate and instead focus its attention on "ensuring that evidence about the realities of battering relationships is presented in a way most likely to assist fact-finders".¹⁷⁰

The Commission proposed to maintain the current admissibility of expert evidence on domestic violence covering the "broad range of issues concerning the

¹⁶⁸ New Zealand Law Commission *Battered Defendants: Victims of Domestic Violence Who Offend: A Discussion Paper* (NZLC R41, Wellington, 2000).

¹⁶⁹ New Zealand Law Commission *Battered Defendants: Victims of Domestic Violence Who Offend: A Discussion Paper*, above n 168, 4.

¹⁷⁰ New Zealand Law Commission *Battered Defendants: Victims of Domestic Violence Who Offend: A Discussion Paper*, above n 168, 8.

psychological, social and economic aspects of domestic violence”.¹⁷¹ Significantly for our purposes here, the Commission noted that expert evidence is “relevant and substantially helpful”¹⁷² where it concerned the following:¹⁷³

Research on the patterns of violence in battering relationships, the social and economic factors that affect battered women, the psychological effects of battering and separation violence. This may help to explain why the woman remained in the relationship.

Elisabeth McDonald, in her article *Battered Woman Syndrome*,¹⁷⁴ argued that knowing why the woman remained in the relationship is the principal utility of BWS being used in evidence. McDonald points out that the main arguments in favour of admitting the evidence “is that it will assist the jury understanding why the woman behaved the way she did”¹⁷⁵ because:¹⁷⁶

Many people do not understand why a woman does not leave an abusive relationship, and jurors may therefore attempt to explain this by categorising her as either a masochist, who enjoys being beaten, or a liar who has exaggerated the extent of the abuse.

As John Hughes points out,¹⁷⁷ due to the fact that financial interdependence and emotional commitment “were absent in *Ruka*, the majority did not rely on the effect of battered woman’s syndrome in formulating the

¹⁷¹ New Zealand Law Commission *Battered Defendants: Victims of Domestic Violence Who Offend: A Discussion Paper*, above n 168, 9.

¹⁷² New Zealand Law Commission *Battered Defendants: Victims of Domestic Violence Who Offend: A Discussion Paper*, above n 168, 9.

¹⁷³ New Zealand Law Commission *Battered Defendants: Victims of Domestic Violence Who Offend: A Discussion Paper*, above n 168, 9.

¹⁷⁴ Elisabeth McDonald “Battered Woman Syndrome” (1997) NZLJ 436.

¹⁷⁵ McDonald, above n 174, 436.

¹⁷⁶ McDonald, above n 174, 436.

¹⁷⁷ John Hughes “Battered Woman’s Syndrome and Interdependence as Factors in Establishing Conjugal Status in Social Security Law” (1999) 7 Waikato LR.

reasons for their decision”,¹⁷⁸ other than to say it is a factor that goes to “the determination of whether a relationship in the nature of marriage existed”.¹⁷⁹ This, therefore, is unhelpful in determining what level of violence must exist in a relationship before it can be considered to either negate the requisite emotional commitment in s 63(b), or be used as a factor in the living apart inquiry under s 63(a).

It is argued that the approach taken by Thomas J in *Ruka* is the most suitable benchmark for determining the level of violence and its impact on the two inquiries under s 63.¹⁸⁰

But while the syndrome represents an acute form of the battering relationship ... it is probably preferable ... to avoid reference to it and simply to speak of the battering relationship. There is a danger that in being too closely defined, the syndrome will become too rigidly approached by the Courts ... [The] syndrome, where it is found to exist, is not in itself a justification for the commission of a crime. It is the effects of the violence on the battered woman's mind and will, as those effects bear on the particular case, which is pertinent. It is not, therefore, simply a matter of ascertaining whether a woman is suffering from battered woman's syndrome and, if so, treating that as an exculpatory factor. What is important is that the evidence established that the battered woman is suffering from symptoms or characteristics which are relevant to the particular case. In determining whether a battered woman is living in a relationship in the nature of marriage, therefore, the ultimate question is whether the evidence establishes that she possesses those symptoms or characteristics which negative or tend to negative any element which would otherwise point to the relationship being one in the nature of marriage.

¹⁷⁸ Hughes, above n 177, 124.

¹⁷⁹ *Ruka v Department of Social Welfare* [1997] 1 NZLR 154, 162-163, Richardson P and Blanchard J.

¹⁸⁰ *Ruka*, above n 179, 173-174, Thomas J. See Hughes, above n 177, 125.

