

Digging Through Its “Dirty Laundry”: An Interrogation of the Ministry of Social Development’s Determinations of Benefit Recipients’ Relationship Status

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*The amount of social security assistance a person can receive in Aotearoa New Zealand depends on their relationship status. Single persons are entitled to substantially higher rates of financial assistance than those in a relationship. Determinations of benefit recipients’ relationship status therefore have significant implications. In 1996, the Court of Appeal in *Ruka v Department of Social Welfare* held that a de facto relationship for the purpose of social security entitlement comprised two essential elements: financial interdependence and emotional commitment. On these terms, a relationship marred by extreme levels of physical, psychological and financial violence is not a relationship in the nature of marriage. The majority judgment was initially hailed as “radical” and a positive shift in how the Ministry of Social Development was required to determine benefit recipients’ relationship status. This article argues, however, that the potentially transformative effects of *Ruka* were never realised and the judgment has had minimal impact on how the Ministry conducts investigations and determines benefit recipients’ relationship status. This article further contends that the current approach leads to unjust and punitive outcomes for benefit recipients, particularly mothers and their children, and results in breaches of fundamental human rights.*

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I INTRODUCTION

The amount of social security assistance a person can receive in Aotearoa New Zealand depends on their relationship status. Single persons are entitled to substantially higher rates of financial assistance than those in a relationship. Determinations of benefit recipients' relationship status therefore have significant implications.¹ In 1996, the Court of Appeal in *Ruka v Department of Social Welfare* held that a de facto relationship for the purpose of social security entitlement comprised two essential elements: financial interdependence and emotional commitment.² On these terms, a de facto relationship marred by extreme levels of physical, psychological and financial violence is not considered to be a "relationship in the nature of marriage".³ Some initially hailed the majority as "radical" and a positive shift in how the Ministry of Social Development ("the Ministry") was required to determine benefit recipients' relationship status.⁴ However, this article argues that the potentially transformative effects of *Ruka* were never realised and the judgment has had minimal impact on how the Ministry conducts investigations and determines benefit recipients' relationship status.⁵

"Marriage-type relationship" fraud is the most common type of benefit fraud in Aotearoa New Zealand.⁶ The Ministry deems this to occur when a benefit recipient incorrectly identifies their relationship status as single on a benefit application or fails to notify the Ministry of changes to their relationship status.⁷ As a result, they receive more financial assistance from the state than their legal entitlement. When marriage-type relationship fraud is suspected, the Ministry determines whether a benefit recipient is in a relationship in the nature of marriage. These determinations are highly controversial

1 See Table 1 in Part II(C) of this article.

2 *Ruka v Department of Social Welfare* [1997] 1 NZLR 154 (CA) [*Ruka* (CA)] at 161–162 and 181.

3 Interpretation Act 1999, s 29A; and *Ruka* (CA), above n 2, at 162–163 and 182–184.

4 John Hughes "Battered Woman's Syndrome and 'Interdependence' as Factors in Establishing Conjugal Status in Social Security Law" (1999) 7 Wai L Rev 104 at 104.

5 See also Jessica Wiseman "Determining a Relationship in the Nature of Marriage: The Impact of *Ruka* on the Department of Work and Income's Conjugal Status Policy" (2001) 32 VUWLR 973 at 997; and Carolyn Doyle, Patricia Eastale and Derek Emerson-Elliott "Domestic Violence and Marriage-like Relationships: Have we begun to emerge from the Dark Ages?" (2012) 37(2) Alt LJ 91 at 93.

6 The Ministry uses this term in its categorisation of benefit fraud: see Letter from Group General Manager Client Service Support to R Gavey regarding the Data on the Ministry of Social Development's benefit fraud investigations and prosecutions where a line of enquiry was relationship status (or "marriage type relationship" fraud) (16 November 2020) at 8 (obtained under Official Information Act 1982 request to the Ministry of Social Development).

7 As required by Social Security Act 2018, s 113 [SSA 2018].

and often at odds with how the person receiving a benefit characterises their relationship.

