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**NZISS and the exercise of  
discretion in Special Benefit  
assessment since *Ankers* : new  
direction and more discretion?**

Submitted for the LLB (Honours) Degree  
at Victoria University of Wellington  
2 September 1996

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M158  
1996

M158

McKINNON, H.A. NZISS and the exercise of discretion ...

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# CONTENTS

- I. INTRODUCTION
- II. SPECIAL BENEFIT : THE LAW AND THE MINISTERIAL DIRECTIONS
- III. *ANKERS v ATTORNEY GENERAL*
  - A. Matters leading up to the review application
  - B. The findings
- IV. THE POST-*ANKERS* ERA : HAS NZISS PRACTICE CHANGED?
  - A. What has NZISS done to change their practice?
    - 1. Written instructions to staff
    - 2. Discretion training
    - 3. SWIFTT computer programme
    - 4. Decision summary sheets
    - 5. Application form
  - B. Why NZISS action to date is inadequate
    - 1. Unworkable ministerial directions
    - 2. Insufficient knowledge about how to manipulate the formula
    - 3. Institutional barriers to effective exercise of discretion in NZISS
      - (a) Organisational
      - (b) Staff training
      - (c) Work pressures and performance standards
- V. THE MOVE TO GREATER DISCRETION
  - A. Reasons for the move to greater discretion
  - B. Is a move to greater discretion a good thing? : The discretion versus rules debate
  - C. Finding the optimum point on the rule to discretion scale
  - D. A suggestion
- VI. CONCLUSION

## I. INTRODUCTION

This paper examines the practice of the New Zealand Income Support Service (NZISS) in relation to the exercise of discretion in assessing Special Benefit entitlement following the decision in *Ankers v Attorney General*.<sup>1</sup>

To have discretion, in its broadest sense, is to be able to make decisions, or take particular courses of action, according to some degree of personal assessment and judgment.

In the administrative law context, administrative discretion does not enable a decision-maker to take any course of action that s/he chooses, but rather to make a choice among possible courses of action or inaction.<sup>2</sup> Dworkin describes discretion as similar to a hole in a doughnut - discretion does not exist except as an area left open by the surrounding belt of restriction.<sup>3</sup>

With regard to Special Benefit the surrounding belt of restriction is provided by the Social Security Act 1964, by ministerial directions and by NZISS rules or policies.

This paper will consider the extent to which NZISS practice has changed since *Ankers* and in response to the new ministerial direction. This will involve a discussion of the actions NZISS has taken to change their practice and suggested reasons for why change may not be as substantial as expected. The reasons examined include: the unworkability of the ministerial direction itself; the inadequacy of NZISS actions; and the institutional barriers to effective exercise of discretion in an organisation such as NZISS.

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<sup>1</sup> [1995] NZFLR 193.

<sup>2</sup> Davis, KC *Discretionary Justice: A preliminary inquiry* (University of Illinois Press, Chicago, 1971) 14.

<sup>3</sup> Dworkin, R *Taking Rights Seriously* (Butterworths, London, 1977) 31.

The wider question of the implications of a move towards greater discretion in the assessment of Special Benefit will be considered with a view to establishing whether it is 'a good thing' or whether greater reliance on rules would be a better option for NZISS. An attempt to strike the right balance between rules and discretion is made in a suggestion for some appropriate rules enabling better assessment of Special Benefit in the future.

## II. SPECIAL BENEFIT : THE LAW AND THE MINISTERIAL DIRECTIONS

Special benefit is payable under section 61G of the Social Security Act 1964.<sup>4</sup> The statute itself does not stipulate the eligibility criteria but rather provides that the Director-General may in his discretion, grant entitlement to a Special Benefit if "satisfied that, after taking into account all of that person's financial circumstances and commitments, ... such a special entitlement is justified".

The Director-General's discretion is guided by a series of ministerial directions pursuant to section 5(2) of the Social Security Act 1964 which requires the Director-General to comply with any general or special directions given to the Director-General by the Minister in writing.

The directions stipulate that they are to be applied "without derogating from your duty to have regard to the particular financial circumstances and commitments of the applicant".<sup>5</sup>

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<sup>4</sup> See Appendix.

<sup>5</sup> Ministerial Direction Section 61 : Special Benefit, 1 April 1992 and 28 March 1995. See Appendix.

The directions outline some general principles and provide an "assessment procedure" which is essentially a formula calculated by: deducting the applicant's weekly allowable fixed costs<sup>6</sup> from their weekly chargeable income;<sup>7</sup> then deducting the standard income costs figure<sup>8</sup>; then deducting \$10.00. Any remaining deficit would then be payable as Special Benefit provided such deficit did not exceed 30% of the applicant's allowable fixed costs.

#### EXAMPLE

A single unemployment beneficiary with two dependent children, whose weekly chargeable income is \$210.45 and whose weekly allowable costs are \$94.30.

#### Calculation

Chargeable income	210.45
less allowable costs	<u>94.30</u>
Disposable income	116.15
less standard costs	<u>136.15</u>
Deficiency	(20.00)
less deduction	<u>\$10.00</u>

The difference a =	\$10.00
b is 30% of allowable costs =	\$28.29

A special benefit of \$10.00 a week is justified, subject to clauses 8 and 9.

The ministerial directions examined in the *Ankers* case provided for a deduction of \$20.00 per week. In addition they provided that the requirement to deduct \$20.00 could be disregarded where there were special circumstances and the 30% of fixed costs limit could be exceeded where exceptional circumstances existed.<sup>9</sup> Since *Ankers*, a new ministerial direction has been issued.

<sup>6</sup> Cost determined by NZISS as essential which cannot be readily avoided or varied.

<sup>7</sup> Benefit rate plus part-time earnings, plus interest from savings, plus child support and so on.

<sup>8</sup> The proportion of living costs applicants "may be expected to meet from their benefits" - a figure determined by NZISS without any reference to the consumer price index or other objective criteria. This is a figure which has been criticised as long since outdated, see Evaluation Unit, Social Policy Agency, *An Evaluation of the Special Needs Grants and Special Benefit Programmes*, Wellington, 1993, 30.

<sup>9</sup> Above n 5, 1 April 1992.

The current ministerial direction specifies a deduction of \$10.00 per week instead of \$20.00 per week. In addition, it simply states that the formula is subject to clauses 8 and 9. Clause 8 provides that upon completion of the above formula calculation, the applicant can be granted a greater or lesser amount of special benefit if it is justified having regard to certain principles and other listed factors.<sup>10</sup> Clause 9 states that there is no requirement to grant a Special Benefit, or grant at a particular rate, if in the circumstances of the particular case it is determined that such grant should not be made.<sup>11</sup>

### III. *ANKERS v ATTORNEY GENERAL*

*Ankers v Attorney-General* involved an application for review of the ministerial directions relating to the assessment of Special Benefits under the Social Security Act 1964, and of the application of such directions by the Director-General Social Welfare (D-GSW) and his staff.<sup>12</sup>

#### A. Matters Leading up to Review Application

In 1992 Ms Ankers and others applied to the Department's Auckland office for Special Benefits. Their applications were declined following a formula assessment of their entitlement.

All four applicants applied for a Committee Review of the decisions with the aid of The Peoples Centre Inc - an advice and advocacy service for beneficiaries. The initial decisions were upheld. The applicants' subsequent appeal to the Social Security Appeal Authority was allowed in whole or in part.<sup>13</sup>

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<sup>10</sup> Including special or unusual financial expenditure, special or unusual reasons for such expenditure, the causes of the applicant's financial difficulty, and any other matters considered relevant. See ministerial direction in Appendix.

<sup>11</sup> Above n 5, 28 March 1995.

<sup>12</sup> Above n 1, 195.

<sup>13</sup> Above n 1, 202.

On advice that the Crown intended to challenge the Appeal Authority decision, Ms Ankers made an application for review to the High Court on her own behalf and (pursuant to Rule 78 of the High Court Rules) on behalf of all past and present Special Benefit applicants.<sup>14</sup>

The grounds put forward by Ms Ankers were as follows:

- (1) The ministerial directions were ultra-vires and illegal.
- (2) The ministerial directions were unreasonable.
- (3) The application and practice by the D-GSW of the ministerial directions was unlawful, unreasonable or unfair.<sup>15</sup>

#### **B. The Findings**

Thorp J found against the first two grounds of review and upheld the third ground. Those findings that have some bearing on the issues discussed in this paper are set out below:

- (1) The ministerial directions were not invalid.

(1.1) *"The use of a formula to promote consistency in the exercise of discretion does not derogate from the duty to have regard to the particular financial circumstances and commitments of the applicant, and is unobjectionable provided it is seen as a guide and not as a rule ... [and] provided it is subject to reconsideration in the light of the applicant's overall circumstances."*<sup>16</sup>

- (1.2) The directions were not bad for ambiguity, uncertainty and vagueness. They were not so uncertain as to be unworkable.<sup>17</sup>

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<sup>14</sup> Above n 1, 203.

