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DISCRETION IN SOCIAL SECURITY LAW AND
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WORDLENGTH

The text of this paper (excluding contents page, footnotes and bibliography) comprises approximately 15000 words.

ABSTRACT

This paper examines discretion in New Zealand's social security law and practice. The paper summarises the academic writing on the discretion versus rules debate. It highlights factors which impact on an official's exercise of discretion in the social security context. It then examines specific examples of discretion found in the Social Security Act 1964 and analyses the relevant policy and practice of the New Zealand Income Support Service.

The author argues that although a residual discretion is necessary in social security law to ensure individualised justice, in practice, the distinction between rules and discretion is becoming blurred. Discretionary supplementary assistance is now tightly regulated by descriptive ministerial directives and welfare programmes, and entitlement arises upon satisfying detailed criteria. Given this reality, the paper focuses on ways to improve the quality of service offered by the New Zealand Income Support Service.

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I INTRODUCTION

Williams notes that "no field of legislation more intimately concerns the citizen than the social security and welfare legislation",¹ and yet the legislation, policy and practice of the Department of Social Welfare remains largely a mystery to both lawyers and the public alike. The provision of social security is authorised by the Social Security Act 1964 ("the Act") and is administered by the New Zealand Income Support Service ("the NZISS"). A large number of decisions made under the Act are discretionary in nature.

Discretion in welfare law is a valuable tool enabling decision-makers to take account of individual circumstances, but the guidelines and practical application of discretion need constant monitoring to ensure that decisions are made properly and according to the law. This paper examines the legality of the NZISS's interpretation of selected practical examples of discretion found in the Act.

It is generally accepted that bureaucracies require a mixture of both discretion and rules to function most efficiently. Traditionally, rules have provided certainty, whilst an element of discretion is required to ensure individualised justice.² This paper discusses the theory surrounding the discretion versus rules debate. It highlights the changing attitude of the current Government towards social security, demonstrating the practical consequences for beneficiaries through the selected examples.

The findings of the High Court regarding the highly discretionary special benefit, authorised by s61G of the Act, are discussed, along with recent changes to the Special Needs Grant Programme, authorised under s124(1)(d) of the Act. The policy and practice of the NZISS in relation to the discretion to impose a 26 week stand-down for misconduct as an employee is examined. Finally the discretion of the NZISS to write off over-payments made to beneficiaries is analysed.

New Zealand's formerly comprehensive social security system has been radically altered over the last six years with the introduction of heavy targeting. This approach has ensured fiscal, to the detriment of social, responsibility. Part VI describes the recent action of the Government to enable further targeting of supplementary assistance by attempting to introduce regulations to govern what is currently discretionary assistance. The progress of the

¹D G T Williams "Judicial Restraint and Judicial Review: The Role of the Courts in Welfare Law" in M Partington & J Jowell (eds) *Welfare Law & Policy - Studies in Teaching, Practice and Research* (Nichols Publishing Co, New York, 1979) 101.

²C Harlow & R Rawlings *Law and Administration* (Weidenfeld & Nicholson, London, 1984) 145.

Social Welfare Reform Bill 1995 is described along with the responses of welfare groups to the proposed changes.

It is the author's submission that in recent times the distinction between rules and discretion in social security law and practice has become blurred such that the exercise of discretion is increasingly dictated by restrictive guidelines and detailed, exhaustive definitions. Support for this proposition is found from the courts who have commented that upon satisfying detailed discretionary criteria, an entitlement arises for the claimant.³

Given this environment, Part VII discusses ways to improve decision-making at the NZISS. Current statutory review procedures are discussed and suggestions for improvement made. Finally, the role of the Ombudsmen and judicial review in the social security context is described.

II DISCRETION VERSUS RULES

The definition adopted in this paper is that public officials have discretion whenever the effective limits of their power leave them free to make a choice among possible courses of action or inaction.⁴ This is contrasted with rule-based provisions in which a definite detailed legal consequence attaches to a definite detailed state of affairs.⁵ Some legislative provisions authorising official action combine elements of both rules and discretion.

This section discusses the different categories of discretion which may exist. The problems faced specifically by providers of social security are addressed, along with the traditional attitude of welfare groups towards discretion. Common criticisms of discretion are highlighted and consideration is given to whether these would be solved through the implementation of rule-guided procedures.

An official's discretion may be categorised in the following ways: strong or weak, formal or informal, and provisional or final. Strong discretion is found where a rule allows an official to provide something desired by the claimant, but the rule imposes no constraint on what is to be given to any particular individual.⁶ This is contrasted with weak discretion where a rule

³*Ankers v Attorney-General (No. 2)* [1995] NZAR 418, 420-421.

⁴Davis cited in M Adler and S Asquith *Discretion and Welfare* (Heinemann Educational Books, London, 1981) 9.

⁵J Black, S Harrop, J Hughes *Income Support Law and Practice* (Butterworths, Wellington, 1995) A/162.

⁶This is sometimes referred to as discretion based on the absence of any rule, but this is incorrect since all statutory discretion is exercised under some rule. R E Goodin "Welfare Rights, Law and Discretion" [1986] 6 *Oxford Journal of Legal Studies* 232, 234; An example of strong discretion in the Act is s61G which authorises the payment of special benefit.

directs an official to provide something under certain conditions, but the official retains the option to decide who receives what. Sub-categories of weak discretion include formal and informal discretion. Formal discretion exists where the range of options available to an official is explicitly stated in the rules. The range of options available is merely implicit in informal discretion. Discretion is further differentiated by whether the decision of the official is final or not. Provisional discretion means the decision is subject to review and possible overturning by another official. Ultimate discretion is not subject to review by another official, although it may be subject to judicial review by the courts. Statutory discretion usually involves a combination of the various categories.⁷

The discretion given to public officials is conferred by legislation. It is often quoted that discretion is like a doughnut such that it does not exist except as an area left open by a surrounding belt of restriction.⁸ However, the analogy of discretion to a sponge is preferred by Sossin.⁹ She considers that discretion is shaped by far more than the legal structures surrounding it. Sossin views discretion as porous and shaped by politics and values.

The provision of social security by the state creates unique problems which arise from political, fiscal and moral values, and the logistics of a centralised bureaucracy. It will be shown that volume, values and power imbalances present special problems for administrators of social security.

The current societal reality is that vast and increasing numbers of people are requiring financial support from the state. Volume is seen as the cardinal enemy of discretion and individualisation, where heavy caseloads force routinisation.¹⁰ Additionally, society distinguishes between the deserving and the undeserving poor. The elderly and disabled constitute the deserving poor, whereas the unemployed and solo parents are considered undeserving. It was noted by the Honourable Dr Michael Cullen, MP, that much of New Zealand's social security system still makes such a distinction.¹¹ Society's attitude towards the poor has been reflected in the organisation and structure of programmes providing support.¹²

⁷For example, there may be weak, formal, provisional discretion.

⁸R Dworkin *Taking Rights Seriously* (Duckworth, London, 1977) 31.

⁹L Sossin "Redistributing Democracy: An Inquiry into Authority, Discretion and the Possibility of Engagement in the Welfare State" [1994] 26 *Ottawa LR* 1, 12.

¹⁰J Handler "Discretion in Social Welfare: The Uneasy Position in the Rule of Law" in P Robson (ed) *Welfare Law* (Dartmouth, Hants, 1992) 396.

¹¹(1995) 550 *NZPD* 8801.

¹²For example, until recently, NZISS policy manuals stated that unemployment beneficiaries were not able to access an advance on their benefits, even though the legislation did not preclude them.

Liberal legalism views the relationship of citizen to the state as individualistic and adversarial.¹³ Beneficiaries, however, are extremely dependent on the state for financial assistance and, in many cases, have an ongoing relationship with a particular caseworker. In nearly every case, beneficiaries are financially precluded from asserting their rights through the courts, the quintessential check on abuse of administrative power.¹⁴

The power imbalance which exists between a beneficiary and an official is formalised in social security legislation. The bureaucracy controls information, resources, the power of retaliation, and staff, pressed for time, may think they know what is best for the clients.¹⁵ The beneficiary, on the other hand, may feel insecure, and fear imposing themselves or taking up too much time.¹⁶ Beneficiaries are currently ill-equipped to participate in, or understand, the structures and procedures of the administration. Discretion implies discussion, bargaining and a minimal sharing of power. Handler argues that the dependent poor cannot adequately participate in the decision-making process.¹⁷ Discretion requires that beneficiaries have information and resources to legitimate the process and to redress the power imbalance.

It is the power imbalance, and the inherent potential for abuse, between beneficiaries and officials which have, traditionally, led welfare advocates to call for a return to legality and the curbing of discretion in social security legislation.¹⁸ Discretion, it has been argued, leads to undesirable social control by officials and standards of morality imposed on beneficiaries which are not imposed on the rest of the community.¹⁹

Advocates of rule-governed systems argue that discretion results in inconsistent and arbitrary decisions by both officials and appeal tribunals.²⁰ Officials with strong, formal, ultimate discretion need not have or give reasons for deciding one way or the other.²¹ In this sense, they may act arbitrarily. The corollary to arbitrariness is the claim of uncertainty and insecurity in a discretionary system. Discretionary decisions may prevent beneficiaries from understanding how the system works due to ignorance of the considerations of officials.

¹³Above n 10, 401.

¹⁴Evidence is found in the paucity of claims taken to the High Court on benefit issues over the years. Of these cases, a number were brought by superannuitants who, traditionally, have had more financial resources. The possibility of receiving civil legal aid to bring a claim is discussed in Part VII, along with the barriers to the process.

¹⁵Above n 10, 397.

¹⁶Above n 10, 403.

¹⁷Above n 10, 397.

¹⁸Above n 6, 239.

¹⁹Above n 6, 240.

²⁰Above n 2, 588.

²¹Above n 6, 242.

Goodin argues that discretion reduces certainty and that the poor are the most sensitive to such uncertainties.²²

The benefit of discretion is that it allows an official to assess support based on the individual needs and circumstances of the beneficiary. Discretion, therefore, must be exercised having regard to all the circumstances of the case. It is argued that this necessarily means more intrusive mechanisms are required to assess whether or not to exercise the discretion.²³ Breaches of privacy and the intrusiveness of officials' information gathering have been cited as reasons against discretion in social security.²⁴ Welfare advocates argue that welfare institutions will only be improved with a return to legality.²⁵

Some scholars argue that those seeking the accountability of government should press for rules because "open rules provide a basis for argument around policy and for criticism of administrative action".²⁶ Prosser argues that discretion can provide the means by which government can avoid making difficult policy decisions by not clearly stating what policy is to be followed.²⁷ If a legislative purpose can be found, however, Prosser suggests the issue of rules versus discretion becomes a technical one, establishing what will most feasibly achieve the objectives of the legislation.²⁸ Prosser sees the chief purpose of litigation of welfare issues to be the raising of awareness as a basis for political mobilisation rather than as a means of providing direct reform.²⁹

Other scholars have noted that those wishing to limit discretion have, in turn, sought greater procedural rights for those subject to it.³⁰ Procedural rights refer to a process which must be followed, such as the principles of natural justice. Substantive rights, on the other hand, refer to an outcome, for example, the receipt of the unemployment benefit at a certain rate.

Adler and Asquith comment that the strengthening of procedural rights in no way guarantees the enhancement of substantive rights. Indeed, with increasing demands for financial support and scarcity of resources, the increased procedural rights may well legitimate the

²²Above n 6, 243.

²³Above n 6, 247.

²⁴An example of intrusive behaviour by officials in determining whether or not to provide discretionary assistance was highlighted recently in Christchurch. Christchurch NZISS staff were searching people's cupboards who were applying for special needs grants for food to assess whether they *really* needed the assistance or not. See "Kitchen search Irks Pair Seeking Food Aid" *The Dominion*, Wellington, New Zealand, 15 April 1996, 3.

²⁵Above n 4, 9.

²⁶T Prosser "The Politics of Discretion: Aspects of Discretionary Power in the Supplementary Benefits Scheme" in Adler & Asquith, above n 4, 169.