In this article, I will conduct a socio-legal analysis of the Ministry’s “dirty laundry” by interrogating both its investigations and determinations of benefit recipients’ relationship status.⁸ Part II will provide an overview of the legal framework for making relationship status determinations and the bearing of such determinations on the amount of financial assistance a person can receive. For the remainder of this article, I split the Ministry’s “laundry” into three interconnected “baskets”. Basket one (Part III) will examine the Ministry’s investigation process and critically assess its internal practices for accessing benefit recipients’ personal and private information. Basket two (Part IV) will scrutinise the Ministry’s decision-making process for determining benefit recipients’ relationship status and highlight the misapplication and limitations of *Ruka*. Finally, basket three (Part V) will analyse the consequences of the Ministry’s relationship status determinations, specifically in relation to the prosecution and debt recovery processes.

The central thesis of this article is that the Ministry continues to misuse and abuse its administrative discretion under the Social Security Act 2018 (SSA 2018) to investigate and determine benefit recipients’ relationship status. This is leading to unjust and punitive outcomes for benefit recipients, particularly single mothers and their children, and results in breaches of fundamental human rights.

II SOCIAL SECURITY ACT 2018

The Ministry of Social Development is primarily responsible for the administration of benefits.⁹ The Chief Executive of the Ministry has the legal power to make decisions under the SSA 2018. They often delegate this decision-making power to caseworkers at Work and Income (the administrative unit of the Ministry) or Ministry investigators.¹⁰ One of the most influential decisions caseworkers and investigators make is whether a benefit applicant or current benefit recipient is single or in a de facto relationship. Section 8(4) of the SSA 2018 authorises the Ministry to decide that a person receiving a

8 I also consider at points the role of other actors implicated in the social security system, including the Benefit Review Committee, the Social Security Appeal Authority, the courts and Parliament (through legislation).

9 Māmari Stephens *Social Security and Welfare Law in Aotearoa New Zealand* (Thomson Reuters, Wellington, 2019) at [4.2].

10 At [4.2].

benefit is in a “de facto relationship”, even when they claim to be single. Conversely, s 8(2) also provides the Ministry with the power to determine that a person receiving a benefit is single, even when they are married or in a civil union. The SSA 2018 also enables the Ministry to determine the date on which these relationships began and ended.¹¹ The purpose of s 8 “is to ensure that unmarried couples who enter into a relationship akin to marriage are not treated more favourably for benefit purposes than those who are legally married”.¹²

The primary test for a de facto relationship is whether two people “live together as a couple in a relationship in the nature of marriage”.¹³ The meaning of the phrase “relationship in the nature of marriage” is contentious and central to this article.¹⁴

Ruka v Department of Social Welfare

The Court of Appeal decision in *Ruka* is the leading New Zealand authority on relationship status determinations in the context of social security entitlement. In 1995, Ms Ruka was charged and convicted of benefit fraud in the District Court (upheld in the High Court) because she failed to reveal to the Ministry that she was in a “relationship” with Mr T.¹⁵ For many years, Ms Ruka received the Domestic Purposes Benefit, which required the recipient to be single.¹⁶ At the same time, she was living with the father of her child (Mr T) who was extremely violent towards her.¹⁷ Barker J in the High Court recognised that the relationship was characterised by “unremitting violence”, “lack of financial support” and “lack of emotional dependence”.¹⁸ Nevertheless, he held it was still a relationship for the purposes of social security because Ms Ruka “elected to continue with the relationship” even though she was “trapped” and “it might have been almost impossible for her to have got out of it”.¹⁹

The Court of Appeal overturned the High Court decision. It quashed her convictions on the basis that Ms Ruka’s involvement with

11 SSA 2018, ss 8(3) and 8(5).

12 *Ruka* (CA), above n 2, at 181.

13 Interpretation Act, s 29A.

14 Section 8 of the SSA 2018 is similar to s 63 of the Social Services Act 1964 [SSA 1964]. Even though the phrase “relationship in the nature of marriage” was removed from s 8, the test is still the same because s 8 refers to s 29A of the Interpretation Act (which specifically includes this phrase).

15 *Ruka v Department of Social Welfare* [1995] 3 NZLR 635 (HC) [*Ruka* (HC)] at 640.

16 *Ruka* (CA), above n 2, at 159. The Domestic Purposes Benefit is substantially similar to Sole Parent Support Benefit under the SSA 2018.

17 At 157–158.

18 At 160.

19 *Ruka* (HC), above n 15, at 639.