<sup>15</sup> Above n 1, 204.

<sup>16</sup> Above n 1, 206.

<sup>17</sup> Above n 1, 207.

- (2) The Minister's directions were not unreasonable. It is up to the Minister, not the Court, to determine the priorities to be given to different social programmes. Measures to reduce 'fiscal blowout' were not contrary to the policy of the Act.<sup>18</sup>
- (3.1) The application in practice by the D-GSW of the ministerial directions was unreasonable because in the majority of cases, first instance decisions were made without considering the possible existence of special or exceptional circumstances and principally by a mechanical application of the formula underlying the SWIFTT computer programme.<sup>19</sup>
- (3.2) NZISS practice breached the rules of natural justice and section 27 of the New Zealand Bill of Rights Act 1990 as applicants were not given a fair opportunity to place before the decision maker information relevant to his decision.<sup>20</sup>

#### IV. THE POST-ANKERS ERA : HAS NZISS PRACTICE CHANGED?

Since *Ankers*, NZISS has put considerable effort into reassessing many Special Benefits declined prior to the *Ankers* decision and into issuing instructions on how to correctly assess entitlement to ensure compliance with the new ministerial directions. The total number of customers whose entitlement was reassessed amounted to 10,303. Of these only 593 cases resulted in a change of entitlement, that is, less than 6%.<sup>21</sup>

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<sup>18</sup> Above n 1, 212.

<sup>19</sup> Above n 1, 216.

<sup>20</sup> Above n 1, 219.

<sup>21</sup> The total amount paid out in arrears was \$180,907.96 and the total administration cost was established at \$49,300.00. Memorandum from Kathryn Byrne, Policy Advisor, NZISS to Lisa Tortell, Assistant Crown Counsel, Crown Law Office, Wellington, 19 July 1996.

Given the findings in *Ankers*, one might expect a greater number of reassessments to result in changes of entitlement. What does this suggest? There are three possibilities:

- (1) NZISS had been considering all individual special and exceptional circumstances and thus had been correctly establishing entitlement but they were unable to put sufficient evidence of this before the High Court (and the 6% represents an ordinary error rate).
- (2) NZISS practice has not changed significantly since the *Ankers* decision such that even the reassessments were determined by and large as they had been before *Ankers*.
- (3) The reason that NZISS were unable to prove consideration of special and exceptional circumstances was that the large majority of their clients did not have special and/or exceptional circumstances - a fact that was established early on in the assessment process but not recorded as such.

I submit that the correct position is that NZISS practice has not changed significantly since *Ankers* despite considerable work by senior officials which certainly gives the appearance of substantial change and improvement. Consequently NZISS may still be failing to comply with the ministerial direction in determining Special Benefits.

**A. What has NZISS Done to Change their Practice?**

**1. Written instructions to staff**

Several information bulletins and reminders about the correct assessment procedure and the need to consider all individual commitments and circumstances have been issued to staff.

All manual instructions have been updated and loaded on to the SWIFTT computer system where they are now automatically updated by further information bulletins or new policy statements.<sup>22</sup>

<sup>22</sup> Interview with Iona Cameron, Customer Services Officer, NZISS, Wellington Office, 8 July 1996.

Consequently staff now have immediate and easy access to up to date information from essentially one source, thus overcoming a problem associated generally with the level of competence of NZISS staff and the accuracy of their work - a problem highlighted by the Social Policy Agency's evaluation of the Special Benefit and the Special Needs Grants Programmes in 1993.<sup>23</sup>

## 2. *Discretion training*

Training seminars on the use of discretion have been conducted at district offices by two Head Office policy analysts.

This training is ongoing and currently involves two policy analysts delivering two to three days per week, either at the request of a district office or on the analyst's own motion following an unusual high or low in the Special Benefit statistics recorded for a particular district.<sup>24</sup>

## 3. *SWIFTT computer programme*

Previously SWIFTT automatically calculated entitlement to Special Benefit and the rate payable based on a formula assessment. SWIFTT has since been amended to provide "special circumstances" and "depart from formula" indicators which subsequently allow officers to waive the \$10 deficit and 30% allowable fixed costs limits and manually enter an amount at any rate.<sup>25</sup> In short, SWIFTT no longer precludes the exercise of discretion.

<sup>23</sup> Evaluation Unit, Social Policy Agency, *An Evaluation of the Special Needs Grants and Special Benefit Programmes*, Social Policy Agency, Wellington, 1993, 23.

<sup>24</sup> This would be picked up via a current monitoring programme which nevertheless appears to be somewhat haphazard. Interview with Kathryn Byrne, Policy Analyst, Head Office, NZISS, 19 July 1996.

<sup>25</sup> Interview with Helen McGillvray, Compass Officer, Porirua Office NZISS, 11 July 1996 and SWIFTT Special Benefit Screen Printout, NZISS, 11 July 1996.

#### 4. *Decision summary sheets*

Decision summary or disposal sheets which provide a checklist of factors to consider and record in arriving at a decision to grant or decline Special benefit, have been issued to staff.<sup>26</sup> Decision sheets represent a valuable tool in ensuring accuracy and ultimately compliance with ministerial directions. In a busy, pressured work environment they are often relied upon as the sole source of information.<sup>27</sup> It is now mandatory for a decision sheet to accompany every Special Benefit decision. Failure to complete a decision sheet is recorded as an individual staff error.<sup>28</sup>

Given that the decision sheet may be heavily relied upon by a number of staff, one would think it important for the sheet to specify what factors to consider, it does not do so, nor does it remind staff to inform customers of the factors that bear on their eligibility, thereby allowing customers the opportunity to state, for example, special or exceptional reasons for expenditure. This is particularly significant given the findings in *Ankers* that despite manual instructions requiring that customers are asked to detail their special circumstances, this was not observed in the majority of cases<sup>29</sup> and the finding that failure to allow such opportunity to put forward information relevant to decision-making constitutes a breach of natural justice.<sup>30</sup>

<sup>26</sup> NZISS *Information Bulletin* 1995/078 "Special Benefit", Wellington, 2 October 1995.

<sup>27</sup> Interview with Steve Taute, Customer Services Officer, Wellington, 9 July 1996.

<sup>28</sup> Interviews with Customer Services Officers, Iona Cameron, Wellington, District Office, 8 July 1996; Steve Taute, Wellington District Office, 9 July 1996; Helen McGillvray, Porirua Office, 11 July 1996; Samantha Scott-Smith, Porirua Office, 11 July 1996. The decision sheet is set out in the Appendix.

<sup>29</sup> Above n 1, 217.

<sup>30</sup> Above n 1, 219.

## 5. *Application form*

The Special Benefit application form has been changed since *Ankers*. The relevant question pertaining to entitlement is question 5 which asks "What individual circumstances do you have which mean you should get a special benefit?" An 11-line box is provided, presumably for a detailed answer.

The amended application form can be subjected to the same criticisms as Thorp J made regarding the previous one. The form seeks details of weekly financial commitments but not of the reasons for that expenditure.<sup>31</sup> In addition, the application form would also breach the requirements of natural justice applying Thorp J's reasoning that:<sup>32</sup>

*administrative fairness ... includes an opportunity to place before the decision maker information relevant to the decision. An applicant cannot be said to have been given a fair opportunity to do this unless he or she is also given a fair opportunity to comprehend the conditions upon which such benefits are granted, and at least the principal criteria bearing on eligibility.*

The amended application form does not indicate eligibility criteria nor does it provide applicants with an opportunity to put relevant information forward. The question is relatively meaningless to most applicants.<sup>33</sup>

<sup>31</sup> See above n 1, 217 and NZISS "Special Benefit Application" form.

<sup>32</sup> Above n 1, 219.

<sup>33</sup> NZISS interviews indicate that most applicants simply write "not enough money to pay bills" or something of a similar nature.

The concept of individual circumstance is even less clear than special circumstances and the form provides no indication of possible answers to this question, thereby reducing the likelihood of obtaining sufficient information to consider all an applicant's financial circumstances and commitments.

#### **B. Why NZISS Action to Date is Inadequate**

The written instructions and reminders to staff, the manual revisions, the training, the amended SWIFTT computer programme, the amended application form, and the decision summary sheets appear to constitute a massive effort to redress previous misapplication of the Minister's directions and one would expect that such a massive effort would yield considerable positive change. I submit that it has not, and that NZISS is still substantially failing to comply with the ministerial direction regarding Special Benefit in the sense that discretion is not genuinely exercised in the majority of cases.