²⁷Above n 26 169.

²⁸Above n 26 169

²⁹Above n 26, 170.

³⁰Above n 4, 17.

administration whilst masking the effects of expenditure cuts and drawing attention away from continuing substantive inequalities.³¹

Goodin notes that the problems associated with discretion are not necessarily solved by implementing rule-based systems. It has been argued that arbitrariness, intrusiveness and uncertainty will remain.³² Goodin believes that only the potential for manipulation and exploitation will be removed, but Harlow queries even this, noting that "administrators well understand how to play games with rules".³³

Arbitrariness may remain in rule-based systems because officials can cite the rules without justifying, or giving reasons for, the decision.³⁴ The range of considerations specified by the rules may appear as uncertain and arbitrary to the beneficiary as discretionary considerations.³⁵ If the conditions are formalised and restricted, the result may be objectively worse for the beneficiary. There may be certainty at the expense of adequate assistance. The claims of intrusiveness and breach of privacy are endemic to the provision of social security. Intrusiveness could be reduced, but at the expense of individual justice.³⁶

Opposition to rule-based systems criticises the procedures as inflexible, impersonal and insensitive to differing needs.³⁷ Rules do not allow for individualised justice. As rules define, they necessarily also restrict. In the process of interpreting rules, officials often subtly redefine them.³⁸ It is not clear, either, that increasingly complex regulatory language prevents abuse of the system.³⁹

It is generally accepted that discretion and rules are on a continuum. For a bureaucracy to work efficiently, a balance of both discretion and rules is desirable. The task for legislators is to find the optimum point on the scale. It has been shown that similar problems occur under discretionary and rule-based systems. Rules create unique problems too. Accepting that an element of discretion is necessary for the efficient administration of a bureaucracy, the question is how to ensure that the discretion is well exercised. The various ways to achieve this will be discussed later in the paper.

³¹Above n 4, 18-19.

³²Above n 6, 250.

³³Above n 2, 162.

³⁴Above n 6, 250.

³⁵Above n 6, 251.

³⁶Above n 6, 252.

³⁷Above n 2, 11.

³⁸Above n 6, 258.

³⁹Above n 9, 42.

The main justification for discretion is the need for individualised justice. This is particularly pertinent in the provision of social security where the range of extraordinary contingencies cannot be provided for in the rules. The best proposal appears to be to guarantee a certain baseline benefit with deviations only in an upward direction.⁴⁰ With this format, volume can be dealt with without sacrificing the individual.

This is, theoretically, the approach of the New Zealand social security legislation, where, in general terms, basic benefits are given upon fulfilling certain criteria, and supplementary assistance is given on a discretionary basis according to the individual circumstances of the case. It will be shown, however, that within the supposedly rule-based basic benefits a variety of discretionary decisions are made by staff, and that entitlement arises in discretionary supplementaries upon satisfying the listed criteria. Indeed, the discretionary supplementary assistance is becoming rule-like in its application, due to the heavy targeting.

In the past New Zealand had a universalist approach to superannuation and family benefit. A universalist approach to social services is entitlement by all irrespective of the incomes and means of individual recipients. Selectivity involves discrimination between people who are within determined categories. Implicit in the selective approach is some kind of test of need related to the individual's own resources.⁴¹ The formerly universal schemes no longer exist in that form, and the entire social security system is now heavily targeted.

Rules and discretion are only ever as good as the policies which underlie them. Legislators and policy makers are finding mechanisms which ensure that only the "needy" receive assistance from the state. In theory, targeting should make more resources available for the poorest in society. The last few years, however, have seen a drastic change in the Government's concept of the "needy". The following section illustrates the current National Government's radical change in approach to social security from previous years.

III POLICIES UNDERLYING SOCIAL SECURITY

A Royal Commission on Social Security, 1972

The 1972 Royal Commission described the principles on which the social security benefit system was originally based in the following way:⁴²

⁴⁰Judicial comments on the legality of unidirectional discretion will be discussed in Part V.

⁴¹*Royal Commission on Social Security in New Zealand* (Government Printer, Wellington, 1972) 132.

⁴²Above n 41, 65.

1. Social security is a community responsibility, with a legitimate function of the state being the redistribution of income so as to ensure that everyone can live with dignity;
2. Eligibility should be based on need. Need is identified by circumstances (ie sickness) and measurement (ie an income test). In some circumstances, such as age, need can be assumed to exist;
3. Eligibility should be based on residence rather than contribution to any social security fund;
4. Benefits should be paid at a level which enables people to participate in and belong to the community.

B Royal Commission on Social Policy, 1988

The objectives of social security, as seen by the 1988 Royal Commission on Social Policy, are described as follows:⁴³

1. The right to a sufficient share of resources to allow full participation in society;
2. The relief of immediate need arising through unforeseen circumstances;
3. A commitment to ensuring the wellbeing and healthy development of children.

C Statement of Government Policy by the Minister of Social Welfare in 1991

Jenny Shipley's paper *Social Assistance: Welfare that Works*⁴⁴ described the approach of the National Government, elected in 1990, as that of a "modest safety net", with emphasis on fiscal savings, an incentive to work and a reduction of "welfare dependence". The safety net is to provide a modest standard of living for those who can "demonstrate that matters beyond their control threaten to force them into poverty".⁴⁵

This heavily targeted approach has been implemented by a number of statutory amendments and restrictive ministerial directives. The result for beneficiaries has been the lowering of benefit rates, increased age thresholds for certain benefits, lowered asset and income

⁴³*Report of the Royal Commission on Social Policy* (Government Printer, Wellington, 1988) 38.

⁴⁴(Government Printer, Wellington, 1991).

⁴⁵Above n 44, 13.

thresholds, lengthened stand-downs for benefits, the widening of the NZISS's power to obtain information and the introduction of penalties and increased fines for fraud.

III DISCRETION IN SOCIAL SECURITY

A Delegation of Authority in the Social Security Act 1964

The Director-General of Social Welfare ("the D-G") is the Department of Social Welfare's chief executive.⁴⁶ She is responsible for administering monetary benefits through the NZISS,⁴⁷ one of three agencies of the Department of Social Welfare ("the Department"). In exercising her powers under the Act, the D-G is subject to the general direction and control of the Minister of Social Welfare ("the Minister").⁴⁸ The Minister may not lawfully use his power to override the discretion conferred on the D-G. Section 3A of the Act provides that the Minister may delegate powers to the D-G.

The D-G's own powers, functions and discretions may be delegated to individuals or classes of people (ie officers of the Department at various levels) under s10 of the Act. The NZISS's policies and procedures are contained in five departmental manuals. These manuals contain instructions and guidelines for staff on how to interpret the Act.

B Different Types of Discretion

In its broadest sense, discretion is separated into two categories: "agency discretion" and "officer discretion".⁴⁹ Agency discretion is the term applied to the power to make policy or to give instructions. An individual's power to apply or interpret rules is known as officer discretion. Officer discretion exists in bureaucracies even when no discretion is identified by law. For example, an official must exercise judgment in deciding whether or not certain criteria have been satisfied or even if a document is genuine.⁵⁰

C Limitations on the Exercise of Discretion

At a first glance some discretions may appear unlimited since relevant matters for consideration are not detailed in the statute.⁵¹ Courts have held that this discretion is to be

⁴⁶Section 3 of the Act. The current D-G is Mrs Margaret Bazley.

⁴⁷Section 2 of the Act.

⁴⁸Section 5 of the Act. The current Minister is the Honourable Peter Gresham, MP.

⁴⁹Above n 5 A/162.

⁵⁰Above n 6, 238.

⁵¹For example, the discretion to grant a special benefit under s61G.

considered in light of the statutory scheme and the purpose of the discretionary provision within that scheme.⁵²

General discretions are also limited by ministerial directives issued under s5 which states that the "powers, functions and discretions conferred on the [D-G] ... shall be exercised under the general direction and control of the Minister of Social Welfare". The ability of ministerial directives to fetter the exercise of statutory discretion has been the subject of judicial attention and is discussed in Part V.

The NZISS's own policy manuals further interpret and limit discretion. This is the quintessential example of agency discretion. The NZISS manuals summarise the legislative provisions and set out the policy of the Department. Manuals are an essential part of the social security process to ensure uniform treatment between different districts and to fill in vaguely worded legislation.⁵³ So, where the Act may confer a very broad discretion on officials, this is greatly confined in practice by adherence to the manuals.

The NZISS manuals specify that they are a complement to the legislation rather than a substitute, but evidence shows that manuals are often considered determinative by staff.⁵⁴ Problems arise when the manuals are inconsistent with the legislation, for example, when seemingly inflexible rules are specified yet a discretion is conferred by legislation. Further problems occur when guidelines retain flexibility but the actual practice of the NZISS does not.

D Broad Principles Surrounding the Exercise of Discretion

The courts have developed a number of principles to govern the exercise of discretion which are summarised as follows.⁵⁵ The authority in which a discretion is vested must exercise the discretion, but it cannot be compelled to exercise it in any particular manner. The authority must exercise the discretion in a real and genuine sense: it must not act under the dictation of another body, or adopt a fixed rule of policy to prevent the exercise of discretion in individual cases. The authority must act in good faith, have regard to relevant considerations and disregard irrelevant ones. It must not act arbitrarily or promote purposes that are alien to the spirit of the empowering legislation.

⁵²*O'Sullivan v Farrer* (1989) 89 ALR 71.

⁵³R Cranston *Legal Foundations of the Welfare State* (Weidenfeld & Nicholson, London, 1985) 216.

⁵⁴Above n 5 A/163; Interview with Catriona Ross, Benefit Rights Co-ordinator, Wellington People's Resource Centre, 8 July 1996.

⁵⁵For a fuller discussion on the principles surrounding the exercise of discretion, see J M Evans *De Smith's Judicial Review of Administrative Action* (4 ed, Stevens & Sons Ltd, London, 1980) ch 6.

The fundamental principle that a fixed rule of policy must not prevent the exercise of discretion in individual cases is stated succinctly by Taylor:⁵⁶

Reliance on policy is not unlawful. What is unlawful is the blind following of policy. The normal rule is that each case must be considered on its own merits; a claim that the policy should not be followed in a particular case must be considered. This does not mean that an exception to policy must be made, but only that the authority should be open to persuasion in deciding that.

The leading New Zealand authority on this issue is the Court of Appeal decision of *Hamilton City Council v Electricity District Commissioner & Others*.⁵⁷ The Court held that if an Act confers a discretion it is unlawful for administrative policy rules to fetter that discretion to the extent that the discretion is not exercised in a "real and genuine sense".⁵⁸ Therefore, there is nothing to prevent the NZISS from setting policy guidelines which specify considerations which are to be taken into account for a general class of case. When the policy or practice is to apply the guidelines rigidly, regardless of the circumstances of the individual case, however, this is an unlawful fetter on the exercise of the discretion. The High Court decision of *Ankers v Attorney-General*⁵⁹ deals with this very issue in relation to the granting of special benefits. The circumstances surrounding the case and the findings of the Court will be discussed in depth in Part V.

The misinterpretation of voluntarily adopted rules or guidelines provides a further administrative law challenge to the exercise of discretion. The Court of Appeal in *Chiu v Minister of Immigration* held that the significance of such behaviour depends on the context in which the misinterpretation occurs, but that in the majority of cases, the misinterpretation will "vitiating the decision upon the ground that it constitutes an error of law ..., produces unreasonableness in the administrative law sense ..., frustrates a legitimate expectation, or causes a delegate to stray beyond the authorised scope of his [or her] delegation".⁶⁰ In the *Ankers* decision the Judge held that the disregard by staff of the instruction in the Manual to consider individual circumstances was unreasonable in the administrative law sense.⁶¹

⁵⁶G D S Taylor *Judicial Review* (Butterworths, Wellington, 1991) 344.

⁵⁷[1972] NZLR 605.

⁵⁸Above n 57, 639.

⁵⁹[1995] 2 NZLR 595.