Mr T lacked the necessary level of financial support and emotional commitment, partially due to his violence towards her, to be considered a relationship in the nature of marriage.²⁰ As Catriona MacLennan noted, Ms Ruka’s relationship was “one of victim to rapist, not one of husband and wife”.²¹ The Court of Appeal held (by a three to two majority) that the test for a relationship in the nature of marriage includes two “prerequisite factors”:²² financial interdependence and emotional commitment.²³ Richardson P and Blanchard J developed the two-part test, explaining that where:²⁴

... cohabitation and a degree of companionship demonstrating an emotional commitment ... are found together with financial interdependence there will be such a merging of lives as equates for the purposes of the legislation to a legal marriage.

Five years after *Ruka*, and following public criticism of the Ministry’s response, Frances Joychild was commissioned to conduct an independent review of the Department of Work and Income (now the Ministry). This review assessed the Department’s implementation of the two-part test in their everyday case management.²⁵ Joychild identified various systemic failures by the Department to apply the updated test appropriately.²⁶ Joychild recommended that the Ministry review all overpayments established for marriage-type relationship fraud subsequent to *Ruka* (between November 1996 and December 2000).²⁷ The Ministry did not automatically review all 15,600 cases. Rather, it shifted the onus onto benefit recipients to request a review of their individual decision.²⁸ Only 5,700 cases were reviewed.²⁹ Significantly, the Ministry overturned 63 per cent of these cases upon

20 *Ruka* (CA), above n 2, at 162–163.

21 Catriona MacLennan “Commentary on *Ruka v Department of Social Welfare* Defining a Relationship for the Purposes of State Support” in Elisabeth McDonald and others (eds) *Feminist Judgments of Aotearoa New Zealand Te Rino: A Two-Stranded Rope* (Hart Publishing, Portland, 2017) 87 at 88.

22 Frances Joychild *Report to the Minister for Social Services, Review of Department of Work and Income Implementation of the Court of Appeal Decision, Ruka v Department of Social Welfare [1997] 1 NZLR 154* (Ministry of Social Development, Wellington, 18 June 2001) at 41.

23 *Ruka* (CA), above n 2, at 161–162 and 181.

24 At 162.

25 Joychild, above n 22, at i.

26 At i and ii.

27 At 67.

28 Tina McIvor “The Ruka Review: how a government department ignored the law, and its reluctance to put things right” *Scoop Politics* (New Zealand, 21 October 2005).

29 Susan St John and others *The complexities of ‘relationship’ in the welfare system and the consequences for children* (Child Poverty Action Group, November 2014) at 29.

review because they were held to have been incorrectly decided in light of *Ruka*.³⁰

As a result of the Joychild report, the Ministry updated their policies and guidelines in accordance with *Ruka*.³¹ Over 20 years have passed since Joychild published her report in 2001. Since then, there has been no comprehensive independent review of the Ministry's relationship status determinations to assess the long-term implementation and application of *Ruka*.³² Currently, benefit recipients are able to review the Ministry's relationship status decisions to the Benefit Review Committee (BRC) and then again to the Social Security Appeal Authority (SSAA) if they believe the Ministry has unfairly or improperly determined their relationship status.³³

Benefits Affected by Relationship Status

It is crucial that relationship status determinations are made following the proper procedure and are based on up-to-date understandings of the law. This is because the amount of financial assistance a person can receive depends on their relationship status.³⁴ More pertinently, relationship status primarily determines the Sole Parent Support entitlement. To be eligible for Sole Parent Support, the person must be caring for at least one dependent child and not be in a relationship in the nature of marriage.³⁵ A person is not in a relationship in the nature of marriage if: they are single; their marriage or civil union has dissolved; they are living apart and are inadequately maintained by their partner; their partner has died; or their partner is in prison or on home detention.³⁶

Table 1 below sets out the single and coupled rates for all the main benefits as of 1 April 2021. There is a significant difference between the coupled rate and two combined single rates, which

30 At 29.

31 See Peter Hughes *Ministry of Social Development response to the Joychild report regarding the implementation of the Ruka decision* (Ministry of Social Development, Wellington, 2001).