With regard to the decision summary sheets and the amended application forms these are simply designed in a way that frustrates their underlying purposes. On a more general level I submit three reasons in support of the contention that NZISS practice has changed little since *Ankers* and NZISS is still substantially failing to comply with the ministerial directions regarding Special Benefit.

- (1) The ministerial direction itself does not make practical sense. Although it appears precise, it is in fact vague and unworkable.
- (2) Even if that were not so, problems with the information disseminated by Head Office NZISS has resulted in a failure to communicate to some staff, or at the very least, some staff have failed to understand, how the directions can be practically applied, that is, how the formula can be manipulated and subsequently how an appropriate rate of Special Benefit can be determined.

- (3) The existence of institutional barriers to the effective exercise of discretion and therefore compliance with the ministerial direction.

1. ***Unworkable ministerial direction***

In effect the ministerial direction asks staff to follow a formula, which itself precludes consideration of some financial commitments and circumstances, then pay Special Benefit at an appropriate rate in light of the applicants' overall financial commitments and circumstances.

I agree with the submissions made by Mr Harrison in the *Ankers* case with respect to the previous ministerial direction and argue that it applies to the current ministerial direction with even more force:<sup>34</sup>

*It is logically and legally impossible both to comply with the terms of the operative parts of the direction and to comply with the statutory obligation to consider the wider picture. No mental gymnastics on the part of the decision-maker can encompass the task - or at least, not honestly.*

Thus, there can be no genuine exercise of discretion.

This argument was rejected by Thorp J on the grounds that the operative parts of the direction were exemplary rather than mandatory, and that:<sup>35</sup>

*the use of a formula to promote consistency in the exercise of discretion is unobjectionable, provided it is seen as a guide and not as a rule ... So long as that assessment remains a guide, and is subject to reconsideration in the light of the applicant's overall situation it is unobjectionable.*

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<sup>34</sup> Above n 1, 206

<sup>35</sup> Above n 1, 207

I submit that while the ministerial direction does not provide that the formula assessment is mandatory it is, if not actually intended to be, interpreted by staff as a rule and not a guide. This phenomenon has been examined by Galligan in a number of contexts and as he notes "... what may be discretionary from an external legal point of view, may be anything but discretionary from the internal point of view of officials within the system".<sup>36</sup> Thus I submit that NZISS is not in fact genuinely exercising their discretion, but rather continuing to apply a rule(s).

## 2. *Insufficient knowledge about how to manipulate the formula*

Even if one assumes that the ministerial direction makes sense conceptually, without the formula, how is entitlement to Special Benefit determined in practice?

In response to this question Pat Thomas, Manager Long Term Benefits, explained: if officers determine that Special Benefit should be paid at a rate different from that yielded by the formula, having exercised discretion and taken the listed factors into account, officers may vary any part of the formula to take account of an applicant's individual circumstances, that is, *any* cost which is not usually allowed, may be allowed (including those specified as non-qualifying costs and those supposedly covered by the standard income costs) and; the \$10 deduction may be waived along with the 30% of fixed costs limit.<sup>37</sup>

<sup>36</sup> Galligan, DJ *Discretionary Powers: A legal study of official discretion* (Clarendon Press, Oxford, 1986) 13.

<sup>37</sup> Interview with Pat Thomas, Manager, Long Term Benefits, NZISS, Wellington, 19 July 1996.

The vital piece of information missing from the manual instructions, the information bulletins and the decision summary sheets, which appears to have been omitted in training and which is not known by at least some of the staff<sup>38</sup> is that, in assessing Special Benefit, they may allow costs they usually would not allow - costs precluded by the existing rules about Special Benefit. Without this information - this specific direction that the rules can be overridden - staff cannot comply with the ministerial direction and consider all individual circumstances and commitments precisely because they regard the formula as a rule except insofar as they are told to deviate from it.<sup>39</sup>

The ministerial direction requires completion of a formula assessment followed by reconsideration taking into account all of the applicant's particular financial commitments and circumstances. I submit that the process of completing the formula inevitably precludes consideration of all financial circumstances.

The allowable costs and standard income costs parts of the formula weed out a number of costs as non-qualifying. Thus the costs remaining after completion of the formula assessment represent only some of the applicant's financial circumstances.

If staff are not aware that they may allow *any* costs they will not consider adjusting entitlement in light of the *overall* financial circumstances, as required by clause 8 of the ministerial direction, because they will have an inadequate information base from which to do so. Rather they will consider allowable commitments and circumstances, and in some 'deserving' cases, waive the \$10 deduction and/or the 30% limit accordingly.

<sup>38</sup> Interviews with NZISS staff: Steve Taute, Wellington, 9 July 1996; Helen McGillvray, Porirua, 11 July 1996; Samantha Scott-Smith, Porirua, 11 July 1996; Jasper Williamson, Lower Hutt, 27 July 1996.

<sup>39</sup> See Ch 11.2910 in NZISS, *Supplementary Allowances and Grants Manual*, Wellington, October 1995.

The discretion conferred by the ministerial direction to pay Special Benefit at any rate, or not pay it at all, is meaningless in this context.

Rectifying this omission and amending the manual and the decision sheets accordingly, along with changing the application form, would go a long way towards ensuring compliance with the ministerial directions and more effective exercise of discretion.

### 3. *Institutional barriers to effective exercise of discretion in NZISS*

NZISS faces a number of barriers to effective exercise of its discretion generally, and in particular to exercising a greater degree of discretion in Special Benefit assessment, thereby maintaining compliance with the ministerial directions. These barriers explain why there may have been little significant change since *Ankers* in the way NZISS staff assess Special Benefits.

#### (a) *Organisational*

##### (i) Authority leakage.

NZISS is an extremely large organisation with a great number of levels through which general and specific directives are transmitted downwards to front-line staff. The greater the number of levels, the greater the number of "discretionary decisions which may not altogether conform with the wishes and intentions of senior administrators".<sup>40</sup>

<sup>40</sup> Gregory, R and Hutchesson, P *The Parliamentary Ombudsman* (George Allen & Unwin, London, 1975) 23.

Anthony Downs calls this phenomenon “authority leakage”.<sup>41</sup> Where directives, involving an assessment as complex as Special Benefit, with so many factors to consider, are being filtered through a number of levels it is almost inevitable that the knowledge and practice of front-line staff will not accord with senior administrators’ beliefs about it. The ability to include or disregard *any* cost as an allowable cost if the individual circumstances so warrant is a salient example of the kind of knowledge believed by senior administrators to be practised; and yet it is precisely the kind of knowledge which some staff lack and others fail to practice.

(ii) Institutional culture.

Another organisational feature which acts as a barrier to the effective exercise of discretion is the culture of the organisation.

I submit that NZISS is subject to “over-organisation”. This means that conduct is generally dictated “by elaborate codes of rules and regulations prescribing in great detail how the official must behave ...”. In such an environment, “strict adherence to the rules becomes the cardinal virtue” and a preoccupation with ritual and procedure for their own sake results.<sup>42</sup>

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<sup>41</sup> Above n 40, 24.

<sup>42</sup> Above n 40, 22.

The conduct of NZISS officials is subject to countless rules and regulations contained in countless statutes, manuals, circulars, information bulletins, posters, and so on. There are rules about virtually everything and discretion is predominantly, if not almost exclusively, confined to rule and fact interpretation.

Introducing a highly discretionary assessment procedure into such an environment is almost inevitably bound to fail. Requiring a high degree of discretion from staff may be asking something of staff that they are incapable of delivering. Thus discretion may be rarely exercised, if not predominantly ignored. Alternatively discretion may be confined by locally-developed rules thereby putting into operation "a system of rules promulgated by those not in authority to make rules".<sup>43</sup>

The new ministerial direction regarding Special Benefit asks staff to follow a formula then consider all individual circumstances. If they warrant payment at a different rate, the formula can be disregarded - what then forms the basis from which an assessment and decision can be made?

<sup>43</sup> Goodin, R "Welfare, Rights and Discretion" *Oxford Jnl Leg Stud* 6 (1988) 232, 260.

Interviews with NZISS staff suggest that:<sup>44</sup>

- (1) new rules or modified old rules are developed; or
- (2) the formula is applied and the specified discretionary elements, the \$10 deduction and 30% of fixed costs limit are varied; or
- (3) the formula is applied as is; or
- (4) it goes in the "too hard basket".