⁶⁰[1994] 2 NZLR 541, 550.

⁶¹Above n 59, 607.

E The Impact of New Zealand's International Obligations on the Exercise of Discretion

Recent comments from the judiciary demonstrate that New Zealand's international obligations are having an increasing impact on the country's legal system. It is a fundamental principle that international treaty obligations are not binding in domestic law until they have been incorporated into statute.⁶² New Zealand courts have been quick to note, however, that conventions ratified by the government are not to be ignored.

A number of ratified United Nations conventions have a potential impact on the provision of social security, in particular articles 9, 10 and 11 of the International Covenant on Economic Social and Cultural Rights ("ICESCR").⁶³ Also of potential relevance are the United Nations Convention on the Rights of the Child and the International Covenant on Civil and Political Rights.

In *Regina v Secretary of State for the Home Department, ex parte Brind* the House of Lords held that an international convention is not to be the determinative factor when an official exercises discretion.⁶⁴ The leading New Zealand authority on the bearing of international conventions on administrative action is the Court of Appeal decision of *Tavita v Minister of Immigration*.⁶⁵ In the case, Cooke P commented that it was an unattractive argument that administrators were obliged to ignore international instruments and noted that the law relating to the effect of treaty obligations on domestic law is undergoing evolution.⁶⁶ The reasoning in *Tavita* was affirmed in *Puli'uvea v Removal Review Authority*,⁶⁷ although the case was distinguished on its facts. It is possible to reconcile the British and New Zealand cases by reading *Tavita* as authority that United Nations conventions are a mandatory consideration when exercising discretion, but that they are not determinative.

The bearing of international instruments on the interpretation of social security legislation was considered by Thorp J in the first *Ankers* case.⁶⁸ The Court rejected the plaintiff's argument that the Minister had failed to take New Zealand's obligations under the ICESCR into account. Thorp J held that there was no evidence that the Minister had not taken the relevant international obligations into account. There was in fact evidence that senior departmental

⁶²*Ashby v Minister of Immigration* [1981] 1 NZLR 222.

⁶³Article 9 recognises the right of everyone to social security, including social insurance. Article 10 states that parties to the covenant recognise that the widest possible protection and assistance should be accorded to the family. Article 11 recognises the right of everyone to an adequate standard of living for the individual and his or her family, including adequate food, clothing and housing, and to the continuous improvement of living conditions.

⁶⁴[1991] 1 AC 696, 762.

⁶⁵[1994] 2 NZLR 257.

⁶⁶Above n 65, 266.

⁶⁷(1996) 14 FRNZ 322.

⁶⁸Above n 59, 601.

members monitored New Zealand's compliance on an ongoing basis.⁶⁹ *Tavita* was distinguished on the basis that in that case it was accepted that the Minister had not taken the international covenants into account.

The Court did not consider that it was the judiciary's place to examine the merits of the government's analysis of the situation.⁷⁰ The *Ankers* decision appears to follow the New Zealand approach to the force of international instruments, such that they are a mandatory consideration in the exercise of bureaucratic discretion, but are not determinative.

V SPECIFIC EXAMPLES OF DISCRETION IN THE SOCIAL SECURITY ACT 1964

This section of the paper selects four examples of discretion found in the Act to illustrate the differences between legislation, policy and practice in social security. Two forms of supplementary assistance have been chosen - the provision under s61G for the grant of special benefit, and the Special Needs Grant Programme authorised under s124(1)(d). There is a strong focus on supplementary benefits since they are traditionally discretionary in nature and are designed to cover situations not envisaged by the basic benefit.

It is generally assumed that the basic benefits are rule-based, providing an entitlement for the applicant upon satisfying the legislative criteria. Section 60H(3) of the Act, however, confers a discretion on the D-G to impose a 26 week stand-down for an applicant applying for the unemployment benefit where the reason for leaving the job or government-assisted scheme is by virtue of misconduct as an employee. The policy and practice of this discretion will be discussed.

The final practical example is the discretion found in s86(9A) which gives the D-G the power to write off any overpayment upon satisfying certain statutory criteria. It will be shown that this section gives the appearance of a statutory discretion, but is actually only discretionary in its interpretation, since entitlement arises upon fulfilling the listed statutory criteria.

A *Special Benefit*

One of the "strongest" examples of discretion under the Act is the power of the Department to grant a special benefit under s61G. A special benefit is payable to any person, including non-

⁶⁹Above n 59, 602.

⁷⁰Above n 59, 601.

beneficiaries, at the discretion of the D-G if she is satisfied that, after taking into account all the applicant's financial circumstances and commitments, such a special entitlement is justified.⁷¹ The NZISS considers that the principal objective of the special benefit is to direct individual additional assistance to those who have special and unusual commitments that lead to an inability to meet essential living expenses.⁷²

There are no set criteria in the legislation for determining whether a person gets a special benefit or how much they get. However, the NZISS acts according to a directive from the Minister authorised by s5, and applies a formula to get an initial assessment. The important variables in the formula are standard costs and fixed costs.

Standard costs are appended to the Ministerial Directive ("the Directive") and include a figure which is meant to represent the weekly amount that would be spent on food, bills, clothing and entertainment. The standard costs vary according to the benefit the applicant is on. If the applicant is not a beneficiary, then the standard cost of the appropriate invalid's benefit is taken.

Fixed costs are defined as regular essential expenses reckoned on a weekly basis arising out of the special circumstances of the applicant which cannot readily be avoided or varied.⁷³ Fixed costs include such things, for example, as accommodation costs, hire purchase payments for essential household items, certain motor vehicle payments, some transport costs and essential child care payments.

Special benefit is payable for the lesser of either (a) the deficiency between the person's income less certain fixed costs and a standard income less \$10, or (b) 30% of the applicant's fixed costs. It was the application of this formula which gave rise to the High Court decision of *Ankers v Attorney-General*.⁷⁴

The decision was not the first instance of external review of the NZISS's practice of administering special benefits. In 1994 the Social Security Appeal Authority ("the SSAA") stated the NZISS must not use its policy manual to exclude any class of applicants from applying for special benefit.⁷⁵ The SSAA instructed NZISS that staff must consider each case on its merits. The resulting High Court decision shows that the directions of the SSAA had not been followed.

⁷¹Section 61G of the Act.

⁷²New Zealand Income Support Service *Main Benefits Manual* (reprinted 1 July 1996) para 11.0100.

⁷³*Direction by the Minister of Social Welfare on Special Benefit* (issued 28 March 1995) Part III.

⁷⁴Above n 59.

⁷⁵*SSAA Decision No. 106/94* (18 November 1994); See also *SSAA Decision No. 39/93* [1993] NZAR 524; *SSAA Decision No. 75/93* [1993] NZAR 476.

1 The Ankers Decision

In February 1995, Haidi Ankers sought judicial review of the NZISS's handling of special benefit applications. The appropriate directive at the time stated that without derogating from the duty to have regard to the particular financial circumstances of the applicant, the formula as stated above (which had a \$20 threshold to pass), was to be applied when assessing eligibility for a special benefit. The Directive stated that the \$20 threshold and the 30% fixed costs maximum could be disregarded in special or unusual circumstances. The NZISS Manual, however, stated only that the formula could be departed from in "very exceptional circumstances". No definition of "very exceptional circumstances" was given.

Thorp J rejected a claim that the Directive was invalid, but upheld the claim that the manner of processing applications by the NZISS was unreasonable and illegal. The Court held that the use of a formula was not objectionable provided it was used as a guide and not a rule, being subject, therefore, to any special and unusual circumstances affecting the applicant.⁷⁶ Thorp J held, however, that in practice the effective decision was made by an analysis of computer data rather than by the NZISS officer.⁷⁷ In this sense, no genuine decision was made.

The Court held that the NZISS had misinterpreted the Directive by (a) seldom considering or requesting details of special circumstances, and (b) the inadequate reference in the Manual to "very exceptional circumstances".⁷⁸ Additionally, rules of administrative fairness were breached because applicants were not given the opportunity to place all relevant information before the decision-maker and were not informed of the criteria used by the NZISS in assessing special and unusual circumstances.⁷⁹ These actions constituted a breach of natural justice and s27 of the New Zealand Bill of Rights Act 1990.

2 Relief Granted

In a second decision, dated 7 April 1995, Thorp J held that the plaintiff had authority to represent all special benefit applicants since 1 April 1992 given that they shared a common interest in the proceedings and that other applicants were financially unlikely to be able to bring separate proceedings.⁸⁰ The Judge gave relief by way of an order for reconsideration of

⁷⁶Above n 59, 599.

⁷⁷Above n 59, 607.

⁷⁸Above n 59, 606.

⁷⁹Above n 59, 608.

⁸⁰Above n 3, 422.

applications after February 1994. Letters were sent to all affected applicants who were informed of their right to reconsideration if so desired. Applications prior to February 1994 were not reconsidered, because the Court held that the cost and difficulty of correcting the errors would exceed the likely benefit to applicants.⁸¹

By the date of the second decision, a new Directive had been issued.⁸² The Directive contains the broad statement requiring the D-G to have regard to certain matters "without derogating from your duty to have regard for the particular circumstances and commitments of the applicant".⁸³ Paragraph 5 of the Directive states that upon complying with the formula assessment, the decision-maker "should regard as justified the fixing of a special benefit".

In his judgment, Thorp J made a very clear statement that the formula was to be considered a lower limit on eligibility.⁸⁴ That is to say, if applicants satisfied the formula assessment, they became entitled to a special benefit, and that any further consideration could only be to increase the amount paid. Otherwise, discretion was retained to grant a special benefit by virtue of special and unusual circumstances, even if the applicant did not meet the formula assessment.

3 Following the Ankers Decision

The new Directive can be seen as a direct result of the findings of Thorp J in the first *Ankers* decision. It is a lot longer than the former directive and contains a myriad of "savers" - broad statements to cover the deficiencies found previously. The Directive is very prescriptive and details extremely specific examples of allowable fixed costs.⁸⁵ The effect has been that the special benefit programme has become more systematised and bureaucratic than ever before.⁸⁶

The most disturbing consequence of the first *Ankers* decision was the NZISS's policy of interpreting the Directive as a guide only, such that the discretion could be exercised above and below the formula assessment. Paragraph 9 of the Directive states that:

⁸¹Above n 3, 424.

⁸²The Directive, issued 28 March 1995, is still current.

⁸³Above n 73, Part I.

⁸⁴Above n 3, 420-421.

⁸⁵For example, Part III, Allowable costs - "(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)..."

The use of specific examples in a ministerial directive is most unusual.

⁸⁶Above n 54.

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.

Exercise of discretion in this manner was clearly rejected by Thorp J in the later decision,⁸⁷ and yet the NZISS's response was to give Paragraph 9 prominence in practice. Nationwide, applicants were denied special benefits even though they fitted the formula. The NZISS was requiring special and unusual circumstances *in addition* to fitting the formula before a special benefit was granted. In late 1995 the NZISS National Office agreed that this policy contradicted the High Court decision and the application of the formula has since become a lower limit only.⁸⁸

The Directive states that applicants should be told that wherever possible their special benefit should be eliminated or reduced within six months of its grant. It provides that cases where the special benefit rate is over \$50 per week should receive priority.⁸⁹ It is submitted that this direction contradicts the fundamental policy underlying the special benefit. The general principles espoused in the Directive state that special benefit is paid only for costs that are essential, not reasonably avoidable and are likely to continue for a period that justifies the granting of the special benefit. Given this, the three to six month time limit seems unjustifiable. Arguably, the criteria that must be satisfied before eligibility for special benefit arises sensibly preclude the *carte blanche* application of a time limit.

In practice people receiving special benefit have to go in to the NZISS at three months or six months intervals to get their special benefits renewed. If they do not, their special benefit is automatically cut. It has been suggested that this practice is potentially subject to the same grounds of judicial review as were found in the *Ankers* case, for breaches of the rules of natural justice and the New Zealand Bill of Rights Act 1990.⁹⁰ The correct application of the Directive would appear to be a reasonable attempt to reduce costs by applicants. The strict adherence to a cut-off point could be seen as misapplication of the Directive.