Although this passage refers only to s 63(b), it can be used in the s 63(a) inquiry as well. The nub of the passage is His Honour's statement that what "is important is that the evidence established that the battered woman is suffering from symptoms or characteristics which are relevant to the particular case".¹⁸¹ In the s 63(a) inquiry, the violence will be relevant to the extent that it creates in the mind of the battered person a mental attitude averse to cohabitation. This is an objective assessment, which will take into consideration the "Family Court" factors as outlined above.

A relatively recent decision of the Social Security Appeal Authority provides a good illustration of the type of scenario the fact-finder can be confronted with. In *SSAA Decision No 062/03*,¹⁸² the Authority considered whether the appellant was living apart from her husband. Hughes highlights the following point from the Authority's reasoning:¹⁸³

... the appellant was held not to have been "living apart" from her husband, notwithstanding that she had feared for her physical safety during intermittent periods when they shared a household (amongst other things he had chased her with an axe, punched her, and assaulted their school age daughter).

This finding demonstrates the difficulty of arriving at an appropriate level of violence in order to satisfy the test for living apart. It is argued that this difficulty should not be considered insurmountable, and that it is a necessary task

¹⁸¹ *Ruka*, above n 179, 174, Thomas J.

¹⁸² *SSAA Decision No 062/03* (21 May 2003) SSA 243/02.

¹⁸³ John Hughes "Lone Parents and Social Security" (2005) 36 VUWLR 20.

if we are to avoid the unjust anomaly that occurs in the interplay of s 63(a) and (b). At the very least it is argued that where particularly bad violence is established and the general situation is consistent with the facts in *Ruka*, the Chief Executive may treat a married person as living apart from their spouse and therefore satisfy the s 63(a) criteria. Every case will be different, but the essential point that must be established is that the violence created, objectively, a mental attitude averse to cohabitation. To reiterate Judge Callaghan's approach in *McBride*, it "is a matter of assessing the whole situation affecting the parties to decide whether a state of living apart exists".¹⁸⁴

The implication of this argument is that it tacitly upholds the Appeal Authority's decision in *SSAA Decision No 73/99*¹⁸⁵ "that the woman be a 'virtual prisoner' of the man" before it would stretch the living apart criteria to include situations where the husband and wife still live under the same roof.¹⁸⁶ As this paper is only concerned with this specific situation – transplanting the *Ruka* facts to a marriage situation, and asking how this effects the discretion whether or not to recover the debt – no judgement is made as to how lower levels of violence would affect the discretion.¹⁸⁷

IX THE ALTERNATIVE ARGUMENT

¹⁸⁴ *McBride v McBride* [1999] NZFLR 651, 656, Judge Callaghan.

¹⁸⁵ *SSAA Decision No 73/99* (30 July 1999) SSA 6/99. See Hughes, above n 184, 19.

¹⁸⁶ Hughes, above n 183, 18-19.

¹⁸⁷ See Hughes, above n 183, 20 where it is pointed out that in the Appeal Authority the Chief Executive has argued that "violence is simply not a relevant factor in assessing whether a married couple are living apart". The argument of this paper is that where the violence and the general situation equates with that seen in *Ruka* then the violence is substantially material.

If the interpretation of s 63(a) is not accepted, and therefore a debt is established on the Ministry's books, it is argued that the Chief Executive has the ability to decide not to recover the debt under s 86(1). This decision would have to be premised on an appropriate balancing of the relevant considerations, taking into account such factors as the aims and purposes of social security and also the restrictive public finance obligations that are incumbent on the Chief Executive. This situation gives rise to some additional factors that should be taken into account in the exercise of the discretion. Primarily, the concern here is that the Chief Executive does not want to make a decision that would result in discriminatory treatment. It is submitted that the disparity between married and unmarried persons in this circumstance is potentially discriminatory. In light of this, it is necessary to carefully identify the additional factors and the reasons why they are important.

A *Discrimination on the basis of marital status*

As illustrated above, an orthodox reading of s 63 will result in an unmarried battered woman being entitled to a benefit, whereas a married woman in exactly the same kind of abusive relationship would not be entitled to the same benefit. The question here is whether this would amount to discrimination under the law.

Section 19 of the New Zealand Bill of Rights Act 1990 states: "Everyone has the right to freedom from discrimination on the grounds of discrimination in the Human Rights Act 1993". Section 21 of the Human Rights Act 1993 lists the

prohibited grounds of discrimination. Relevant here is s 21(1)(b) which states that a prohibited ground of discrimination is “marital status, which means being ... married, in a civil union, or in a de facto relationship”.¹⁸⁸

In *Quilter v Attorney-General*,¹⁸⁹ Gault J believed that:¹⁹⁰

It [was] necessary to distinguish between permissible differentiation and impermissible differentiation amounting to discrimination ... Discrimination generally is understood to involve differentiation by reference to a particular characteristic (classification) which characteristic does not justify the difference. Justification for differences frequently will be found in social policy resting on community values.