In short, NZISS staff will find rules on which to base their assessments even where that rule is subject to a wider discretion. Developing new rules (and this includes doing so by modifying old rules) at the district level raises issues of legitimacy in rule-making, and potentially issues of ongoing failure to comply with ministerial directions. It also raises issues of potential arbitrariness resulting from "the impartial application of abstract rules which limits the factors taken into account thereby reducing the congruence between particular decisions and underlying purposes".<sup>45</sup>

(b) *Staff training*

The department's own Evaluation Unit has highlighted the variation in competence and exposure to training among NZISS staff.<sup>46</sup> The work pressures faced by staff often preclude the 'luxury' of time away from the front line for

<sup>44</sup> Interviews with Customer Services Officers Steve Taute and Iona Cameron, Wellington, 9 July 1996 and Samantha Scott-Smith and Helen McGillvray, Porirua, 11 July 1996.

<sup>45</sup> Above n 36, 18.

<sup>46</sup> Above n 23, 19.

training.<sup>47</sup> Training is predominantly SWIFTT-based with the objective of acquiring sufficient technical skills to move through the required computer screens and activate some sort of payment or decline decision<sup>48</sup>.

Very little detailed policy is covered in training and training in the exercise of discretion has not been carried out until the recent post-*Ankers* Head Office training on discretion.<sup>49</sup> Thus it is fairly clear that the training environment is not one which promotes and facilitates the exercise of discretion but rather lends itself to the promulgation of rules. Rules can be taught more quickly and easily than discretionary policy and the SWIFTT framework, including training modules, is based on rules.

If NZISS is to achieve substantive change in its practice and genuinely exercise the discretion conferred by the current ministerial direction, NZISS training programmes will be required to undergo major reconstruction.

(c) *Work pressures and performance standards*

For the majority of staff there are a number of disincentives to the proper exercise of discretion. The most significant of these disincentives are work pressure and performance standards. I submit that given the increasing workload pressure facing NZISS staff and the standards by which their performance is monitored, and ultimately their remuneration determined, the majority of staff disregard their discretionary powers in favour

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<sup>47</sup> Training is coordinated at a regional level. NZISS training in the greater Wellington area is carried out by one experienced NZISS officer with responsibility for training in the Wellington, Porirua and Lower Hutt district offices.

<sup>48</sup> NZISS interview with Debbie Kaye, Training Officer, Greater Wellington, 9 July 1996.

<sup>49</sup> Above n 48.

of a quick and easy application of rules. Moreover I suggest that from the standpoint of an NZISS officer, this represents a rational action.

(i) Work pressure.

NZISS has survived several restructurings, losing many experienced staff in the process. Middle management and supervisory levels have been eliminated leaving more work to be done by fewer staff for an increasingly poor and desperate client population.<sup>50</sup>

As NZISS staff see increasing numbers of people in need, it is inevitable that they become somewhat desensitised to that need. As a result, they may feel disinclined to "take up the fight" on behalf of customers by pursuing the full extent of their discretionary powers.

In addition the pressures of this high workload often result in failure to fully explore applicants' circumstances and inform applicants of their entitlements.<sup>51</sup>

(ii) Performance standards

Individual staff performance standards focus primarily on output, the number of people and actions processed.

<sup>50</sup> Barwick, Helena, *Passing the Buck : NZISS procedures for assessing applications for emerging assistance : the problem of DSW referrals to foodbanks*, Downton Ministry, Wellington, December 1994, 31.

<sup>51</sup> Above n 28 and interviews with Customer Services Officers Jasper Williamson and Mike Braniff, Lower Hutt, 27 July 1996.

Staff will be praised for processing a great number of actions. They will be admonished for exceeding "disposal times", spending too much time with one customer, or failing to process the required number of actions per day. Disposal times for each district and region are subject to intense competition. There is high praise for managers who undercut the disposal standards, not to mention high bonuses, and criticism for managers who exceed the standards. There is only one quality standard for individual staff - an accuracy rate percentage which is calculated pursuant to a full check of one day's work randomly carried out every two weeks.<sup>52</sup>

Clearly there is a massive emphasis on quantity over quality. It is hardly surprising then that the majority of staff choose the quickest route to a decision. That route may well be not to ask too many questions, to follow whatever rules have been laid down and to disregard any discretion to do otherwise.

In conclusion, it would appear that the current NZISS environment is not one which fosters the exercise of discretion, much less the proper exercise of discretion according to ministerial directions and the law. In recognition of the current NZISS environment, the better solution for NZISS customers may well lie in a greater reliance on rules.

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<sup>52</sup> Above n 28.

## V. THE MOVE TO GREATER DISCRETION

The post-*Ankers* ministerial direction regarding Special Benefit confers much wider discretionary powers upon individual front-line staff. There is a formula to follow but that formula may be disregarded if, in the opinion of individual staff, the particular circumstances and commitments of an applicant warrant payment of Special Benefit at a rate that is higher or lower than the rate yielded by the formula assessment.

It would appear that NZISS has gone from one extreme to the other. Prior to *Ankers* there was a specific ministerial direction and NZISS practice consisted largely of the mechanical application of a formula which was widely regarded and promulgated as a rule rather than a guideline and as such effectively precluded the exercise of discretion. In the post-*Ankers* era the ministerial direction is much more general and NZISS practice consists of a mechanical application of a formula which can then be thrown out to be replaced by a modified version of the formula or, potentially, any other method of assessment that takes into account the required factors - general principles and those listed in clauses 8 and 9. In short, Special Benefit has moved from a system of very limited discretion to one that is highly discretionary. Or has it? Certainly the direction appears to confer a much greater degree of discretion however I maintain that NZISS practice has not greatly changed. The formula is still applied as a rule in the majority of cases although there is some evidence that in a minority of cases the discretion is exercised to the fullest extent possible - and done so by different officers in different ways.<sup>53</sup>

### A. Reasons for the Move to Greater Discretion

I submit that first and foremost the move to confer wider discretionary powers on NZISS front-line officials is a direct consequence of the *Ankers* case, a reactive response to prevent future challenges of a similar nature.

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<sup>53</sup> Interviews with NZISS Customer Services Officers: Iona Cameron, Wellington, 8 July 1996 and Mike Braniff, Lower Hutt, 27 July 1996.

The new ministerial direction conferring such wide discretion and couched in what appears to be a deliberately vague manner was issued immediately following the *Ankers* judgement. NZISS solicitor, Rod Robson, concedes that "the writing was on the wall" long before the judgment was delivered<sup>54</sup> and work on a new ministerial direction may well have been underway before the judgement was handed down.

I submit that this reactive response may have been a reasonably superficial action done in the interests of being seen to be making a change where change was needed without ever intending real and substantive change.

I suggest that the motivation was fiscal as well as political. The *Ankers* case publicised the Special Benefit criteria as harsh and unreasonable even though the court found the ministerial direction valid. The limits placed on Special Benefit assessment to avoid fiscal blowout<sup>55</sup> had been widely criticised by community groups, local Citizens Advice Bureaus and by the department's own Evaluation Unit.<sup>56</sup>

Galligan suggests that:<sup>57</sup>

*"... within the welfare system efforts are made ... to retain powers in a highly discretionary form in order to avoid or conceal the necessity for difficult policy choices about the distribution of resources. For example, a discretionary format may allow reduction in expenditure without appearing to make changes to the system."*

Conversely a discretionary format may allow continued reduced expenditure while appearing to remove expenditure limits. This possibility was raised by the department's own Evaluation Unit in 1993 when the Social Policy Agency evaluation team observed that "[a] latent function of a discretionary system is

<sup>54</sup> Interview, Rod Robson, NZISS solicitor, Wellington, 16 July 1996.

<sup>55</sup> Above n 1, 199.

<sup>56</sup> Above n 23, 20.

<sup>57</sup> Above n 36, 133.

that it can be used to encourage staff to operate within a defined budget".<sup>58</sup> Thus the status of a district budget could limit the amount of Special Benefit assistance available in a given district.<sup>59</sup>

If one assumes that this is true, the failure of the massive NZISS effort to bring about substantial change becomes totally plausible. NZISS, as with any public agency, is fully aware of the importance of "being seen to be doing the right thing", sometimes to the detriment of substantively doing the right thing. Procedural fairness is the cardinal virtue. Thus NZISS can be seen to have exerted themselves in ensuring compliance with the ministerial directions. They can even be seen to be more generous with Special Benefit but I submit that substantial change cannot be seen quite so readily. And that may just represent the ideal solution for a resource-constrained NZISS.

#### **B. Is a Move to Greater Discretion a Good Thing? : The Discretion Versus Rules Debate**

Would the assessment of Special benefit, and indeed, NZISS practice in general, be better served by wide discretionary powers or by rules? Clearly there is no simple answer.

Schwartz and Wade describe discretion as "a tool, indispensable for individualisation of justice". They argue that "[r]ules alone, untempered by discretion, cannot cope with the complexities of modern government" but they also warn that:<sup>60</sup>

*[d]iscretion is a tool only when properly used; like an axe, it can be a weapon for mayhem or murder. In a government of men and of laws, the*

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<sup>58</sup> Above n 23, 22.