Unfortunately, even following the High Court admonition of the NZISS's practice, cases are still appearing before the SSAA trying to force the NZISS to actually exercise the discretion conferred by s61G. *Social Security Appeal Decision No 7/96*⁹¹ states that NZISS must first

⁸⁷See text at n 84.

⁸⁸Above n 54.

⁸⁹Above n 73, Part II.

⁹⁰Above n 5, 1061G.20.

⁹¹(16 February 1996).

use the formula in the Directive, *then* look to see if there are reasons for departing from the formula by looking to see if there are any special and unusual circumstances. It must not do the reverse of this procedure.

The *entire* Directive is simply a guide to the exercise of discretion conferred by the Act. *Social Security Appeal Decision No 36/96*⁹² reminds NZISS that the Directive cannot supplant the discretion of the D-G. This case involved the application by a student for special benefit. The Directive states that the living allowance component of student loan is to be treated as income for the purposes of special benefit.

The SSAA stated quite clearly that student loan does not count as income, but it can be a factor that the NZISS takes into account when looking at an individual student's financial position. By implication, the SSAA has commented that the Directive is invalid. This comment has not been taken up by the NZISS, however, because the most recent special benefit chapter in the policy manual, updated 1 July 1996, states that "the living component of student loan [is] to be treated as income".⁹³

Other decisions from the SSAA direct NZISS to include certain items as fixed costs which are not specified in the Directive,⁹⁴ waive the standard deduction,⁹⁵ and alter the standard costs component to reflect the reality of the applicant's position.⁹⁶ It is noteworthy that to reach the SSAA, these cases must have come through the statutory review processes.⁹⁷ At no stage previously, had the discretion been correctly exercised.

These cases show that there are still serious problems with the actual practice of the NZISS. The decisions of the SSAA illustrate that NZISS is not following correct procedure even after the severe consequences of the *Ankers* decisions (the re-examination of large numbers of special benefit applications). The problems associated with the discretion in special benefit are not those commonly identified by academics, such as uncertainty and arbitrariness.⁹⁸ The difficulty is trying to get the NZISS to actually *exercise* the discretion and not fetter itself through self-imposed rules. A much more restricted discretion is found in the Special Needs Grant Programme and, as such, the considerations are slightly different.

⁹²(1 May 1996).

⁹³NZISS Policy Manual *Supplementary Allowances and Grants - Volume 2* (reprinted 1 July 1996) para 11.4102; The Department is currently appealing this decision to the High Court. Telephone conversation with Pat Thomas, NZISS National Office, 27 September 1996.

⁹⁴SSAA *Decision No. 106/95* (28 September 1995); SSAA *Decision No. 141/95* (13 December 1995).

⁹⁵SSAA *Decision No. 89/95* (8 August 1995).

⁹⁶SSAA *Decision No. 106/95*; SSAA *Decision No. 141/95*. In these decisions, the SSAA held that teenagers should count as having the same costs as adults.

⁹⁷These will be discussed fully in Part VII.

⁹⁸See text at n 20.

B Special Needs Grants

The Special Needs Grant Programme ("the Programme") authorises the payment of single grants for emergency or unforeseen essential purposes. In this respect it differs from special benefit which provides ongoing financial assistance to meet continuing costs. Unlike s61G which confers a broad discretion on the D-G to grant a special benefit, no expansive statutory discretion surrounds the granting of special needs grants ("SNG"). Under s124(1)(d) expenditure is allowed for the purpose of granting special assistance under any welfare programme approved by the Minister. The Special Needs Grant Programme is the leading example, but other programmes include the Childcare Subsidy Programme, the Training Incentive Allowance Programme and the Transitional Training Support Programme.

The objectives of the Programme are to provide non-recoverable financial assistance:

- (1) for specified essential and immediate needs,
- (2) to meet immediate needs in specified emergency situations, and
- (3) to people in rural sectors as authorised in the Programme.⁹⁹

The principles of the Programme state that the D-G must consider applicants' abilities to meet the need from their own resources and any assistance that might be available from other sources. The D-G may consider the extent to which applicants have caused or contributed to the immediate need or situation giving rise to the immediate need.¹⁰⁰

The Programme specifies an income and cash asset limit which cannot be circumvented.¹⁰¹ This is distinguished from the cash asset limit specified in the Directive for special benefit which remains only a guide to the interpretation of the discretion conferred by s61G.

The Programme specifies a number of situations for which the D-G can give financial assistance. Usually, one grant per 52 weeks is allowed for the same or similar purpose. The language of the Programme is permissive, implying discretion, but in practice, upon satisfying the criteria, entitlement seems to arise. Agency discretion, as discussed in Part IV, is exercised in interpreting the criteria and deciding whether they are satisfied for the particular applicant.

Discretion is found in the Programme because staff have the option to make more than one payment in a 52 week period and to increase the payment above stated limits in exceptional circumstances. Additionally, there is a category of "other emergency grants" which may be

⁹⁹Minister of Social Welfare *Special Needs Grant Programme* (1 July 1996) para 2.

¹⁰⁰Above n 99, para 5.

¹⁰¹Above n 99, paras 7 and 8.

used if special circumstances exist and the D-G considers that without the item or service serious hardship would be suffered by applicants or their dependents.¹⁰²

In practice, however, payments are very commonly restricted to the specified limit.¹⁰³ The Manual makes no mention of the ability to exceed stated limits when describing the available categories.¹⁰⁴ At the beginning of the chapter, Paragraph 12.0461 contains the broad statement that an official may exceed the limit in exceptional circumstances. It is speculated that the absence of this statement alongside all relevant categories affects the number of times the limits are exceeded.

The latest programme, issued 1 July 1996, increased the grant for emergency dental treatment from \$200 to \$300. Similarly, in the last few years the maximum allowable annual grants for food have increased. In all other respects, the Programme has restricted and more narrowly defined the categories under which emergency help is available.

Many examples of narrowed categories are found in the new Programme. Three instances are the transition to work grant, travel for stranded persons grant and the grant for bedding.¹⁰⁵ With these grants the new Programme details specific criteria, inserts what was previously policy into the Programme, and restrictively defines what circumstances the Programme will cover. Given these moves, consideration should be given to whether the NZISS actually needs policy manuals at all.¹⁰⁶ Arguably, it would be better for staff to base their decisions on the Programme itself, rather than the NZISS's further interpretation of the Programme as is found in the Manual.

Part IV of the Programme details under what situations emergency grants are available. The latest programme inserts extra criteria for establishing an emergency situation.¹⁰⁷ It is submitted that the specific provisions contradict the general principles espoused in Paragraph 5.¹⁰⁸ Paragraph 13.2 states that the D-G *must* have regard to the foreseeability of the emergency situation whereas this is a permissive consideration in the principles.

Paragraph 16 authorises payments of "other emergency grants". These are available only in special circumstances and are limited to \$200, although theoretically the limit may be

¹⁰² Above 99, para 16.

¹⁰³ Catriona Ross comments that it is not such a problem in Wellington where there are active lay advocates, but that there is a marked contrast in areas where no advocacy services exist. She suggests the reluctance to grant payments over specified limits is a consequence of a general pressure to reduce payments. Above n 54.

¹⁰⁴ Above n 93, ch 12.

¹⁰⁵ Above n 99, paras 11.3, 11.6 and 11.7.

¹⁰⁶ The same highly detailed and prescriptive approach is found in ministerial directives too.

¹⁰⁷ Above n 99, para 13.

¹⁰⁸ See text at n 99, para 5.

exceeded in exceptional circumstances. It is submitted that this limit on payment contradicts the objective of the Programme which is to *meet* immediate need. If the circumstances are sufficiently special to warrant the granting of an SNG under the "other" category, then surely the grant should cover the actual expense incurred.

The SSAA recently made a similar observation with regards to the Training Incentive Allowance Programme ("the TIA Programme").¹⁰⁹ The SSAA commented that the TIA Programme, as worded, did not fulfil the objects of financially assisting the appellant to undergo employment-related training, increasing her prospects of obtaining full or part-time work, and gaining independence from the benefit system.

The SSAA noted that the provisions in the TIA Programme specifying different rates payable depending on the type of institution offering the course, were "not consistent with the purpose of the empowering section or the objects of the Programme".¹¹⁰ In the SSAA's opinion, the problem was exacerbated by the absence of any discretion which would have allowed the NZISS to deal with any inequities "which are bound to arise in such a tightly regulated and targeted programme".¹¹¹ As a result, the SSAA directed that the appellant's course costs which were not covered by the TIA were to become a fixed cost giving rise to entitlement for a special benefit.

This decision makes a clear statement in favour of a residual discretion in heavily targeted programmes. Furthermore, it criticises the provisions of the TIA Programme as not meeting the stated objectives. It makes a statement about the interrelationship of welfare programmes and the special benefit, and suggests a commonsense approach to deal with the problem. In theory, the problems associated with the TIA Programme should not arise under the SNG Programme, since a residual discretion is retained for exceptional circumstances.

Part VII is a recent addition to the SNG Programme and deals with the Programme's administration of applications and the payment of grants. The inclusion of these details in the Programme elevates them to a higher status than if they were simply NZISS policy. Paragraph 23.2 deals with the recovery of grants. The D-G has the discretion to recover payments in a lump sum, by instalments or out of a benefit. The recovery of a grant in lump sum will, for the most part, have a significant impact on a person's financial situation. It is peculiar that in such a prescriptive programme, no guidelines are given as to how this discretion should be exercised.

¹⁰⁹SSAA Decision No. 72/96 (18 July 1996).

¹¹⁰Above n 109, 5

¹¹¹Above n 109, 5.

A common complaint about welfare programmes is that they can be changed overnight with no consultation.¹¹² Catriona Ross comments that the Programme has changed about four times in the last year.¹¹³ There have been sweeping changes, with little or no publicity. For example, from 1 April 1996 the \$200 non-recoverable grants for dentures, hearing aids and glasses were abolished. The effect of this change is significant for beneficiaries needing those items.

C Discretion to Impose a 26 Week Stand-down for Misconduct as an Employee

Section 60H(3) provides that stand-downs may be imposed if the D-G is satisfied that applicants for the unemployment benefit have lost their employment due to misconduct as an employee, or have ceased to be part of a government-assisted scheme by reason of misconduct. In 1991, the previous maximum stand-down of 6 weeks was changed to a mandatory 26 weeks. The Minister sent a clear message that the stand-down was to operate where workers put their own jobs in jeopardy through misconduct.¹¹⁴

The SSAA has held that the decision to impose a stand-down involves a two step process.¹¹⁵ The NZISS must first determine whether applicants have lost their employment because of misconduct as an employee. The NZISS must then exercise the discretion whether or not to impose a stand-down. *SSAA Decision No. 50/92* was an appeal against the decision to impose a stand-down simply upon confirmation that the appellant had been dismissed for misconduct. The SSAA stated that the NZISS had a responsibility to ensure that the discretion in s60H(3) was seen to be exercised in cases of serious misconduct. For the proper exercise of discretion the official must ask whether the conduct in question was sufficiently serious (and the consequences sufficiently foreseeable) to justify the exercise of the discretion to impose the stand-down.¹¹⁶

Section 60H(3) specifies that there must be misconduct as an employee. The misconduct in question must arise out of, or in connection with, the employment. A stand-down should not be imposed where, for example, the dismissal is founded in misconduct outside of employment which renders the worker unfit for the job.¹¹⁷ The relevant chapter in the Policy Manual does not elaborate or clarify this point.

¹¹²For example, upon receiving the new policy manuals in August 1996, it came to light that since 1 July 1996, there had been a new programme providing non-recoverable assistance to non-beneficiaries. Above n 54, 19 August 1996.

¹¹³Above n 112.

¹¹⁴Above n 5, A/1277.

¹¹⁵*SSAA Decision No. 159/92* (18 December 1992).