32 It is difficult to assess the everyday reasoning process of the Ministry in relation to relationship status determinations because only a handful of cases get appealed to the Social Security Appeal Authority or higher (where decisions become publicly available). Nonetheless, the handful of cases publicly available arguably represent the more borderline decisions, and even in these cases I will argue that the official decisions demonstrate inconsistent and limited applications of *Ruka*.

33 SSA 2018, s 391. However, they are not entitled to legal aid during this process. See Kim Morton and others *Access to Justice for Beneficiaries: A Community Law Response* (Community Law Canterbury, October 2014) at 128.

34 See Table 1 in Part II(C) of this article.

35 SSA 2018, s 30; and Olivia Healey and Jennifer Curtin *Relationship status' and the Welfare System in Aotearoa New Zealand* (Public Policy Institute and Child Poverty Action Group, May 2019) at 7.

36 Section 30 of the SSA 2018 is equivalent to s 20A of the SSA 1964.

effectively amounts to a “financial penalty” for people in relationships.³⁷ Some may justify the difference in rates on the basis that people in relationships can split their expenses. However, this ignores the possibility that single people receiving a benefit can still share accommodation and expenses.³⁸

Table 1: Single and Coupled Rates for Main Benefits as of 1 April 2021.³⁹

Benefit	Relationship Status	
	Single weekly rate	Couple weekly rate (each)
Sole Parent Support	\$386.78	N/A
Jobseeker Support: without children	\$258.50 (for those 25 years or older)	\$206.81
Jobseeker Support: with children	\$386.78	\$220.65
Supported Living Payment: without children	\$316.65 (for those 18 years or older)	\$255.27
Supported Living Payment: with children	\$435.58	\$269.12
NZ Superannuation or Veteran’s Pension	\$436.94	\$336.11

In June 2019, 291,969 people were receiving one of the main benefits (excluding NZ Superannuation and Veteran’s Pension) and of those, 93 per cent stated they were single.⁴⁰ Women and Māori represent a

37 Healey and Curtin, above n 35, at 8; and Welfare Expert Advisory Group *Whakamana Tāngata: Restoring Dignity to Social Security in New Zealand* (February 2019) [WEAG] at 10.

38 Healey and Curtin, above n 35, at 8.

39 Work and Income “Benefit rates at 1 April 2021” (1 April 2021) <www.workandincome.govt.nz>. This table is based on a similar table in Healey and Curtin, above n 35, at 9. All figures in this table are after tax, assuming an M tax code.

40 Letter from George Van Ooyen (Group General Manager Client Service Delivery) to Anonymous regarding Cases of fraud investigated by the Ministry of Social Development since June 2018 (10 February 2020) at 10 (obtained under Official Information Act 1982 request to the Ministry of Social Development).

high percentage of these benefit recipients.⁴¹ Of the 64,029 people receiving Sole Parent Support in the 2019/2020 financial year, over 90 per cent were women and nearly half were Māori.⁴² In the 2017/2018 financial year, the Ministry conducted 4,755 investigations — over half of which involved investigations into benefit recipients' relationship status.⁴³ In the same financial year, there were 180 successful prosecutions for marriage-type relationship fraud.⁴⁴ Over 70 per cent involved women and nearly half involved Māori.⁴⁵ Women and Māori receiving benefits are therefore disproportionately affected by differential entitlements based on relationship status.⁴⁶

III BASKET ONE: INVESTIGATIONS INTO BENEFIT RECIPIENTS' RELATIONSHIP STATUS

The Ministry's principal role is to administer social services and welfare support with respect and dignity.⁴⁷ As this "system is open to abuse",⁴⁸ the Ministry has a responsibility to ensure the system's integrity by preventing, detecting and investigating benefit fraud.⁴⁹ The Ministry employs roughly 100 fraud investigators⁵⁰ who have the power to investigate benefit recipients' personal and financial circumstances, both immediately before and while they receive benefit

41 At 7; and Letter from George Van Ooyen (Group General Manager Client Service Support) to Anonymous regarding Breakdown of statistics regarding prosecutions for benefit fraud since June 2016 (13 May 2019) at 3 (obtained under Official Information Act 1982 request to the Ministry of Social Development).

42 Ministry of Social Development, above n 6, at 7.

43 Letter from George Van Ooyen (Group General Manager Client Service Support) to Anonymous regarding Benefit fraud broken down by gender, ethnicity and type of fraud (24 June 2019) at 5 (obtained under Official Information Act 1982 request to the Ministry of Social Development). Inconsistent statistical information provided by the Ministry in different Official Information Act requests makes it difficult to ascertain the veracity of these figures.