<sup>59</sup> Above n 23, 22.

<sup>60</sup> Schwartz, B and Wade, *HWR Legal Control of Government* (Oxford University Press, London, 1972) 25.

*portion that is a government of men, like a malignant cancer, often tends to stifle the portion that is a government of laws. Perhaps nine-tenths of injustice in our legal system flows from discretion and perhaps only one-tenth from rules.*

This accords with the views of Davis who asserts that on a rule-discretion continuum, the most frequent and serious injustice occurs at that end of the scale where the greatest degree of discretion lies.<sup>61</sup> These views suggest that a move to greater discretion in the assessment of Special Benefit may potentially pose a greater threat to NZISS clients than the previous rigid application of a formula - or rules.

The problems with a discretionary system are that it can lead to arbitrariness, uncertainty and inconsistencies and inequities within and between different authorities. These are the classic objections to discretion which Goodin discusses in "Welfare, Rights and Discretion" where he argues that the problems with discretion are inherent in the practice of discretion itself and can only be surmounted, if at all, by removing discretion from officials.<sup>62</sup> The problems with discretion commonly prompt the cry that rule-making is the solution. Rule-making, it is claimed, will bring certainty and predictability; it will eliminate arbitrariness and it will enable people to stake a claim based on rights.<sup>63</sup>

However Goodin asserts that rules are not the answer, for as he observes:<sup>64</sup>

*[t]he problems ... may be inherent, not merely in discretion but also in the purposes which those discretions were supposed to serve. If so, then any system (rules or anything else) that also serves those purposes will also necessarily display those same faults.*

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<sup>61</sup> Above n 2, 14.

<sup>62</sup> Above n 43, 243.

<sup>63</sup> See generally above n 43 and above n 36, 13 and Jowell, J "The Legal Control of Administrative Discretion" *Public Law* (1973) 178.

<sup>64</sup> Above n 43, 250.

On that basis, the application of rules may be as arbitrary as the exercise of discretion in the sense that it limits the factors taken into account, thereby reducing congruence between particular decisions and their underlying purposes.<sup>65</sup>

Or as Jowell explains it: "rules typically act as shields, permitting legalistic official behaviour with no apparent rational relation between fidelity to the rule and [the] original ends for which the rule was promulgated."<sup>66</sup>

The practice of NZISS in strictly applying a formula which purports to consider all an individual's financial circumstances is an example of such a rule. Rigid application of the formula has denied entitlement to applicants experiencing considerable need due to special circumstances.<sup>67</sup>

Applying Goodin's theory to the uncertainty objection to discretion, discretionary Special Benefit decisions may be unpredictable partly because of the great variety of considerations that must be taken into account in their assessment: "Insofar as the rules that replace discretion attempt to capture the same range of considerations, their operation may (at least from the client's point of view) be as unpredictable as the discretionary case worker's."<sup>68</sup>

Clearly rules do not solve the problems associated with the exercise of discretion and in the welfare context particularly, expecting rules to be more effective than discretion in determining concepts like 'need' appears to be, as Jowell suggests, expecting something of rules that they are incapable of achieving.<sup>69</sup>

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<sup>65</sup> Above n 36, 250.

<sup>66</sup> Jowell, J "The Legal Control of Administrative Discretion" *Public Law* (1973) 178, 193.

<sup>67</sup> See above n 1.

<sup>68</sup> Above n 43, 251.

<sup>69</sup> Above n 66, 211.

Yet Special Benefit programme clients and community agencies have expressed a preference for rules over discretion in relation to benefit entitlement generally and Special Benefit in particular, “so that you can come and say ... this person fits the criteria, therefore she should get it, not can she have it?”<sup>70</sup> and so that decisions are not made on the basis of value judgements.<sup>71</sup>

Staff views also accord with those of clients and community agencies. Staff prefer clear policy rules with little or no discretion because they promote consistency and efficiency as entitlements can be determined with much greater speed.<sup>72</sup> Perhaps a high degree of discretion is unsuited to the NZISS environment.

I submit that the approach of KC Davis offers a more viable solution to the problems NZISS face in assessing benefits generally, and Special Benefits in particular, than an endless debate about whether discretion or rules will best attain the desired ends. To use Davis’ words it seems clear that the solution lies in finding “the optimum point on the rule to discretion scale”.<sup>73</sup>

### **C. Finding the Optimum Point on the Rule to Discretion Scale**

I submit that the current ministerial direction and rules regarding Special Benefit do not represent the optimum point on the rule to discretion scale. But rather they allow for the dangers inherent in both discretion and in rules to be played out.

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<sup>70</sup> Above n 23, 19.

<sup>71</sup> Above n 23, 20.

<sup>72</sup> Above n 23 and above n 51.

<sup>73</sup> Above n 2, 15.

Interviews with NZISS staff support this contention. Descriptions of the approaches individual staff take to assessing Special Benefits suggest that the majority of staff apply the formula somewhat rigidly<sup>74</sup> and rarely genuinely exercise their discretion,<sup>75</sup> thus negating individualised justice and subsequently failing to achieve the underlying purposes of the rules.

On the other hand, a minority of staff choose a variety of methods to calculate an appropriate Special Benefit rate,<sup>76</sup> that is, they exercise their discretion to the fullest extent possible under the ministerial direction.

This results in uncertainty, unpredictability and inconsistency and inequities within and between offices. In addition, selecting their own methods introduces an element of arbitrariness into Special Benefit assessment; arbitrariness that would not exist to the same extent if the assessment procedure was confined by rules.

#### **D. A Suggestion**

NZISS face two problems in the assessment of Special Benefit. First, the expected discretion is not exercised in the majority of cases. The cause? The nature of NZISS culture - a rule-bound culture subject to high workload and ever-increasing efficiency demands.

The solution? Rules which not only demand that discretion is exercised at every required step, but explain how to exercise that discretion. These rules would need to be readily accessible, easy to use and reflected in performance standards.

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<sup>74</sup> Although not as rigidly as before *Ankers*.

<sup>75</sup> Above n 51.

<sup>76</sup> These methods include: Disregarding the formula and paying an increased cost resulting from special circumstances as the Special Benefit rate; varying parts of the formula; completing an income versus outgoings budget and paying any deficit as Special Benefit: Above n 28.

Secondly, in a minority of cases too much discretion is exercised. The cause? The latitude afforded staff by the ministerial direction and inadequately specified rules. The solution? Confine the discretion by rules requiring that a specified assessment procedure is followed in all cases. However, that specified assessment procedure must contain discretionary elements at every stage.

How would these solutions work in practice and what would they look like?

Both solutions can be relatively easily implemented, using the current ministerial direction and most of the current rules, by formulating the discretionary elements as positive rules and by confining assessment to the existing formula which nevertheless incorporates discretion at every step.

Some suggested rules:

- (1) In assessing allowable costs every cost put forward by the applicant must be considered and allowed if there is a good reason for that cost or it is justified given all the applicants' financial commitments and circumstances.

For example: Applicant has large Visa bill due to husband running up costs after he beat her up and left town.

- (2) Standard living costs in excess of those covered by the standard income costs figure must be considered and allowed if they are reasonable given the applicant's particular financial commitments and circumstances.

For example: high electricity costs for an applicant with a young baby in the middle of winter or an asthmatic child.

- (3) The \$10 deduction and 30% fixed costs limit must be waived if the applicant's particular financial commitments and circumstances so warrant.

- (4) The formula assessment procedure must be followed in all cases. Application of the formula with its integral discretionary considerations yields the appropriate rate of Special Benefit.

Rules alone are inadequate. In order to ensure genuine exercise of discretion within its proper confines, each of these rules would need to: be widely promulgated; feature prominently in ongoing training; be written into manual instructions; be shown to have been applied on decision summary sheets; be incorporated into SWIFTT and; perhaps most importantly, be reflected in performance standards and measurements.

## VI. CONCLUSION

I have argued that since *Ankers* and the new ministerial direction NZISS practice in relation to the assessment of Special Benefit has not changed as significantly as one would expect. In the majority of cases a formula assessment, which precludes the genuine exercise of discretion, is still somewhat rigidly applied. The reasons submitted to explain this include the unworkability of the ministerial direction itself, the inadequacy of NZISS actions and the existence of institutional barriers to the effective exercise of discretion in organisations such as NZISS.

I have concluded that a move to greater discretion is not a 'good thing' for NZISS and that a greater reliance on rules, albeit 'discretionary rules', offers better prospects for NZISS. I have suggested that the problems NZISS face in exercising discretion in relation to Special Benefit can be addressed by the formulation of positive rules which require that discretion be exercised at every stage of the assessment procedure; and by confining assessment to the one specified procedure.