¹¹⁶*SSAA Decision No. 34/93* (5 April 1993).

¹¹⁷Above n 5, A/1272.

The Manual recognises that there is no hard and fast rule as to what justifies the imposition of a stand-down. The Manual definition of misconduct refers to conduct so seriously in breach of the contract of employment that by standards of fairness and justice, the employer should not be bound to continue the employment.¹¹⁸ The Manual correctly recognises that there may be situations where a person is fired for misconduct but a stand-down should not be imposed.¹¹⁹ In *SSAA Decision No. 2/96*,¹²⁰ the SSAA held that it was inappropriate to impose stand-down, even though the Employment Tribunal had dismissed the appellant's claim of unfair dismissal. The appellant had been dismissed from his job but it did not meet the threshold of misconduct.

It is submitted that in practice staff do not exercise the two step process that is required by law. Indeed, staff practice seems to be: 'impose stand-down first, ask questions later'. In the last 12 months, all but one of approximately 20 stand-downs examined by the Wellington People's Resource Centre were wrongly imposed and overturned.¹²¹ The imposition of a 26 week stand-down has extreme financial consequences for applicants and their families and, as such, greater care should be taken before one is given.

D Discretion to Write-Off Overpayments

Section 86(1A) confers a discretion on the D-G to recover payments to which a person was not entitled. Section 86(9A) confers on the D-G the discretion to provisionally write-off overpayments if the following cumulative conditions are satisfied:

- (1) the overpayment was the result of an error of the NZISS,
- (2) the overpayment was not intentionally contributed to by the beneficiary,
- (3) the beneficiary received the money in good faith,
- (4) the beneficiary has altered his or her position believing the payment to be valid, and
- (5) it would be inequitable, considering all the circumstances, to require repayment.¹²²

This is an interesting example of statutory discretion, because although the section is couched in the language of discretion, upon satisfying the statutory criteria, an entitlement to the

¹¹⁸NZISS Policy Manual *Main Benefits* (reprinted 1 July 1996) para 5.5041. This definition is taken from *North v Television Corporation Ltd* (1977) 1 ALR 599.

¹¹⁹Above n 118, para 5.5042.

¹²⁰(5 February 1996).

¹²¹Above n 112.

¹²²The section was inserted in 1973 to remedy situations where an overpayment occurred through no fault of the beneficiary and it was unreasonable to expect repayment.

writing-off arises. In this sense, there is officer discretion, as discussed in Part IV, but no agency discretion. Indeed, Judge Latham of the SSAA has commented in a number of cases about the restrictive nature of s86(9A).¹²³

Prior to the 1994 decision of *Carmichael v Director-General of Social Welfare*¹²⁴ repayment was required if a beneficiary could afford to pay it back. In this case the SSAA held that even though the first four criteria were satisfied, because the appellant owned a freehold house and had modest savings, it was not inequitable to recover the overpayment. The High Court held that the NZISS's decision to recover was unreasonable and unfair in the restricted administrative law sense. When the requirements of s86(9A) are all but satisfied it is unreasonable and unfair to require repayment solely because a beneficiary possesses a modest home and limited savings.

The error in the Manual has only been corrected in the April 1996 reprint.¹²⁵ The new Manual states that financial considerations are just one of the circumstances to be borne in mind when making a decision whether to write-off an overpayment, citing the "recent" *Carmichael* decision as authority.¹²⁶

However, the practice of the NZISS does not appear to have caught up. In *SSAA Decision No. 40/96*, Judge Latham stressed that one's ability to repay is only one of the factors to be looked at and is not to be the dominant factor. The Judge cited the *Carmichael* case and said that the appellant's modest means did not make it equitable to require repayment.

Analysis of whether it is equitable or not to require payment does not focus solely on the beneficiary's own circumstances. The length of time taken to discover the error, establish the overpayment and notify the beneficiary of the overpayment should be taken into consideration as well.¹²⁷

Previous policy manuals have stated that the NZISS may require repayment if beneficiaries' circumstances change and they can reasonably be expected to pay.¹²⁸ The latest reprint does not contain this provision, in response to the SSAA's decision that provisional does not mean temporary.¹²⁹ Repayment may only be reinstated if the write-off should never have occurred, for example, the requirements were not originally satisfied. Arguably, depending

¹²³ *SSAA Decision No. 35/96* (6 May 1996); *SSAA Decision No. 40/96* (10 May 1996).

¹²⁴ [1994] 3 NZLR 477.

¹²⁵ NZISS Policy Manual *Core Topics Manual* (reprinted 1 April 1996) para 14.0300.

¹²⁶ Above n 125, 14.1100.

¹²⁷ *SSAA Decision No. 47/89* (25 October 1989) - where the delay of 3 years made recovery inequitable.

¹²⁸ Above n 5, A/2467.

¹²⁹ *SSAA Decision No. 19/95* (30 March 1995).

on which criteria were not satisfied and the length of time between the write-off and re-establishing the debt, it could be argued that it would be inequitable to require repayment at a later stage.

Recent decisions of the SSAA show an apparent frustration at the restrictive nature of s86(9A). In *SSAA Decision No. 35/96* and *SSAA Decision No. 40/96*, Judge Latham drew attention to the disproportionate costs incurred by the NZISS in time and expense in relation to the small amount involved. In the former case the overpayment was assessed at \$72.00 and in the latter, \$360.54. Both appeals were allowed and the debts were written off.

In the author's opinion, the problem lies not with the section itself, but NZISS's interpretation of the section. If the SSAA considered that the criteria had been satisfied, why could the NZISS, through its internal review structures, not have reached the same conclusion? It is submitted, that the NZISS caused its own expense by incorrectly interpreting the provision. Indeed, s86(9A) seems inherently reasonable, ensuring that only the "deserving" get their overpayment written-off.

In both cases the Judge considered it desirable for the D-G to possess an extra discretion allowing her to write-off small sums of money. It is submitted that provision for this already exists in s86(1A) where the D-G has the *option* to recover an overpayment. In an earlier decision the SSAA noted that it will be a "rare occasion when the discretion should be exercised against establishing an overpayment",¹³⁰ but but the Tribunal is affirming that the discretion is available to the D-G.

In a recent SSAA decision, however, Judge Latham states that "it is clear that in this subsection the word 'may' means empowered and is not to be construed, notwithstanding expressions to the contrary in [other SSAA decisions], as a discretionary power".¹³¹ The Judge appears to be interpreting what is clearly a statutory discretion conferred on the D-G as an obligation to recover overpayments. The decision is currently being appealed to the High Court on this point of law.¹³²

¹³⁰*SSAA Decision No. 95/93* (date unknown, page reference unknown).

¹³¹*SSAA Decision No. 93/96* (21 August 1996) 5.

¹³²Above n 54, 27 September 1996. Section 12Q of the Act authorises appeals to the High Court on questions of law.

5 Conclusion

The practical examples considered have not raised the concerns academics commonly identify with discretion, such as arbitrariness and uncertainty.¹³³ The problems relate, instead, to the use of detailed directives, programmes and policy which have the result of reducing the discretionary provisions to seemingly rule-based procedures. In this context, the concern is that the discretion is actually exercised, and that administrative principles surrounding the proper exercise of discretion are followed.¹³⁴

VI THE FUTURE DIRECTION OF SOCIAL SECURITY

Part II described how traditionally welfare advocates have supported rule-based procedures for the provision of social security. Part V has shown how the result in New Zealand has been increasing prescription, complexity and inflexibility. This section discusses the findings of the Social Policy Agency's evaluation of the supplementary assistance programmes, proposed legislation to address issues highlighted and the response of welfare groups.

A Findings of the Social Policy Agency

In 1993 the Social Policy Agency published a report evaluating the special benefit and SNG programmes.¹³⁵ It noted that increased targeting has led to a greater reliance on residual and discretionary programmes to meet basic and ongoing needs. Lack of clear and consistent information, variation in quality of service provided by staff and obstructive application procedures were identified as barriers to the programmes.

The Evaluation Team ("the Team") noted that many staff preferred clear policy with little room for discretion.¹³⁶ This contrasts with the academic writing which suggests that to avoid apathy in the workplace, discretion is preferred.¹³⁷ Staff had concerns that discretion could be used to reflect the values and attitudes of staff to clients and that better training was needed in the use of discretion.¹³⁸ It was recognised by the Team that a latent function of discretion was to encourage staff to operate within a defined budget.¹³⁹

¹³³See text at n 20.

¹³⁴See text at n 56.

¹³⁵Evaluation Unit *An Evaluation of the Special Needs Grant and Special Benefit Programmes* (Social Policy Agency, Wellington, 1993).

¹³⁶Above n 135, 20.

¹³⁷See Adler and Asquith above n 4. 11.

¹³⁸Above n 135, 21.

¹³⁹Above n 135, 22.

The Team noted that there was inconsistency in interpretation of policy between district offices, within offices and between individual staff. The result was confusion for clients, lack of faith in NZISS staff and mounting feelings of resentment and injustice.¹⁴⁰ Frequent changes in policy were identified as one source of inconsistent delivery of service.¹⁴¹ The Team's recommendations, however, made no mention of restricting or reducing the current discretionary elements. Recommendations, instead, focused on simplifying procedures and making the programmes more transparent.¹⁴²

In light of the Team's findings, the *Ankers* cases and a number of SSAA decisions, the Government began considering changes to the supplementary assistance programmes. Deliberations culminated in the Social Welfare Reform Bill 1995 ("the Bill").

B Social Welfare Reform Bill 1995

The Bill proposed, amongst other things, that supplementary allowances (special benefit, SNGs and advance payment of benefits) be governed by regulations.¹⁴³ The effect would have been the removal of statutory discretion. The move met with strong opposition from welfare groups.¹⁴⁴

Welfare groups raised the following areas of concern:

- (1) Regulations, by their nature, are an ineffective means of ensuring that a safety net exists. Regulations will cap spending because they will restrict eligibility;
- (2) The empowering clauses in the Bill were too wide and no protection was given that the principles of the Act would be followed; and
- (3) The current legislative provisions were not the problem. The inadequacies in the provision of supplementary assistance were due to inadequate training of NZISS staff and the rigid application of the Directive.¹⁴⁵

In introducing the Bill the Minister claimed the regulations would be used to set the parameters of these programmes and yet continue to provide adequate assistance where necessary.¹⁴⁶ Welfare groups, however, felt there was "no way ...[to] limit or even predict the

¹⁴⁰Above n 135, 22. For example, in one district during May 1992, staff were instructed to cease approving applications for SNGs.

¹⁴¹Above n 135, 23.

¹⁴²Above n 135, 25-27.

¹⁴³Clauses 27, 39 and 46 of the Bill.

¹⁴⁴Submissions against the Bill were made by the Wellington People's Resource Centre, Combined Beneficiaries' Union, Wellington Community Law Centre, Downtown Community Ministry, Auckland People's Resource Centre, to name but a few.

¹⁴⁵*Guide to the Social Welfare Reform Bill 1995* (unpublished, Wellington, 1995) 8.

¹⁴⁶(1995) 545 *NZPD* 5319.

complexity and diversity of the human experience and need".¹⁴⁷ In retaining discretion the D-G could be forced to consider individual circumstances. Opponents to the Bill argued that the Government had acknowledged that the regulatory approach had failed for accident compensation and that it would be making the same mistake again in social security if these clauses were enacted.

On 8 March 1995 the Minister announced that he would ensure that in both the legislation and regulations the D-G had the discretion to depart from the regulations in special circumstances. He denied that it was his intention, in introducing the Bill, to remove any of the discretion currently applied within the programmes.¹⁴⁸

The Minister's reassurance did not allay public concern. Fifty-nine submissions on special benefit, 49 submissions on the advance payment of benefit, and 56 submissions on SNGs were received by the Social Services Select Committee ("the Committee"). The submissions were unanimously opposed to the changes. The Committee decided not to go ahead with the regulatory provisions due to the weight of public opposition.¹⁴⁹ As a result, statutory discretion is retained for the granting of special benefit, SNGs and advance payment of benefits.