44 At 7.

45 Ministry of Social Development, above n 40, at 6–7.

46 See Healey and Curtin, above n 35, at 17; and Dorothy E Chunn and Shelley AM Gavigan "Welfare Law, Welfare Fraud, and the Moral Regulation of the 'Never Deserving' Poor" (2004) 13 S& LS 219 at 220. For a discussion of the intersectionality in relation to these issues, see Lyndal Sleep *Domestic violence, social security and the couple rule* (Australia's National Research Organisation for Women's Safety Ltd, July 2019) at 19–20.

47 Joychild, above n 22, at vii; and Privacy Commissioner *Inquiry into the Ministry of Social Development's Exercise of Section 11 (Social Security Act 1964) and Compliance with the Code of Conduct* (May 2019) at [1.4].

48 Privacy Commissioner, above n 47, at [1.4].

49 Joychild, above n 22, at vii.

50 Healey and Curtin, above n 35, at 20; and Letter from Group General Manager Client Service Support regarding Policies on "marriage type relationship" fraud (16 November 2020) at 8 (obtained under Official Information Act 1982 request to the Ministry of Social Development).

payments.⁵¹ Their primary responsibility “is to obtain all the possible information that is available to support or negate an allegation or complaint which could lead to an overpayment, penalty or offence”.⁵²

A high proportion of the investigations conducted by the Ministry involve obtaining information about the relationship status of benefit recipients.⁵³ The Ministry itself is aware that “the most complex and difficult investigations involve relationships”.⁵⁴ In relationship fraud investigations, the investigator must determine whether the benefit recipient is in a relationship in the nature of marriage and accordingly whether they are eligible for the specific benefit they receive or have previously received.⁵⁵

Procedural Concerns in Relationship Status Investigations

There are three key areas of concern in relation to the Ministry’s processes for conducting relationship status investigations. These relate to: (1) the benefit fraud allegation process; (2) key performance indicators for investigators; and (3) benefit recipients’ rights throughout the investigation.

First, the allegation process has been labelled as “draconian” because it involves members of the public “dobbing in” benefit recipients where they suspect benefit fraud.⁵⁶ The majority of investigations are commenced after the Ministry receives a public allegation of fraud.⁵⁷ In the 2018/2019 financial year, the Ministry received 8500 public allegations of benefit fraud compared with only 150 internally initiated allegations.⁵⁸ This amounts to nearly one benefit recipient being reported for fraud every hour.⁵⁹ Not all allegations of fraud result in a fraud investigation; rather an assessment is made on a case-by-case basis of the potential risks and level of fraud alleged.⁶⁰ The Ministry uses “Decision Support Tool”

51 SSA 2018, s 298(3). The Ministry has adopted a new “three-tiered approach to managing cases of potential fraud”: early intervention, facilitation and investigation, see Ministry of Social Development, above n 40, at 2.

52 Ministry of Social Development *Investigation Unit Training Package Unit 12: Planning an Investigation (A5897383)* at 2 (obtained under Official Information Act 1982 request to the Ministry of Social Development).

53 See Ministry of Social Development, above n 6, at 8.

54 Joychild, above n 22, at 4.

55 SSA 2018, sch 6 cl 3(a).

56 Healey and Curtin, above n 35, at 16.

57 Ministry of Social Development, above n 6, at 7.

58 At 7.

59 See also Zac Fleming “20% of benefit fraud tip-offs have some legitimacy” *Radio New Zealand* (New Zealand, 4 July 2018).