**BIBLIOGRAPHY**

- Adler, M. and Asquith, S., *Discretion in Welfare* (Heinemann, London, 1981).
- Adler, M. and Bradley, A., *Justice, Discretion and Poverty* (Professional Books Ltd, London, 1976).
- Baldwin and Hawkins, "Discretionary Justice : Davis reconsidered", *Public Law*, 1985.
- Barwick, H., *Passing the Buck : NZISS Procedures for assessing applications for emergency assistance : the problem of DSW referrals to foodbanks* (Downtown Ministry, Wellington, December 1994).
- Black, Harrap, Hughes (eds) *Income Support Law and Practice* (Butterworths, Wellington, 1995).
- Davis, K., *Discretionary Justice - A preliminary inquiry* (University of Illinois Press, Chicago, 1971).
- Dworkin, R., *Taking Rights Seriously* (Butterworths, London, 1977).
- Ehrlich and Posner, "An economic analysis of legal rule-making", *Journal Legal Studies* (1974) 4, 257.
- Galligan, D.J., *Discretionary Powers : A legal study of official discretion* (Clarendon Press, Oxford, 1986).
- Goodin, R., "Welfare rights, law and discretion", *Oxford Journal Legal Studies* (1986) 6, 232.
- Gregory, R. and Hutchesson, P., *The Parliamentary Ombudsman* (George Allen & Unwin, London, 1975).
- Hawkins, K. (ed) *The Uses of Discretion* (Clarendon Press, Oxford, 1992).
- Jowell, J., "Legal control of administrative discretion", *Public Law* (1973) 178.
- Legal Information Service, *Welfare Law Manual* (Auckland, 1995).
- Legal Resource Manual*.
- NZ Law Society Seminar, *Welfare Law and Access to Information* (August 1985).
- NZISS Special Benefit decision summary sheets.
- NZISS Special Benefit Application forms.

NZ Income Support Service, *Supplementary Allowances and Grants Manual* (Wellington, October 1995).

NZISS information bulletins.

Pearl, E. and Gray, K., *Social Welfare Law* (London, 1981).

Pound, R., "Discretion, dispensation and mitigation : the problem of the individual special case", *NYULR* (1960) 35, 92.

Schwartz, B. and Wade, H.W.R., *Legal Control of Government and Administrative Law in Britain and the United States* (Clarendon Press, Oxford, 1972).

Evaluation Unit, Social Policy Agency, *An Evaluation of the Special Needs Grants and Special Benefit Programmes* (Social Policy Agency, Wellington, 1993).

Titmuss, R.M., "Welfare 'Rights', Law and Discretion", *Political Quarterly* (1971) 113.

*Ankers v Attorney-General* [1995] NZFLR 193.

Social Security Act 1964.

Ministerial Directions 1.4.92, 28.3.95 re Special Benefit.

NZ Bill of Rights Act 1990.

Interviews with the following NZISS staff.

Pat Thomas, Manager Long term Benefits, Head Office, 19 July 1996.

Kathryn Byrne, Policy analyst, Head Office, 19 July 1996.

Rod Robson, Solicitor, Head Office, 16 July 1996.

Debbie Kaye, Training Officer, Greater Wellington, 9 July 1996.

Iona Cameran, Customer Services Officer, Wellington, 8 July 1996.

Steve Taute, Customer Services Officer, Wellington, 9 July 1996.

Helen McGillvray, Compass Officer, Porirua, 11 July 1996.

Samantha Scott-Smith, Customer Services Officer, Porirua, 11 July 1996.

Jasper Williamson, Customer Services Officer, Lower Hutt, 27 July 1996.

Mike Braniff, Customer Services Officer, Lower Hutt, 27 July 1996.

## Relevant Sections of the Social Security Act 1964

5. Exercise of powers by Director-General - (1) The powers, functions and discretions conferred on the Director-General by this Act [for the Social Welfare (Transitional Provisions) Act 1990] shall be exercised under the general direction and control of the Minister of Social Welfare.

(2) In the exercise of such powers, functions, and discretions the Director-General shall comply with any general or special directions given to the Director-General in writing by the Minister. As soon as practicable after giving any such direction, the Minister shall publish in the Gazette and lay before the House of Representatives a copy of the direction.

# APPENDIX

### Special Benefit

61G. Special Benefit - Subject to section 61A of this Act, the Director-General may, in the Director-General's discretion, fix a special entitlement to a special benefit in respect of any person whether or not that person is receiving any other benefit under this Part of this Act or the Social Welfare (Transitional Provisions) Act 1990 or any pension or allowance under the War Pensions Act 1954, if the Director-General is satisfied that, after taking into account all of that person's financial circumstances and commitments, including any benefit payable under this Part of this Act or the Social Welfare (Transitional Provisions) Act 1990 and any pension or allowance payable under the War Pensions Act 1954, such a special entitlement is justified.

## Relevant Sections of the Social Security Act 1964

**5. Exercise of powers by Director-General** - (1) The powers, functions and discretions conferred on the Director-General by this Act [[or the Social Welfare (Transitional Provisions) Act 1990]] shall be exercised under the general direction and control of the Minister of Social Welfare.

(2) In the exercise of such powers, functions, and discretions the Director-General shall comply with any general or special directions given to the Director-General in writing by the Minister. As soon as practicable after giving any such direction, the Minister shall publish in the *Gazette* and lay before the House of Representatives a copy of the direction.

### *“Special Benefit*

61G. Special Benefit - Subject to section 68A of this Act, the Director-General may, in the Director-General's discretion, fix a special entitlement to a special benefit in respect of any person whether or not that person is receiving any other benefit under this Part of this Act or the Social Welfare (Transitional Provisions) Act 1990 or any pension or allowance under the War Pensions Act 1954, if the Director-General is satisfied that, after taking into account all of that person's financial circumstances and commitments, including any benefit payable under this Part of this Act or the Social Welfare (Transitional Provisions) Act 1990 and any pension or allowance payable under the War Pensions Act 1954, such a special entitlement is justified.”

[3008] Direction dated 28 March 1995: Section 61: Special benefit

**DIRECTION BY MINISTER OF SOCIAL WELFARE**

IN THE MATTER of section 5  
of the Social Security Act 1964

To: The Director-General of Social Welfare

Pursuant to section 5(2) of the Social Security Act 1964 (the Act), I, PETER JOHN GRESHAM, Minister of Social Welfare, HEREBY give you the following direction.

**PART I  
GRANTS OF SPECIAL BENEFIT**

In the exercise of your discretion to grant a special benefit under section 61G of the Act, and without derogating from your duty to have regard to the particular financial circumstances and commitments of the applicant, you shall have regard to the following matters.

*General principles*

1. THAT the intention of a special benefit under the Act is to alleviate financial hardship and that a special benefit should not to be granted unless without the grant, the applicant or a person dependent upon the applicant would suffer financial hardship.
2. THAT a special benefit should not normally be granted unless the applicant's deficiency of income over his or her expenditure and commitments is reasonably substantial, and that deficiency is likely to continue for a period that justifies special benefit being granted.
3. THAT a special benefit should be considered only in respect of costs of the applicant that are essential and not reasonably avoidable.
4. THAT in considering any application for special benefit, consideration should be given to—
  - (a) The applicant's ability to meet the deficiency from the

applicant's own resources; and

- (b) The assistance that is or might be available to the applicant from other sources to meet the applicant's deficiency.

In particular, when considering —

- (c) An application for a special benefit by a full-time student or the student's dependent spouse, you should take into account the availability of financial support during the academic year under the student allowance or student loan schemes; or
- (d) An application for special benefit for the costs of any essential health services or disability services (as those terms are defined in the Health and Disability Services Act 1993), you should take into account the assistance available under that Act, —

and special benefit should not normally be considered for expenses normally covered by the assistance available under those schemes or that Act unless the applicant has extraordinary expenses and has exhausted his or her entitlements under those schemes or that Act.

#### *Assessment procedure*

5. THAT subject to paragraphs 8 and 9, where —

- (a) An applicant for special benefit has cash assets —
- (i) In the case of a single person, of a value of not more than the equivalent of four times the maximum weekly invalid's benefit rate payable to a single person; or
- (ii) In the case of a married person or a sole parent, of a value of not more than the equivalent of four times the maximum weekly invalid's benefit rate payable to a married couple; and

- (b) The applicant's disposable income is less than the appropriate standard costs —

you should regard as justified the fixing of a special benefit at a rate which is the lesser of **a** and **b** where **a** is an amount equal to the difference between —

- (c) The applicant's disposable income; and
- (d) The appropriate standard costs less \$10 a week, —

and **b** is an amount equal to 30 percent of the applicant's allowable costs.