In this dissenting judgement in the same case, Thomas J premised his discussion of discrimination on the basis that the overall aim of the law should be to provide equality of treatment. For Thomas J, the fundamental question was:¹⁹¹

not whether there is a distinction but whether the distinction which exists is based on the personal characteristics of the individual or group and has the effect of imposing burdens, obligations, or disadvantages on that individual or group which are not imposed on others.

His Honour also believed that for the purpose of giving effective operation to the right contained in the Bill of Rights, it was incorrect to make a distinction between discrimination which arises from “a law which in its term discriminates

¹⁸⁸ Human Rights Act 1993, s 21(1)(b)(ii).

¹⁸⁹ *Quilter v Attorney-General* [1998] 1 NZLR 523 (CA).

¹⁹⁰ *Quilter*, above n 189, 527, Gault J.

¹⁹¹ *Quilter*, above n 189, 532, Thomas J dissenting.

against an individual or group and a law which has a disproportionately severe impact on an individual or group".¹⁹²

On the basis of these statements, it is clear that the anomaly between s 63(a) and (b) can be viewed as discrimination on the basis of marital status, as per s 21(1)(b)(ii) of the Human Rights Act, and thus s 19 of the Bill of Rights Act. In reference to the statement of Gault J above, that the justification for different treatment in the law can be sourced in social policy and community mores, the author strongly argues that there is no tenable social policy or community standard (which, as a standard, is tenuous at best) that would justify the distinction at hand.

B Impact on the discretion

The situation could be seen as coming under the estoppel provision of s 86(9A). This would require that the departmental officer had made an error in judging the married battered debtor as being ineligible to receive the benefit, whereas, so the argument goes, that person was entitled to the benefit under the revised interpretation of s 63(a) as outlined above. The problem here is that, if we were to transplant the *Ruka* facts into a marriage situation, then it cannot be said that the sum was received in good faith, as per s 86(9A)(a)(i).

¹⁹² *Quilter*, above n 189, 533, Thomas J dissenting.

It is more likely that the situation would simply fall under the general discretion under s 86(1). It is the premise of this paper that the Chief Executive's discretion under s 86(1) is not unfettered, a position upheld in the *Attrill* decision.

It has been pointed out that in the *McConkey* decision¹⁹³ Goddard J reasoned that, due to the discretionary nature of s 86(1), factors such as "insolvency or uneconomic commercial return"¹⁹⁴ have the potential to tip the scales in favour of not recovering an established debt. It is submitted here that the very real potential for discrimination could be included as one of Goddard J's factors. However, before this position is reached the Chief Executive needs to properly address all the relevant considerations. The basic point is that the decision cannot be made out of simple compassion; it needs to be made in a manner which is mindful of all the obligations and responsibilities incumbent on the Chief Executive.

In this particular scenario, there are two additional factors that the Chief Executive should take into account. The first, the prospect of an adverse finding by the Ombudsman, has already been considered to some extent, however the Ombudsman has powers that are particularly relevant here, and so therefore further discussion is required. The second consideration is the prospect of an adverse finding by the Human Rights Review Tribunal. It has already been established that the situation could give rise to a case of prima facie discrimination under the Bill of Rights, and as such there is real potential for a successful Bill of Rights challenge in the courts. However, it is worth noting the

¹⁹³ *McConkey v Director-General of Work and Income New Zealand*, High Court, Wellington, AP277/00 (14 August 2002).

¹⁹⁴ *McConkey*, above n 193, 9, Goddard J.

scope and nature of the Human Rights Review Tribunal here as it is a more likely avenue of complaint, given that there are no costs involved in bringing a complaint.

1 Ombudsman

Under s 22 (1)(b) of the Ombudsman Act, the Ombudsman has jurisdiction to report that any decision (for example, a decision of the Chief Executive to recover a debt) was “unreasonable, unjust, oppressive, or improperly discriminatory, or was in accordance with a rule of law or a provision of any act ... that is or may be unreasonable, unjust, oppressive, or improperly discriminatory”.¹⁹⁵

Translating this power to the situation at hand, the Ombudsman would have jurisdiction to assess a decision to recover a debt from a married battered debtor in light of its justness and potential oppressiveness. The Ombudsman may also consider whether the decision is improperly discriminatory on the basis that the same debt would not be recovered from an unmarried battered debtor.