60 Ministry of Social Development, above n 52, at 1–2.

artificial intelligence software to make these assessments and the software ranks the allegations from high to low risk.⁶¹

Anyone can allege benefit fraud.⁶² However, research suggests alлегers are usually former partners, neighbours, friends and family.⁶³ A high proportion of allegations received are made anonymously.⁶⁴ While the Ministry cautions investigators to “be mindful of malicious alleg[e]rs”,⁶⁵ the Decision Support Tool does not take into account the motives of the allegер when conducting the risk assessment.⁶⁶ For example, vindictive and violent former partners may want to get “revenge” by subjecting their former partner to increased state scrutiny.⁶⁷

Secondly, the Ministry uses key performance indicators (KPIs) to incentivise monetary savings.⁶⁸ In 2001, Joychild exposed the Ministry’s “Million Dollar Club”, which formally rewarded investigators who were able to establish more than one million dollars in beneficiary overpayments in one year.⁶⁹ Spurred on by this Club, Joychild posited that investigators may have been “unconsciously influence[d]” to establish marriage-type relationship fraud, even in borderline cases, because their work performance was assessed on the amount of debt they discovered.⁷⁰ More recently, there have been reports that the Ministry is still using KPIs (in relation to debt and prosecution targets) for its investigators.⁷¹ In 2017, the Ministry admitted that investigators were expected to establish \$30,000 in debt and undertake at least one prosecution per month.⁷²

61 Privacy Commissioner, above n 47, at [1.30]; and Murray D Jack *Independent Assessment of the Ministry of Social Development's Polices, Practices and Operations to Identify, Investigate and Prevent Fraud* (Ministry of Social Development, August 2019) at 15.

62 See Work and Income “Report a suspected fraud” <www.workandincome.govt.nz>.

63 Joychild, above n 22, at 7; and WEAG, above n 37, at 87.

64 WEAG, above n 37, at 7; and Ministry of Social Development *Induction to the Ministry of Social Development and Fraud Intervention Services Training Manual: Allegations and Fraud Suspicion* in “Benefit fraud investigation process and domestic violence” at 2 (13 November 2020) (obtained by R Gavey under Official Information Act 1982 request to the Ministry of Social Development).

65 Ministry of Social Development, above n 64, at 3.

66 Privacy Commissioner, above n 47 at [1.31].

67 Ministry of Social Development, above n 64, at 3; and St John and others, above n 29, at 14. It is too soon to assess whether recent legislative changes that make partners jointly liable for benefit fraud (as discussed in Part V) will affect who makes these allegations.

68 Joychild, above n 22, at 10.

69 At 10.

70 At viii.

71 Cat MacLennan “A chance to reverse our humiliating welfare system” (30 April 2018) Newsroom <www.newsroom.co.nz>.

72 Catherine Hutton “Benefit fraud procedure changed following suicide” *Radio New Zealand* (New Zealand, 3 October 2017).

The use of KPIs in the public sector is problematic. KPIs are commercial tools used to enhance productivity and profit for companies. It is inappropriate for the Ministry, as a government agency, to use KPIs in their current form because they hinder investigators’ impartiality.⁷³ Tina McIvor posits that “a culture of financial gain [is] so entrenched [in the Ministry’s investigation process] that it operates unfairly, unlawfully and contrary to the principles of natural justice”.⁷⁴ Natural justice is enshrined in s 27 of the New Zealand Bill of Rights Act 1990 (NZBORA) and includes the right to an unbiased decision maker.⁷⁵ Decision makers must undertake investigations with an open mind.⁷⁶ In *An appeal against a decision of the Benefits Review Committee* [2017] NZSSAA 62, the SSAA found the investigator “predetermined the outcome of his investigation by asking leading questions” and so the evidence from the interview could not be relied upon.⁷⁷ Arguably, the presence of financial incentives to establish benefit fraud could amount to evidence of actual or apparent bias.⁷⁸

Thirdly, benefit recipients’ legal rights throughout the investigation process are unclear. Ministry investigators have broad (delegated) discretionary powers to obtain benefit recipients’ personal information.⁷⁹ During investigations into benefit recipients’ relationship status, the Ministry can require any person (including third parties) to provide information and answer questions relating to a current or previous benefit recipient.⁸⁰ Any person can be prosecuted for failing to provide relevant information or answer the Ministry’s questions.⁸¹ The duty on benefit recipients to answer the Ministry’s questions⁸² directly conflicts with their right to silence during an interview that could result in their prosecution.⁸³ In response to an

73 Joychild, above n 22, at 59.

74 McIvor, above n 28, as cited in St John and others, above n 29, at 30.

75 *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374 (HL) [CCSU] at 410.

76 See *Friends of Turitea Reserve Society Inc v Palmerston North City Council* [2007] NZHC 454879, [2008] 2 NZLR 661 at [102].