At a superficial level, the action of welfare groups in New Zealand, by seeking discretion over the certainty of rules, seems to have contradicted the general overseas trend. It is submitted, however, that the approaches are not irreconcilable given that it is unanimously accepted that social security systems need to be able to provide individualised justice. Arguably, New Zealand welfare groups would campaign against greater discretion in establishing entitlement to basic benefits along with their international counterparts.

C The Different Approaches of Political Parties to Discretion

The passage of the Bill through Parliament highlighted the different approaches of the two main parties to discretion. The Associate Minister of Social Welfare, the Honourable Katherine O'Regan, claimed that it was a desire to ensure consistency between regions that led the move to a regulatory approach.¹⁵⁰ The National Member of Parliament for Wallace, Bill English, affirmed the traditionally conservative approach of the Party by commenting that:¹⁵¹

¹⁴⁷ Above n 145, 8.

¹⁴⁸ Minister of Social Welfare "Social Welfare Regulations and Discretion" (Press Release, 8 March 1995)

¹⁴⁹ Social Services Select Committee Report on the Social Welfare Reform Bill 1995 [1995] AJHR I.13.

¹⁵⁰ (1995) 550 NZPD 8799.

¹⁵¹ Above n 150, 8804.

[o]ne of the benefits of entitlements that are certain and legally testable is exactly their certainty. One knows what one will get in particular circumstances. When one does exercise a wider discretion, that does make the decisions more subjective, and it does make it harder to appeal them or to test them with a higher authority.

These comments are reminiscent of many of the criticisms of discretion discussed in Part II.

The Labour Party had a markedly different approach to the use of discretion. The Honourable Dr Michael Cullen stated categorically that the "Labour Opposition [would] fight, and fight, and fight against the removal of discretionary powers".¹⁵² Mark Burton, Labour Member of Parliament, believed that the imposition of regulations were a de facto extension of benefit cuts because inevitably assistance to those in need would be cut.¹⁵³ He noted that it was fundamental to an effective social security net to retain discretion and flexibility. The Labour Party comments highlight the benefits of discretion discussed in Part II.

D Conclusion

Notwithstanding that the statutory discretion was explicitly retained for the provision of supplementary assistance, the administration of these programmes is tightly regulated by the ministerial directives and NZISS policy.¹⁵⁴ It is submitted that, in practice, the distinction between rules and discretion is becoming blurred. Given that reality, consideration must be given to find ways of ensuring that decisions are made according to law and in good practice.

VII HOW TO ENSURE GOOD DECISION-MAKING

This section discusses ways to improve the decision-making of staff at the NZISS by suggesting action that could be taken internally. Existing structures for review are explained and problems associated with these structures highlighted. The Ombudsmen's role is examined along with the place of judicial review in the social security context.

A Improvement of Internal Decision-making

The reality of the social security bureaucracy is that large numbers of complex decisions are made by junior staff. It is submitted that a way to ensure consistency and accuracy is to

¹⁵²Above n 150, 8802.

¹⁵³Above n 150, 8806.

¹⁵⁴See above Part V.

implement a quality control system. A system of quality assurance currently exists within the NZISS at both a local and national level.¹⁵⁵ Locally, the work of 10% of randomly selected certified competent staff is checked daily by a team quality officer ("TQO"). This method of quality control has been used by the NZISS for many years.

In the last two years a national sample has been analysed for the purpose of providing reliable performance information to Parliament. In the latest annual report, national accuracy was calculated at 82% for initial benefit applications and 74% for reviews of entitlement. Interestingly, the sample did not include any supplementary benefits. Data taken for this reporting year will include supplementary benefits, with the exception of SNGs. Phil Humphries notes that quality control systems of measurement are not very effective for discretionary payments. Instead the NZISS invests in preventative measures, for example, discretion training for staff.

It is submitted that the systems of quality control already operating within the NZISS are worthwhile. The results, however, check procedural rather than substantive issues and should be read with this in mind. A TQO checks decisions according to NZISS policy. A TQO does not check decisions of team leaders or district managers. Therefore, where there is a high level of internal delegation, for example in the highly discretionary supplementary benefits, the decisions are not checked. Arguably it is the discretionary benefits that need the most attention given the large scope for staff decision-making.

The NZISS's quality assurance data suggests a fairly high accuracy rate in decision-making. However, the number of successful reviews and appeals *in practice* belies that result. The Quality Assurance Manager's own words are telling: "While I'm Quality Assurance Manager, I can't give anybody any assurance about the quality of the decision-making." It is submitted that a further level of quality control is necessary, that of checking that NZISS manuals and practice are consistent with the legislation.

Accurate manuals would go a long way towards ensuring the correct decision is made in the first instance. It is well documented that staff rely heavily, and in many cases exclusively, on the manuals. Manuals should be constantly updated in response to SSAA and High Court decisions, something which does not currently occur at speed.¹⁵⁶ The manuals are currently in hard copy. Arguably, if the manuals were computerised they could easily be updated on a nationwide basis.

¹⁵⁵The following information on the NZISS quality control systems was provided during an interview with Phil Humphries, National Quality Assurance Manager, 18 September 1996.

¹⁵⁶For example, following *SSAA Decision No. 73/93* (17 August 1993) where the SSAA held that a certain provision in the Manual was illegal, the error was not rectified until 1996.

The Evaluation Team recommended simplifying application forms.¹⁵⁷ It is submitted that the forms could more explicitly draw attention to the circumstances considered by officials when making decisions. For example, application forms for special benefit could ask applicants to specify if they have any special circumstances which would justify exceeding a specified limit. In focusing the applicant on what information is required to make the decision, a staff member is, arguably, better equipped to make the correct decision in the first instance.

It is submitted that staff issues need to be addressed also. Greater resources are needed for initial and on-going training. It is assumed that an office environment conducive to good work, such as adequate facilities and support, would reduce staff turnover and, consequentially, reduce the costs associated with new employees.

Sossin comments that the publication of administrative jurisprudence would improve decision-making.¹⁵⁸ It is submitted that putting the decisions of the SSAA onto a database accessible by all officials would be useful for staff members in analogous situations.¹⁵⁹ Arguably, this is not inconceivable given current technology.

It is submitted that the NZISS's current computer system, SWIFFT, is not conducive to the proper exercise of discretion. The decisions of officials are affected by the "categories" under which support must be entered. There are a number of examples where applicants are granted supplementary assistance for items, such as shoes or clothing, under the SNG category of "Food", because no appropriate category exists and staff are reluctant to enter it under the "Other" category.¹⁶⁰ The negative consequences for applicants occur if they apply for assistance for food later in the year and are declined for having reached their annual limit.

The value of instituting good procedures to improve service delivery has been recognised in the Wellington district offices which have implemented new procedures for reviewing decisions. The local initiative, which began on 1 July 1996, ensures that all complaints go through a complaints co-ordinator.¹⁶¹ The complaints co-ordinator determines which team leader the reviews will go to. The team leader is then responsible for allocating the reviews to customer service officers. The complaints co-ordinator sets a time frame within which the reviews need to be decided. The most marked improvement is that the offices have stopped

¹⁵⁷ Above n 135, 25.

¹⁵⁸ Above n 9, 40.

¹⁵⁹ This, of course, begs the question of the precedent value of the SSAA which will be discussed later.

¹⁶⁰ Above n 112.

¹⁶¹ Interview with Diana Adams, NZISS Wellington Office Complaints Co-ordinator, 16 September 1996; *Benefit Forum Minutes* (unpublished, Wellington, 30 July 1996).

losing applications for review.¹⁶² The initiative is a positive one as it seeks to improve internal procedures of the NZISS.

B Greater Information To Claimants

The corollary to improving internal structures is the empowering of the "consumer" of the social security system. The publication of manuals and guidelines used by the NZISS in a language understandable to the general public in a place easily accessible for those interested would go a long way towards legitimating the system. Implementing transparent guidelines would reduce the concerns associated with discretion and seemingly arbitrary decision-making. Support for the publication of the manuals is found in the rule of law.

It is submitted that it would be worthwhile for the NZISS to publish the grievance and appeal procedures and have them available in hand-out form in each office explaining, in an understandable format, the different stages of review. In the author's opinion, the standard notification of the right of appeal found in all NZISS letters does not adequately explain the process of review.

It is submitted that lay advocates are an important tool for applicants at both initial decision-making and review. Advocates have knowledge in the area, are removed from the power imbalance between applicant and official, and have communication skills that less confident applicants may lack. The value of advocates has been acknowledged by academics and staff alike,¹⁶³ and a case can be made for public funding of welfare advocacy groups.

C Attitudes to Beneficiaries

Any attempt to improve decision-making must begin with the bureaucrat. The Evaluation Team noted that an officer's perception of a client affected the way discretion was exercised.¹⁶⁴ In the author's opinion, more can be done by the NZISS to eradicate offensive and inappropriate behaviour. In other words, the NZISS needs to take complaints seriously.

In 1995, the SSAA commented on the need to ensure sensitivity when dealing with applicants. In *SSAA Decision No. 102/95*,¹⁶⁵ the SSAA held that the NZISS's letter to the beneficiary had been inappropriate and that the behaviour towards the beneficiary (if as

¹⁶²Diana Adams commented that officers used to find a stack of reviews, some up to a year old, which had not been processed. Above n 161.

¹⁶³Above n 10, 409; Above n 161.

¹⁶⁴Above n 135, 20.

¹⁶⁵(28 September 1995).

alleged) had been insensitive, crass and unhelpful. The NZISS was told to ensure that the staff member dealing with this beneficiary in the future had tact, sensitivity and good problem-solving skills. It is believed that training in cultural sensitivity, interviewing and assessment techniques, and consciousness-raising of implicit value systems, would go a long way towards improving the quality of service.¹⁶⁶

The author recognises that it is difficult to change internalised values and attitudes and that this is made even more difficult when inappropriate comments come from the judiciary. In *SSAA Decision No. 35/96* an appeal against the decision not to write-off an overpayment of \$72 was allowed. Judge Latham made the following comment: "For reasons that will later appear, the subtitle of this appeal could well be in Shakespeare's words 'Much Ado About Nothing'."¹⁶⁷

It is submitted that this comment was inappropriate because the appellant satisfied the strict criteria of s86(9A) and the appeal was allowed. He had every right to pursue his grievance to the highest review body. Furthermore, small amounts mean a lot to beneficiaries who are on or below the poverty line. These words from a middle-class judge do not send a good signal to NZISS staff about appropriate and sensitive behaviour.

D Structures for Review

The complexity of the legislation and administration of New Zealand's social security benefits requires mechanisms to safeguard individual rights. A variety of methods are available to challenge or dispute decisions of the NZISS. The Act provides for a right of review to a benefit review committee ("BRC"), the SSAA, and the High Court and Court of Appeal on questions of law. The NZISS has inserted a further level of review called an administrative review which is an internal review following an initial application for review of decision.

A person who intends to challenge a decision made by the NZISS is required to fill out a review of decision form. If dissatisfied with the administrative review, a person can apply for a BRC hearing. The new procedure in the Wellington offices provides that if an administrative review is unfavourable, the complaints co-ordinator will automatically book a date and time for a BRC hearing.¹⁶⁸ The complaints co-ordinator will then notify the applicant of the unfavourable decision, the date and time of the BRC hearing and supply them with the NZISS's submission to the BRC. This represents a radical shift in NZISS practice which, in the past, insisted on separate applications for review and applications for BRC

¹⁶⁶This was suggested by the Evaluation Team, above n 135 26.

¹⁶⁷Above n 123, 1.