Such an inquiry would be sure to hit the snag of the s 63(a) and (b) anomaly. While s 22(1)(b) enables the Ombudsman to report that the rule of law upon which the decision was made contains certain deficiencies, s 22(3)(e) of the Ombudsman Act, allows for jurisdiction to recommend that any law on which a “decision, recommendation, act, or omission [is] based should be

¹⁹⁵ Ombudsman Act 1975, s 22(1)(b).

reconsidered".¹⁹⁶ Given this potential, a decision by the Chief Executive not to recover the debt of a married battered debtor would find sufficient justification in law, and would therefore be administratively sound.

2 *Human Rights Review Tribunal*

Section 76 of the Human Rights Act outlines the Human Rights Commission's responsibility for receiving and assessing complaints that allege a breach of the Act. Section 92B states that where such a complaint has been made, "the complainant, the person aggrieved (if not the complainant), or the Commission may bring civil proceedings before the Human Rights Review Tribunal".¹⁹⁷ Section 92B(2) states that where such a complaint "relates to a discriminatory practice ... proceedings under subsection (1) may be brought by the Commission on behalf of the class of persons affected".¹⁹⁸

Section 92I provides for remedies. The relevant parts of the section read as follows:

- (3) If ... the Tribunal is satisfied on the balance of probabilities that the defendant has committed a breach ... the Tribunal may grant 1 or more of the following remedies:
- (a) a declaration that the defendant has committed a breach ...
 - (b) an order restraining the defendant from continuing or repeating the breach, or from engaging in, or causing or permitting others to engage in, conduct of the same kind as that constituting the breach, or conduct of any similar kind specified in the order
 - (c) ...

¹⁹⁶ Ombudsman Act 1975, s 22(3)(e).

¹⁹⁷ Human Rights Act 1993, s 92B(1).

¹⁹⁸ Human Rights Act 1993, s 92B(2).

(d) an order that the defendant perform any acts specified in the order with a view to redressing any loss or damage suffered by the complainant or, as the case may be, the aggrieved person as a result of the breach

(e) ...

(f) an order that the defendant undertake any specified training or any other programme, or implement any specified policy or programme, in order to assist or enable the defendant to comply with the provisions of this Act

It is evident that the Tribunal has powers, particularly in relation to granting remedies that can have far-reaching consequences for the defendant. It has been established that recovering the debt of a married battered debtor could constitute discrimination under the s 19 of the Bill of Rights Act, via s 21(1) of the Human Rights Act. It is notable that under the Tribunal's jurisdiction, a complaint of discrimination need only be satisfied to the standard of the balance of probabilities, as per s 92I(3).

If this is made out the remedies available to the Tribunal could have significant consequences for the Ministry. Of particular importance would be the power to restrain the Ministry from continuing or repeating the breach, as per ss (3)(b), and the power to order the Ministry to implement any specified policy or programme to ensure that it does not breach the Human Rights Act, as per ss (3)(f). Such measures would render the orthodox approach to s 63 nugatory. It is therefore advanced that the potential for an adverse finding by the Human Rights Review Tribunal provides further support in administrative law for the Chief Executive's decision not to recover the debt of a battered married woman.

X RESOLUTION OF THE CASE STUDY

The majority decision in *Ruka* established that by virtue of the circumstances of Ruka's relationship, she was exculpated from having committed a fraud on the Ministry in order to receive a benefit. As illustrated above, the exculpation was the result of an inquiry into the material circumstances of Ruka's relationship and a finding that she could there did not exist a relationship in the nature of marriage. On this basis, the Chief Executive could not recover the Ruka's debt because, on the basis of the Court's decision, the debt no longer existed.

It has been argued that in fact situations replicating the *Ruka* scenario, but where the battered debtor is married as opposed to being in a de facto relationship, it would be incongruous for the Chief Executive to recover the debt. However, as has been stressed several times in this paper, the Chief Executive must find some legal justification for not recovering the debt. This justification can be obtained on two fronts. On the basis of the above legal analysis of s 63(a), the Chief Executive could legitimately find that the client should be regarded as unmarried for the purposes of the benefit. Therefore, no debt would exist. Such a finding would be premised on the constructive interpretation of 'living apart' as outlined above.

The other alternative, if the interpretation of s 63(a) is not considered desirable, would be to decide not to recover the debt on the basis that the relevant considerations point to not recovering the debt. As has been pointed out, this debt scenario is distinct from the first two in that it involves weighing some additional factors. For the sake of clarity, the author will perform the balancing exercise here.