### Example

A single unemployment beneficiary with 2 dependent children, whose weekly chargeable income is \$210.45 and whose weekly allowable costs are \$94.30.

#### Paragraph 5(b) calculation

Chargeable income	210.45
less allowable costs	<u>94.30</u>
Disposable income	116.15
less standard costs	<u>136.15</u>
Deficiency	(20.00)

#### Calculation of the benefit:

Paragraph 5(c) is the disposable income = \$116.15

Paragraph 5(d) is \$136.15 - \$10 = \$126.15

The difference **a** = \$10

**b** is 30% of allowable costs = \$28.29

A special benefit of \$10 a week is justified, subject to paragraphs 8 and 9.

6. THAT until the transfer to Regional Health Authorities of the responsibility for purchasing care for people with disabilities who are in residential care (intended to take place on 1 July 1995) and subject to paragraphs 8 and 9, a special benefit should be considered justified in respect of a person with psychiatric or physical disabilities who is in residential care and whose chargeable income is less than the specified amount. The rate of special benefit considered justified should be the difference between **a** and **b** where **a** is the specified amount and **b** is the person's chargeable income less the appropriate personal allowance.
7. THAT subject to paragraphs 8 and 9, a special benefit should be considered justified in respect of a person receiving training benefit under the Act who incurs additional accommodation costs because he or she is undergoing training away from his or her usual home. The rate of the special benefit considered justified should be the lesser of —
  - (a) The additional weekly accommodation costs incurred; and
  - (b) \$100 per week.

8. THAT upon completion of the appropriate calculation set out in paragraph 5, 6, or 7, you shall consider whether there is justification for increasing or decreasing the rate of special benefit paid to the applicant, or to fix or decline to fix an entitlement to special benefit, having regard to the principles set out in paragraphs 1 to 4 and to the following matters:
- (a) Whether the applicant has any special or unusual financial expenditure compared to others in a similar general position to the applicant and the extent of any such expenditure;
  - (b) Whether the applicant has any special or unusual reasons for any expenditure item that has caused or contributed to his or her deficiency;
  - (c) The nature of the financial difficulty, and the likely duration of the deficiency;
  - (d) The age and health of the applicant and his or her dependents and any special needs arising from that age or health;
  - (e) The ability of the applicant to improve his or her financial situation;
  - (f) The causes of the applicant's financial difficulty;
  - (g) The extent to which the basic necessities of life for the applicant or his or her dependents would be at risk if a grant of special benefit at the rate calculated, or another rate, was not made;
  - (h) Any other matters that in the circumstances of the particular case, you consider to be relevant.
9. THAT nothing in this Part of this direction requires you to grant a special benefit, or a special benefit at any particular rate, if, in your discretion, you determine that in the circumstances of the particular case, such grant ought not to be made.

*Application of Direction*

10. THAT this Direction should be applied to applications for special benefit made on or after the 1st day of April 1995, and in respect of any reviews of that benefit on or after that day.

**PART II**  
**ADMINISTRATION OF THE SPECIAL BENEFIT PROGRAMME**

1. In administering the programme of special benefits, you are to ensure that where practicable, persons receiving special benefit under the Act receive appropriate advice with the objective that wherever possible, their need for a special benefit is eliminated or reduced within 6 months after the later of —
  - (a) The date of any grant of a special benefit after the date of this direction; or
  - (b) Any review of a special benefit after the date of this direction.
2. Cases where special benefit is being paid at a rate of more than \$50 a week should receive priority under paragraph 1.

**PART III**  
**DEFINITIONS**

In this direction, the following definitions are used:

**Accommodation costs** has the meaning in section 61E of the Act;

**Allowable costs**, in relation to an applicant and subject to section 68A of the Act, means any regular essential expenses reckoned on a weekly basis arising out of the special circumstances of the applicant and his or her spouse (if any) which cannot readily be avoided or varied, and include —

- [(a) The applicant's actual accommodation costs including arrears, provided that any arrears incurred while the person was in receipt of accommodation benefit, accommodation supplement, rent rebate allowance, or tenure protection allowance under the Act are not to be included; and]
- (b) Hire purchase and other types of regular payments for a washing machine or a refrigerator or a television set or for household furniture where the acquisition of that item was essential; and
- [(c) Disability related expenses, being expenses of a kind for which a disability allowance would be payable under section 69C of the Act (but not including any counselling costs in excess of the amount made available by way of disability allowance under the Act); and
- (d) Motor vehicle repayments and reasonable running costs

where —

- (i) The vehicle is required for the transport of the applicant or his or her spouse to and from paid employment; or
- (ii) The applicant or a member of his or her family suffers chronic illness or has a disability and the vehicle is required for that person's transport, —

and no suitable public transport is available;

- (e) Motor vehicle repayments for an applicant who is a beneficiary where —

- (i) There is no public transport available; and
- (ii) The agreement to acquire the vehicle on terms was entered into prior to the applicant applying for the benefit;

- (f) The costs of public transport to and from paid employment;

- (g) The costs of essential child care (after deducting any child care subsidy payable under the Child Care Subsidy Welfare Programme) —

- (i) To enable the applicant or his or her spouse to take part in paid employment; or
- (ii) Because the applicant or his or her spouse is seriously disabled or seriously ill;

- (h) For a person for whom a telephone is a necessity by reason of his or her —

- (i) Health or disability or family circumstances; or
- (ii) Personal safety or security (for example, an elderly person living on his or her own, or a separated person with a non-molestation order against the spouse); or
- (iii) Employment (for example, an electrical worker on call 24 hours per day), —

the basic cost of a telephone (excluding toll charges), —

but do not include

- (i) Any fixed charges made in respect of a line or pipe used in the domestic supply to that person of telephone services, electricity, gas, or water;
- (j) The costs of any tuition the applicant or his or her spouse or any of the applicant's dependent children is undertaking (including stationery, books, fees, or other course related costs);
- (k) Any payments required to be made by the applicant or his or her spouse in respect of any debt, fine, or other liability, other than the payments or repayments referred to in paragraphs (a) to (h) of this definition;

- (l) Any fees charged by Post Office Bank Limited, a private savings bank, a trustee savings bank, the Public Service Investment Society Limited, a registered bank or a building society or a credit union for an account held by the applicant or the applicant's spouse with that bank, society, building society, or credit union;

**Cash assets**, in relation to any person, mean assets of that person and his or her spouse (if any) that can be readily converted into cash and include:

- (a) Shares, stocks, debentures, bonus bonds, and other bonds;
- (b) Bank accounts, including fixed and term deposits with any bank, friendly society, credit union, or building society;
- (c) Money invested with or lent to any bank or other financial institution;
- (d) The net equity held in any property or land not used as the person's home;
- (e) Building society shares;
- (f) Mortgage investments and other long term loans;
- (g) Bills of exchange or promissory notes;
- (h) The applicant's share in any partnership;

but do not include —

- (i) The motor vehicle principally used by the applicant for his or her personal use;
- (j) A caravan, boat, or other vehicle —
  - (i) The net equity in which is less than \$2,000; or
  - (ii) Which is used by the person or a member of his or her family for day to day accommodation;
- (k) The personal effects of the person and his or her spouse (if any);

**Chargeable income**, in relation to an applicant, includes:

- (a) The amount of any benefit granted under Part I of the Act; and
- (b) Where the applicant is receiving unsupported child's benefit or orphan's benefit in respect of any child, the difference between —
  - (i) The amount of that benefit; and
  - (ii) The maximum amount of family support that would be payable under the Income Tax Act 1976 in respect of a child of that age as if that child was the applicant's dependent child; and
- (c) Any war pension received under the War Pensions Act 1954; and
- (d) New Zealand Superannuation, Veteran's Pension, or transitional retirement benefit received under the Social Welfare (Transitional Provisions) Act 1990; and

- (e) Income, as defined in section 3 of the Act; and
- (f) The amount of any regular payments received under any welfare programme approved under section 124(1)(d) of the Act (other than regular payments intended to pay or reimburse specified costs of the applicant); and
- (g) The amount of any child support payments —
  - (i) In the case of a non-beneficiary, received by the person under the Child Support Act 1991; or
  - (ii) In the case of a beneficiary, paid to the person by the Child Support Agency pursuant to section 142 of that Act; and
- (h) The living costs component of the amount of any student allowance or student loan received by the applicant, —  
and includes the chargeable income, as so defined, of his or her spouse (if any);

**Deficiency** has the meaning in paragraph 2 of Part I of this Direction;

**Disposable income**, in relation to an applicant, means the applicant's weekly chargeable income after the deduction of the applicant's allowable costs;