¹⁶⁸See text at n 161.

hearings. The Act does state, however, that an application for review is an application for a BRC hearing.¹⁶⁹

Section 10A states that any beneficiary or applicant affected by any decision made by a person in the exercise of any power, function or discretion conferred by s10 against which the person has a right of appeal under s12J,¹⁷⁰ may apply in writing for a BRC hearing within 3 months of receiving notification of the decision.¹⁷¹ A BRC is composed of two officers of the NZISS and a community representative.¹⁷² The decision of any two members is the decision of the BRC.¹⁷³ On reaching its decision, the BRC must give written notification to the applicant of the reasons for the committee's decision and advise of the right of appeal to the SSAA.¹⁷⁴

The SSAA comprises three persons appointed by the Governor-General on recommendation of the Minister following consultation with the Minister of Justice.¹⁷⁵ The decision of the majority is the decision of the SSAA. A person has the right to appeal to the SSAA providing a BRC hearing has already been held.¹⁷⁶ The SSAA may confirm, modify or reverse the decision appealed against in accordance with the Act.¹⁷⁷ The SSAA may refer the matter back to the D-G, advising the D-G of its reasons for doing so and shall give such directions as it thinks just as to the reconsideration.¹⁷⁸ The Act specifies that the D-G or any other party may have legal counsel before the SSAA,¹⁷⁹ and that the SSAA may award costs to an appellant if an appeal is allowed in whole or in part.¹⁸⁰

Hearings are private unless the SSAA orders otherwise,¹⁸¹ and it is unlawful to publish proceedings unless otherwise authorised.¹⁸² A similar presumption of privacy of decisions is found in the Deportation Review Tribunal. Arguably though, decisions of the SSAA involve matters affecting the public and are of a much wider concern than the individual bringing the appeal. It is particularly important when considering the proper exercise of discretion that the principles espoused by the SSAA are transparent and open to public scrutiny. It is submitted

¹⁶⁹Section 10A of the Act.

¹⁷⁰Section 12J of the Act states that a person has a right of appeal to the SSAA except on medical grounds.

¹⁷¹Section 10A(1) of the Act.

¹⁷²Section 10A(3) of the Act.

¹⁷³Section 10A(6) of the Act.

¹⁷⁴Section 10A(9) of the Act.

¹⁷⁵Section 12A of the Act.

¹⁷⁶Section 12J of the Act. The SSAA cannot hear an appeal on medical grounds in respect of an invalid's benefit, handicapped child's allowance or tenure protection allowance.

¹⁷⁷Section 12M(7) of the Act.

¹⁷⁸Section 12M(8) of the Act.

¹⁷⁹Section 12K(8) of the Act.

¹⁸⁰Section 12O(1) of the Act.

¹⁸¹Section 12N(3) of the Act.

¹⁸²Section 12N(4) of the Act.

that as a matter of principle the decisions of the SSAA should be public unless ordered otherwise. In practice, the majority of the decisions of the SSAA are actually published. To date this year, approximately 90% have been published. This action suggests that the SSAA recognises the importance of the decisions for the public.

Section 12Q authorises appeals to the High Court on questions of law. The High Court may grant leave to appeal to the Court of Appeal on questions of law, and the Court of Appeal may grant special leave if leave is refused by the High Court.¹⁸³

Whilst it can be demonstrated that comprehensive appeal procedures exist in the Act, many incorrect decisions go unchallenged.¹⁸⁴ The failure to review should not be equated with acceptance of a decision by an applicant. There are a number of reasons why an applicant may not appeal against an adverse decision: the decision may be accepted out of grim resignation; the applicant may lack confidence, knowledge or experience of the appeals system; an applicant may not have the expertise to judge whether or not a decision is correct; or an applicant may have difficulty finding independent advice on social security issues.¹⁸⁵

Applicants who do appeal still find problems with the appeal system. Wellington has an internal policy whereby the person who makes the initial decision is given the opportunity to reconsider.¹⁸⁶ This is usually supervised by a team leader. Catriona Ross comments that it is also possible to get "same person review" when internal delegation levels are at team leader or district manager level. This is most common when reviewing decisions involving highly discretionary supplementary assistance, for example, where an amount is applied for over specified limits.¹⁸⁷ In these circumstances, the review generally upholds the original decision. Ms Ross notes that in these situations it is worthwhile to go straight to a BRC hearing. Problems occur when the application is for emergency assistance and the appellant has the wait for a BRC to be called.

BRC hearings are held weekly or monthly depending on the office. A decision is received anytime from the same day to many months later.¹⁸⁸ The average decision takes about two

¹⁸³Section 12R treats an appeal as if the determination were made under s107 of the Summary Proceedings Act 1957.

¹⁸⁴This is demonstrated by the *Ankers* decisions; Above n 112.

¹⁸⁵N Wikeley & R Young "The Administration of Benefits in Britain: Adjudication Officers and the Influence of Social Security Appeal Tribunals" [1992] *Public Law* 238, 244-245.

¹⁸⁶Whereas in theory it is possible for the review to be delegated to another, in practice, the same person will review it. Above n 54, 4 September 1996.

¹⁸⁷Above n 186.

¹⁸⁸In one case, the BRC took 7 months to reach a decisions. The BRC was then declared invalid because one of the staff members had a conflict of interest. Above n 186.

weeks, the greater amount of that time being spent getting the signature of the community representative.¹⁸⁹

The majority of the criticisms of the BRC process arise from the close link the committee has with the bureaucracy. Decisions are made according to NZISS policy rather than a strict analysis of the law.¹⁹⁰ If a BRC wants a legal opinion, it receives one from NZISS lawyers, the same people who appear for the Department before the SSAA.¹⁹¹ There are also serious issues involving the training of members on the BRC. The training package for staff members is not given to the community representatives unless they specifically ask for it.¹⁹² Anecdotal evidence suggests that an alarming number of community representatives on BRCs do not even have access to the Act.¹⁹³ Additionally, nationwide there are NZISS staff on BRCs who have not received training for the role.¹⁹⁴

In the author's opinion, the BRC can be considered an arm of the bureaucracy and, as such, is not an effective tier of appeal. The decision of the two staff members is sufficient to be the decision of the BRC. If, as has been suggested, staff members follow NZISS policy in making their decision, the BRC is actually in breach of its statutory obligation which is to "review the decision ... in accordance with *the Act*".¹⁹⁵

This point is well illustrated by *SSAA Decision No. 136/95* in which the SSAA drew attention to the unusual step taken by the community representative on the BRC. In a memorandum issued by the community representative he stated that:¹⁹⁶

Our role on the [BRC] is not to promote the NZISS Practice Manual but to determine whether the officers making the original decision took into account all matters that should have been considered. Both [Departmental representatives on the committee] indicated that they felt they could not override the Manual or Department Directives. When we accept the role on the [BRC], we are in fact attending on behalf of the D-G to exercise her delegated right of discretion. ... Nowhere in the [Act] does it state that the Manual shall override the principles of the Act and the Supplementary Allowances Programme is an obvious section where the D-G must exercise maximum discretion.

¹⁸⁹Above n 186.

¹⁹⁰Above n 161.

¹⁹¹Above n 186.

¹⁹²Above n 186.

¹⁹³Above n 112.

¹⁹⁴Above n 155.

¹⁹⁵Section 10A(8) of the Act (emphasis added).

¹⁹⁶(8 November 1995) 6.

The SSAA also commented in *SSAA Decision No. 60/96* that there was little point relying on BRCs if they were not prepared to use the discretion contained in the legislation. These comments strongly suggest that the practice of BRCs needs to be addressed.

The majority of cases are intended to be decided at BRC and the SSAA. As such, the SSAA is in a better position than the courts to develop a coherent body of legal principles. The NZISS, however, does not consider itself bound by SSAA decisions.¹⁹⁷ In the NZISS's opinion, the SSAA only has the power to consider individual cases and, therefore, does not set precedent.¹⁹⁸ Arguably, however, this is true of all courts. The NZISS is mindful of comments the SSAA makes about the NZISS's general practice but does not feel bound by such comments.¹⁹⁹

It is consistent with the doctrine of precedent that the SSAA may disagree with itself and have its decisions overturned by a higher court. There appears to be no justification, however, for the NZISS disregarding the principles espoused by the SSAA. The situation appears analogous to the now obsolete Accident Compensation Appeal Authority which set precedent, even though at a low level. It is submitted that the NZISS is breaching the rule of law and its administrative law duties to act fairly and consistently by not considering itself bound by the SSAA's decisions. Arguably, if an applicant at a BRC was told that the committee was not bound by the decisions of the SSAA, the person could bring proceedings for judicial review.²⁰⁰

Evidence shows that representation at BRC and the SSAA by lay advocates or lawyers has positive results for appellants.²⁰¹ Civil legal aid is available for persons appealing to the SSAA and those seeking judicial review of NZISS action.²⁰² If applicants have reasonable grounds for taking the proceedings²⁰³ and are not precluded by circumstances in s34(3) of the Legal Services Act 1991,²⁰⁴ then they can receive civil legal aid to cover representation by a solicitor.²⁰⁵ Civil legal aid is considered a loan and the loan is secured by a charge on

¹⁹⁷ Above n 161; Above n 155.

¹⁹⁸ Telephone conversation with Pat Thomas, NZISS National Office, 27 September 1996.

¹⁹⁹ Above n 198.

²⁰⁰ The grounds for judicial review are set out in the text at n 230.

²⁰¹ Above n 186; Above n 161; R Cranston *Legal Foundations of the Welfare State* (Weidenfeld & Nicholson, London, 1985) 176.

²⁰² Sections 19(1)(h) and 19(1)(b) of the Legal Services Act 1991.

²⁰³ Section 34(1) of the Legal Services Act 1991.

²⁰⁴ For example, where the applicant exceeds the disposable income and asset limit, fails to provide full financial information to sub-committee, or is not a resident of New Zealand and proceedings might reasonably be brought in another country, etc.

²⁰⁵ Section 20 of the Legal Services Act 1991.

applicants' land and chattels.²⁰⁶ The requirement of repayment may be waived in cases of substantial hardship.²⁰⁷

In practice, applicants are generally required to pay \$50 up front. If applicants have an asset, they will probably be required to repay the loan. If costs are awarded, these will go towards repaying the cost of the representation. If applicants have no asset, there is a high chance they will not be required to pay the legal aid back.²⁰⁸

Evidence shows that beneficiaries are aware of civil legal aid. Over the last 12 months, 75-80% of applications for civil legal aid were made by beneficiaries, the majority of these being accepted.²⁰⁹ Only two, however, were applications for representation at the SSAA. This may be attributed to a lack of awareness by beneficiaries that they can get legal aid for representation at SSAA, a reluctance to risk further debt, and the procedural hassle involved in applying for legal aid for a benefit issue. Arguably, however, given the financial circumstances of most beneficiaries, they would get the requirement of repayment waived due to substantial hardship. If not, and the appeal was successful either wholly or in part, the appellant could apply to the SSAA for costs against the Department.²¹⁰

Even though a comprehensive statutory appeal system exists, problems have been identified with the application in practice. The BRC tier, in particular, lacks credibility as an objective review on the merits of the decision. On average, 80% of original decisions are upheld by BRC.²¹¹ An argument could be made for the creation of independent review officers to do the job which is currently left to the BRC.²¹² This approach has been adopted in the Australian social security context.²¹³ It is submitted that the officers would be legally trained and legislatively autonomous from the NZISS, improving decision-making at the first level of review. This would contrast markedly with current practice in New Zealand where, in many cases, the person who made the original decision reviews it, and where both the administrative review and BRC adhere rigidly to NZISS policy rather than the legislation.

Even though the next tier of appeal, the SSAA, does provide the necessary independence, it is submitted that it is unreasonable and inexpedient to have to reach the highest level of appeal

²⁰⁶Section 40 of the Legal Services Act 1991.

²⁰⁷Section 37(3) of the Legal Services Act 1991.

²⁰⁸Telephone conversation with Elizabeth Urquhart, Acting Secretary of Legal Services Sub-committee, Wellington, 10 September 1996.

²⁰⁹Telephone conversation with Chris Smith, former Acting Secretary of Legal Services Sub-committee, Wellington, 11 September 1996.

²¹⁰Section 120 of the Act. In *SSAA Decn No. 23/96* (19 March 1996), costs of \$600 were awarded against the Department.

²¹¹Above n 161; Above n 186.