Of the main considerations, which equally apply to any debt recovery decision under s 86(1), the public finance dimension and the nature and purpose of the social security legislation are likely to be the most relevant. The respective concerns here are that the Chief Executive is mindful of the Ministry's financial accountability and that help should be given to those truly in need of financial assistance. In addition to these considerations, the Chief Executive should be aware of the very real prospect of a finding of discrimination on the basis of marital status either in the courts or in the Human Rights Review Tribunal. Furthermore, the role of the Ombudsman takes on considerable importance in relation to the ability to make findings on any unjust decision as well as the ability to recommend that any law that is giving rise to unjust results should be reconsidered. It is the author's contention that in this scenario there are sufficient factors which have the effect of trumping the public finance obligations. As such, an appropriate weighing of all of these considerations should point to a decision by the Chief Executive to not recover the debt.

XI CONCLUSION

The first conclusion of this paper is that s 86(1) and s 86(9A) provide for a discretion for the Chief Executive in the recovery of debts due to the Crown. As such, there are a number of obligations that are incumbent on the Chief Executive whenever this discretion is exercised. This paper has acknowledged that some of these obligations are conflicting. In light of this, it is argued that certain considerations should be taken into account whenever the discretion is exercised. The four general considerations apply to any decision to recover a debt under s

86(1). Those considerations are: The terms and guarantees of the Ministry's service charter; the jurisdiction of the Ombudsman to investigate any administrative decision; the onerous public finance obligations the Chief Executive owes; and the nature and purpose of the Social Security legislation for which the Chief Executive has responsibility.

It has been argued that the terms of the service charter have the ability to create for clients a legitimate expectation that they will be followed. As such, it is necessary for the chief Executive to bear the terms in mind whenever called upon to exercise the discretion. It has also been established that the Ombudsman's broad jurisdictional ambit means that the administrative decision to recover debt must be made in accordance with sound policy and on the basis of good practice.

The public finance obligations on the Chief Executive are particularly onerous. Judge Michael Brown's report on CYFS¹⁹⁹ clearly illustrates that public finance considerations are likely to win out in conflicts with other statutory duties. However, it has been argued here that it is incorrect in administrative law to place undue weight on any one particular consideration when there are a range of considerations that need to be taken into account. In most cases, the fight for the centre ground will be between these public finance considerations and the aims and purposes of the Social security legislation. The point that has been stressed here is that if a proper process is followed, and each consideration is given due weight, then any decision to recover established debt under the Act will be sound in administrative law.

¹⁹⁹ Michael J A Brown *Care and Protection is About Adult Behaviour: The Ministerial Review of the Department of Child, Youth and Family Services* (Report to the Minister of Social Services and Employment, the Honourable Steve Mahary) December 2000.

This paper has also presented a case study as a means of fleshing out some of the issues that arise in decisions to recover particular debts. The hypothetical situation concerned a married person who had improperly received a benefit yet the marriage contained extreme domestic violence. This situation was chosen because of the uneasy comparison with people in the same factual position but living in a de facto relationship. On the basis of the majority's decision in *Ruka v Department of Social Welfare*,²⁰⁰ the de facto person would be entitled to the benefit and therefore no debt would arise. This paper has attempted to reconcile the married and de facto positions for the purposes of debt recovery.

The first argument was that the hypothetical married person would be entitled to the benefit on a constructive interpretation of s 63(a). This involved unpacking the legal edifice of the concept of *living apart*, which is a pre-requisite to the exercise of the Chief Executive's discretion under that provision. It was concluded that if the facts of the *Ruka* case were to be replicated in a marriage, then the Chief Executive had the ability to consider that person entitled to the benefit under s 63(a). As such, no debt would be registered against the person and therefore there would be no debt to recover under s 86(1).

If this argument was not accepted, and the consequence was that a debt was lodged against the person in the Ministry's books, then the alternative argument was that the Chief Executive still had discretion to decide not to recover the debt under s 86(1). This decision would involve balancing the general

²⁰⁰ *Ruka v Department of Social Welfare* [1997] 1 NZLR 154 (CA). See the discussion of s 63(b) of the Social Security Act 1964 above.

considerations outlined above, as well as taking into account the potential for discrimination at law. The discrimination would arise in relation to the difference of treatment between married persons and persons in de facto relationships. It was submitted that a decision not to recover the debt would be the only sensible outcome of an administratively proper balancing of all the considerations.

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