**Income**, in paragraph 5(c) of Part I of this Direction, means income as defined in section 3 of the Act;

**Non-beneficiary** means a person who is not a beneficiary;

**Personal allowance** means —

- (a) In the case of a person with physical disabilities, \$65.96;
- (b) In the case of a person with psychiatric disabilities, \$25.35;
- (c) In the case of a person with both physical and psychiatric disabilities —
  - (i) \$65.96 if that person's disabilities are predominantly physical; or
  - (ii) \$25.35 if that person's disabilities are predominantly psychiatric;

**Residential care**, in respect of any person, means care received as a resident in a home either registered under section 18 of the Disabled Persons Community Welfare Act 1975 or approved by the Director-General as meeting the standards required for registration under that Act;

**Specified amount** means —

- (a) \$326.98 in the case of a person who requires daily supervision but not the constant supervision of a caregiver;
- (b) \$411.45 in the case of a person who requires 24 hour per day supervision and care;
- (c) \$479.04 in the case of a person who requires 24 hour per day supervision and care plus active support and therapy such as day programmes and rehabilitation programmes;

**Standard costs**, in relation to an applicant, means the appropriate amount set out in the Schedule to this direction, being the proportion of the living costs of the applicant and his or her dependents that he or she may be expected to meet —

- (a) From his or her benefit; or
- (b) In the case of a non-beneficiary, from the appropriate rate of an unemployment benefit that would be payable to the applicant if he or she was entitled to that benefit, —

but do not include any of the applicant's allowable costs;

and expressions otherwise defined in the Act shall have the meanings so defined unless the context otherwise requires.

#### PART IV REVOCATION AND SAVINGS

1. This Direction supersedes the Direction concerning special benefit dated 31 March 1994, which is hereby revoked with effect from midnight on 31 March 1995.
2. The revocation of that Direction does not affect the validity of, or the continuation of, any special benefit granted pursuant to it before that benefit is reviewed under the provisions of section 81 of the Act.

Dated this 28th day of March 1995

Peter J Gresham  
Minister of Social Welfare



## SCHEDULE

## STANDARD COSTS

Qualification of Applicant	[Standard Costs]
1. For a person who is not a beneficiary, or who is in receipt of an <u>unemployment benefit</u> , <u>job search allowance</u> , or <u>training benefit</u> , and who is:	
(a) Single aged 16 or 17 years without dependent children	\$59.17
(b) Single aged 18 to 24 years without dependent children	\$59.17
(c) Single aged 25 years or more without dependent children	\$82.47
(d) Single with 1 dependent child	\$120.20
(e) Single with 2 or more dependent children	\$136.15
(f) Married without dependent children	\$154.71
(g) Married with 1 or more dependent children	\$159.78
2. For a person in receipt of an <u>independent youth benefit</u>	\$59.17
3. For a person in receipt of a <u>sickness benefit</u> and who is:	
(a) Single aged 16 or 17 years without dependent children	\$58.34
(b) Single aged 18 to 24 years without dependent children	\$81.43
(c) Single aged 25 years or more without dependent children	\$87.18
(d) Single with 1 dependent child	\$120.20
(e) Single with 2 or more dependent children	\$136.15
(f) Married without dependent children	\$181.00
(g) Married with 1 or more dependent children	\$174.75
4. For a person in receipt of a <u>widow's benefit</u> , or a <u>domestic purposes benefit</u> under section 27B of the Act ( <i>sole parent</i> ) or section 27C of the Act ( <i>woman alone</i> ), and who has:	
(a) No dependent children	\$87.18
(b) 1 dependent child	\$120.20
(c) 2 or more dependent children	[\$136.15]
5. For a person in receipt of a <u>domestic purposes benefit</u> under section 27G of the Act ( <i>care of sick or infirm</i> ) and who is:	

(a) Single aged 16 or 17 years without dependent children	\$78.84
(b) Single aged 18 years or more without dependent children	\$111.86
(c) A sole parent with 1 dependent child	\$145.05
(d) A sole parent with 2 or more dependent children	\$159.75
6. For a person in receipt of <u>invalid's benefit</u> or <u>transitional retirement benefit</u> and who is:	
(a) Single aged 16 or 17 years without dependent children	\$78.84
(b) Single aged 18 years or more without dependent children	\$111.86
(c) Single with 1 dependent child	\$145.05
(d) Single with 2 or more dependent children	\$159.75
(e) Married without dependent children	\$204.08
(f) Married with 1 or more dependent children	\$196.78
7. For a person in receipt of <u>New Zealand Superannuation</u> or <u>veteran's pension</u> and who is:	
(a) Single without dependent children and living alone	\$111.86
(b) Single without dependent children and not living alone	\$111.86
(c) Single with 1 dependent child	\$145.05
(d) Single with 2 or more dependent children	\$159.75
(e) Married without dependent children	\$204.08
(f) Married with 1 or more dependent children	\$196.78
8. For a married couple one of whom is in receipt of <u>New Zealand Superannuation</u> where the other is receiving <u>sickness benefit</u>	
	\$162.07
9. For a married couple one of whom is in receipt of <u>New Zealand Superannuation</u> where the other is receiving <u>invalid's benefit</u> or a <u>transitional retirement benefit</u>	
	\$188.27
10. For a married couple one of whom is in receipt of <u>New Zealand Superannuation</u> where the other is not receiving a benefit or is receiving <u>unemployment benefit, job search allowance, or training benefit</u>	
	\$130.57
11. For a married couple one of whom is receiving <u>sickness benefit</u> where the other is not receiving a benefit or is receiving <u>unemployment benefit, job search allowance, or training benefit</u>	
	\$149.50

12. For a married couple one of whom is receiving <u>sickness benefit</u> where the other is receiving an <u>invalid's benefit</u> or a <u>transitional retirement benefit</u>	\$177.88
13. For a married couple one of whom is receiving <u>domestic purposes benefit</u> under section 27G of the Act ( <i>care of sick or infirm</i> ) where the other is not receiving a benefit or is receiving <u>unemployment benefit</u> , <u>job search allowance</u> , or <u>training benefit</u>	\$146.38
14. For a married couple one of whom is receiving <u>domestic purposes benefit</u> under section 27G of the Act ( <i>care of sick or infirm</i> ) where the other is receiving a <u>sickness benefit</u>	\$177.88
15. For a married couple one of whom is receiving <u>domestic purposes benefit</u> under section 27G of the Act ( <i>care of sick or infirm</i> ) where the other is receiving an <u>invalid's benefit</u> or a <u>transitional retirement benefit</u>	\$204.08
16. For a married person whose spouse is unlawfully in New Zealand	The standard costs that would otherwise apply to the applicant if he or she were unmarried

## [3008.1] History

In Part III: in the definition of "Allowable costs", paras (a) and (c) were substituted by a Direction by the Minister of Social Welfare dated 8 May 1995.

In the Schedule the column heading "Standard Income" was omitted and the heading "Standard Costs" was substituted by a Direction by the Minister of Social Welfare dated 8 May 1995.

In cl 4(c) of the Schedule the expression "135.15" was omitted and the expression "136.15" was substituted by a Direction by the Minister of Social Welfare dated 8 May 1995.

The following is reproduced from the explanatory note as reasons for the direction:

The amendments to the definition of Allowable costs correct two errors in the previous direction where any accommodation supplement, rent rebate allowance, tenure protection allowance, and disability allowance were counted twice in the assessment, as they are also included in the definition of Chargeable income by virtue of being benefits payable under Part I of the Act.

The amendments to the Schedule correct typographical errors.

## SPECIAL BENEFIT DECISION SUMMARY

1. Formula rate = \$ \_\_\_\_\_  
(amount shown on SWIFTT)
  
2. Ensure the customer has recorded on the application all points that they want considered and you have discussed all these points with the customer.
  
3. Does the customer's individual situation warrant a grant of SPB?  
 NO - DECLINE APPLICATION  
       Clearly record and advise the reasoning behind this decision  
 YES - DETAIL THE REASONING BELOW  
 \_\_\_\_\_  
 \_\_\_\_\_  
 \_\_\_\_\_  
 \_\_\_\_\_
  
4. Have you decided to waive the \$10.00 standard deduction? Y/N  
 If yes, why? \_\_\_\_\_
  
- Have you decided to ignore the 30% of allowable costs, upper limit? Y/N  
 If yes, why? \_\_\_\_\_
  
5. Are there any other relevant factors in the customer's individual circumstances and commitments which would increase the amount payable? Y/N  
 If yes, why? \_\_\_\_\_
  
6. Are there any other relevant factors in the customer's individual circumstances which would decrease the amount payable? Y/N  
 If yes, why? \_\_\_\_\_

DECISION:	
Application Granted	:@ \$ _____ pw from _____
Application Declined	:
Reason for EITHER Decision	:
_____	
_____	
_____	
_____	
Signed _____	Date _____
Checked _____	Date _____

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