²¹²This would be analogous to the internal review by independent solicitors in the Child Support Agency.

²¹³Above n 53, 217.

to achieve a review of decision according to the law. There may also be barriers to appeal to the SSAA such as the psychological obstacle of appearing before a judicial body and the time it takes to get a hearing.²¹⁴

A foreseeable problem with independent review officers is the requirement for legislative change. Arguably, similar improvements could be achieved through changes in policy and practice at the BRC stage. If all members of BRCs were comprehensively trained, including training on statutory interpretation, and were directed to decide the case according to law and not policy, there would be substantial improvement.²¹⁵ The BRC would be seen less as an arm of the bureaucracy if staff members on the committee were not heavily involved in the day-to-day affairs of the district office, as they currently are. It is submitted that changes such as these would improve the quality of review at the BRC stage, reduce the number of appeals to the SSAA, and save the government time and money. These improvements could be achieved without changing the legislation, but simply the policy and practice of the NZISS.

E The Ombudsmen

The NZISS is subject to investigation by the Ombudsmen.²¹⁶ An investigation may follow a complaint by a person or by the Ombudsmen's own motion.²¹⁷ There is a statutory bar to investigation if a right of review on the merits of the decision exists, for example to the SSAA. The Ombudsmen may override that bar if they think it is unreasonable for the complainant to have to resort to it. The Ombudsmen may refuse to investigate a complaint if, in the Ombudsmen's opinion, the complaint is trivial, frivolous, vexatious, not made in good faith, or if the complainant does not have sufficient personal interest in the subject matter of the complaint.²¹⁸

The Ombudsmen have wide powers of investigation. The Ombudsmen may regulate their own procedure subject to the provisions of the Ombudsmen Act 1975 and rules from the House of Representatives.²¹⁹ Before an investigation, the Ombudsmen have to inform the Head of Department or principal administrator of their intention to conduct an investigation.²²⁰ The investigations are conducted in private and the Ombudsmen may make

²¹⁴See also text at n 185.

²¹⁵Adequate training of BRC members will become particularly important from next year when a member of the New Zealand Employment Service will be on committees for decisions regarding the imposition of stand-downs following worktests.

²¹⁶Section 13(1)(a) of the Ombudsmen Act 1975. The Department of Social Welfare is listed in Part I of the First Schedule.

²¹⁷Section 13(3) of the Ombudsmen Act 1975. The Ombudsmen may also be asked to conduct an investigation by the House of Representatives and the Prime Minister (s13(4) and (5) of the Ombudsmen Act 1975).

²¹⁸Section 17(2) of the Ombudsmen Act 1975.

²¹⁹Section 18(7) of the Ombudsmen Act 1975.

²²⁰Section 18(1) of the Ombudsmen Act 1975.

inquiries as they think fit.²²¹ Section 19 of the Ombudsmen Act 1975 confers on the Ombudsmen wide powers to call evidence.

The Ombudsmen have wider grounds of investigation than the courts. They are not confined to legality. If an investigation concludes that a decision was contrary to law, unreasonable, unjust, oppressive, improperly discriminatory, based wholly or partly on mistake of law or fact, or simply wrong, the Ombudsmen have a number of available remedies.²²²

If the Ombudsmen think a matter should be referred to an appropriate authority for further consideration, an omission rectified, the decision cancelled or varied, the practice altered, the law reconsidered, reasons given or any other steps taken, they may report their opinion and reasons to the appropriate department and may make such recommendations as they consider fit.²²³

The Ombudsmen usually aim for compromise, such that no recommendations are required. If recommendations are made, they are usually followed, even though they are not legally binding. If no adequate action is taken in a reasonable time, the Ombudsmen may send a copy of their report and recommendations to the Prime Minister and the House of Representatives.²²⁴

The Ombudsmen receive more than twice the number of complaints against the Department than any other government department.²²⁵ The last two years have seen a substantial increase in the numbers of complaints made specifically against the NZISS. In the year ending 30 June 1995, 50 complaints were made against the NZISS, whereas 105 complaints were made the following year. Those figures are not completely accurate either, as some complaints were not distinguished as NZISS and were simply attributed to DSW complaints. For the year ended 30 June 1996, 39 NZISS complaints resulted in informal enquiries, 25 were declined because an adequate remedy or appeal was available, 8 were resolved informally, and 6 were resolved formally.²²⁶

Statistics show that the Ombudsmen have an important role in checking the practice of the NZISS. Complaints to the Ombudsmen are free, and the process is informal, quick and effective. The number of complaints about the NZISS has doubled in the last two years, and

²²¹Section 18(3) of the Ombudsmen Act 1975.

²²²Section 22(1) of the Ombudsmen Act 1975.

²²³Section 22(3) of the Ombudsmen Act 1975.

²²⁴Section 22(4) of the Ombudsmen Act 1975.

²²⁵*Report of the Ombudsmen (For the Year Ended 30 June 1996)* AJHR A.3, 15.

²²⁶Facsimile from Emma Bonnett, Office of the Ombudsmen, 18 September, 1996.

it is suggested that those numbers will continue to rise as people become more aware of the Ombudsmen and their powers.

F Judicial Review

Judicial review of administrative action is seen by Bradley not as a "procedure for ensuring good administration in the mass of departmental decisions so much as a residual safety valve, able to resolve issues of principle and set standards of conduct when government is considered to have acted unlawfully or unfairly".²²⁷ In his opinion, the more comprehensive the provision of accessible remedies for particular classes of decision, the less the need for recourse to judicial review.

The courts have shown judicial restraint where the body of knowledge and expertise of the decision-making body is beyond that of the court.²²⁸ In a decision involving Britain's supplementary benefit scheme, the High Court held that "when Parliament entrusts an expert body of people, whether they be tribunals or civil servants and independent inspectors, with the task of fulfilling the intentions of Parliament in a specialist sphere, the courts should be very slow to interfere".²²⁹ Arguably, however, the three substantive grounds for judicial review are still available to review social security administrative action.

The three main grounds for judicial review are illegality, irrationality, and procedural impropriety.²³⁰ These grounds are neither exhaustive nor mutually exclusive. To avoid illegality, decision-makers must understand correctly the law that regulates their decision-making power and give effect to it.²³¹ Ultra vires or illegality covers three situations:

1. an abuse of discretionary power by exercising discretion for an improper purpose, on irrelevant grounds, without regard to relevant considerations or by acting in bad faith;
2. abdicating a statutory discretionary power by adopting fixed rules of policy, fettering discretion by contract or representation, acting under dictation of another, or improper delegation; and
3. committing a reviewable error in making findings of fact or law.²³²

²²⁷ Cited in Wikeley, above n 185, 238.

²²⁸ *Regina v Panel on Take-Overs and Mergers, ex parte Datafin plc* [1987] 1 QB 815, 841.

²²⁹ *R v Social Fund Inspector, ex parte Ali* Unreported, 13 November 1992, High Court, citation incomplete, Brooke J.

²³⁰ *Council of Civil Service Unions v Minister for the Civil Service* [1984] 3 All ER 935, 950.

²³¹ Above n 230, 950.

²³² P A Joseph *Constitutional and Administrative Law in New Zealand* (The Law Book Company Ltd, Sydney, 1993) 677 - 704.

A decision is held to be irrational if it is so outrageous that no sensible person who applied his or her mind could have arrived at it.²³³ There are two elements to procedural impropriety - the rule against bias and *audi alteram partem*. The rule against bias specifies that the person taking the decision should not have an interest in the outcome, and *audi alteram partem* (literally, hear the other side) provides that affected parties must be given adequate notice and the opportunity to be heard.²³⁴

Over the years, Lord Cooke of Thorndon appears to have reduced the substantive principles of review to simply that "the decision-maker must act in accordance with the law, fairly and reasonably".²³⁵ He contends that a tripartite structure remains but adds that the threefold duty merges rather than being discreet.²³⁶

Other possible grounds of review include: the legal rights conferred under the New Zealand Bill of Rights Act 1990; substantive fairness, where not only the procedure but the result should be fair;²³⁷ proportionality, in circumstances where the interference with a citizen's affairs by an administrator is disproportionate to the objectives said to justify the interference;²³⁸ legitimate expectations, where there is a legitimate expectation of procedure the courts will require that;²³⁹ mistake or misrepresentation;²⁴⁰ and the "innominate ground of review" where something has gone wrong which is of a nature and degree that requires the intervention of the court.²⁴¹

Judicial review does not, under the established grounds of review, examine the merits of decision-making. It is a residual safety valve to resolve issues of principle and set standards of practice. Judicial review of decisions of the NZISS is rare. Whilst judicial review is an option for a person affected by a decision of the NZISS, in practice, it is the least used avenue. The *Ankers* decisions are the most recent proceedings for judicial review of actions of the NZISS.²⁴² In these decisions Thorp J held that the NZISS had unreasonably and invalidly processed special benefit applications. The Court ordered the reconsideration of special benefit applications since February 1994.²⁴³

²³³ Above n 230, 951. This is commonly referred to as Wednesbury unreasonableness following the decision in *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1947] 2 All ER 680.

²³⁴ *Halsbury's Laws of England* (4 ed, Butterworths, London, 1973) vol 1, para 68.

²³⁵ *New Zealand Fishing Industry Association Inc. v Minister of Agriculture and Fisheries* [1988] 1 NZLR 544, 552.

²³⁶ Above n 235, 552.

²³⁷ *Daganayasi v Minister of Immigration* [1980] 2 NZLR 130, 149.

²³⁸ Above n 230, 950.

²³⁹ *Schmidt v Secretary of State for Home Affairs* [1969] 2 Ch 149.

²⁴⁰ *Martin v Ryan* [1990] 2 NZLR 209, 224.

²⁴¹ *Regina v Take-Over Panel, ex parte Guinness* [1990] 1 QB 146, 160.

²⁴² Above n 59; Above n 3.

²⁴³ See text at n 80.

Barriers to judicial review by beneficiaries include the cost of the process, the delay involved in hearing the case, and the fact that a beneficiary has an ongoing relationship with the NZISS. When review is sought, however, the use of class actions provides access to remedies for the large number of people who share a common interest. Representative actions allow people who would not normally be able to fund a separate action, access to the results of the proceedings.

VIII CONCLUSION

A mixture of both discretion and rules enables the most efficient functioning of bureaucracies. Traditionally, rules have provided certainty, whilst discretion accommodates individual circumstances. This paper has shown, however, that in the New Zealand social security context, the distinction between rules and discretion is becoming blurred in practice.

Over the last five years, the Government has introduced aggressive targeting to social security. This has resulted in tightly regulated ministerial directives and welfare programmes governing the exercise of discretion in supplementary assistance. The courts have noted that upon satisfying the tight criteria of ministerial directives, entitlement to assistance arises. The effect has been the creation of a discretionary supplementary assistance programme not too dissimilar from a rules-based system.

Indeed, the problems associated with discretion in the social security context are not those raised by academics, such as arbitrariness and uncertainty for the applicant. Instead, the difficulty is trying to get the New Zealand Income Support Service to actually exercise the discretion in practice. The paper has analysed the occasions on which the practice of the NZISS has been criticised and has highlighted problems with the exercise of other statutory discretions.

Notwithstanding the tight regulation of discretion, there is strong support for the retention of a residual discretion to ensure individualised justice. In 1995 the Government attempted to remove the statutory discretion currently authorising special benefit, SNGs and the advance payment of benefits, and replace it with authorisation by regulations. The move met with strong opposition and was eventually dropped due to the weight of public disapproval. In a recent SSAA decision, the Tribunal commented on the problems that arise in supplementary assistance programmes that do not retain a residual discretion.

Acknowledging the current reality of the blurred boundaries between discretion and rules, consideration has been given to ways of improving decision-making generally. The paper has suggested that much can be done within the NZISS itself to improve both initial decision-making and the appeal process. A number of issues involving the NZISS's practical application of statutory discretion have been highlighted, and the author submits that these need to be addressed in order for the NZISS to legitimate its position as the administrator of New Zealand's social security regime.

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