77 *An appeal against a decision of the Benefits Review Committee* [2017] NZSSAA 62 at [55].

78 See generally *Saxmere Company Ltd v Wool Board Disestablishment Company Ltd* [2009] NZSC 72 [2010] 1 NZLR 35. However, the threshold is quite high. See, for example, *Friends of Turitea Reserve Society Inc*, above n 76.

79 Privacy Commissioner, above n 47, at [1.12]; and Joychild, above n 22, at 12.

80 SSA 2018, sch 6 cls 1 and 2(1); and Stephens, above n 9, at 124. The person is not required to provide privileged information: SSA 2018, sch 6 cls 1(2) and 4.

81 Section 290(5).

82 Section 305 and sch 6 cl 1.

83 Evidence Act 2006, ss 32(1)(a) and 60; and see Ministry of Social Development *Induction to the Ministry of Social Development and Fraud Intervention Services Training Manual: Interviews & Statements* at 7 in “Benefit fraud

Official Information Act 1982 request, the Ministry conceded that benefit recipients “have a general right not to incriminate themselves” and “are not required to answer questions” posed by Ministry investigators in relation to an alleged offence.⁸⁴ However, there is no evidence that benefit recipients are informed of their right to silence and the potential risks of disclosure.

Further, while being interviewed, benefit recipients do not have a formal right to legal representation.⁸⁵ As benefit recipients are not being detained or arrested, they are ostensibly able to leave at any time.⁸⁶ However, unlike police interviews, benefit recipients have an existing, ongoing, hierarchical relationship with the Ministry and rely on the goodwill of this relationship for their daily survival.⁸⁷ Benefit recipients are therefore unlikely to do anything that may harm this relationship. Additionally, there are reports some benefit recipients do not receive prior notice of these interviews and instead investigators arrive unannounced at their homes.⁸⁸ This does not allow benefit recipients time to prepare or to organise a support person to be present, let alone a lawyer.⁸⁹ Legal representation is also expensive and likely unaffordable to benefit recipients during the interview stage.⁹⁰

The lack of legal representation during the interview process is concerning as benefit recipients are often unaware that the Ministry can use the information provided to prosecute them.⁹¹ Recent cases demonstrate that Ministry investigators may employ unethical (and illegal) interviewing techniques that trap benefit recipients into admitting to being in a relationship in the nature of marriage without sufficient understanding of the law.⁹² *Brown v Ministry of Social Development*⁹³ and *An appeal against a decision of the Benefits*

investigation process and domestic violence” (13 November 2020) (obtained by R Gavey under Official Information Act 1982 request to the Ministry of Social Development).

84 Ministry of Social Development, above n 52, at 5.

85 However, the Work and Income website states benefit recipients can bring a legal representative, advocate or support person with them, see “How to avoid benefit fraud” <www.workandincome.govt.nz>.

86 Ministry of Social Development, above n 52, at 7; and New Zealand Bill of Rights Act 1990, s 23(1).

87 Healey and Curtin, above n 35, at 19; and see also Morton and others, above n 33, at 123.

88 Child Poverty Action Group “Submission to the Social Services Select Committee on the Social Security Legislation Rewrite Bill” (20 June 2016) [CPAG] at 34–35.

89 At 34–35; and Joychild, above n 22, at 11.

90 Healey and Curtin, above n 35, at 19. They are also not entitled to legal aid.

91 Morton and others, above n 33, at 123.

92 *An appeal against a decision of the Benefits Review Committee* [2017] NZSSAA 25 at [46]; and [2017] NZSSAA 62, above n 77, at [108].

93 *Brown v Ministry of Social Development* [2018] NZHC 3131 at [5] and [18].

Review Committee [2017] NZSSAA 25⁹⁴ serve as examples of cases in which questionable processes were arguably used by Ministry investigators. In *Brown*, Ms Brown pleaded guilty even though at sentencing the Judge admitted that “her partner had not been particularly supportive financially and was not a stable presence in her life or the lives of her children and grandchildren”.⁹⁵ In [2017] NZSSAA 25, a former male partner of a female benefit recipient successfully appealed a Ministry decision to make him jointly liable even though the female benefit recipient had earlier pleaded guilty.⁹⁶ The SSAA stated there was no “evidence that the [female] partner understood what constitutes a relationship in the nature of marriage for the purposes of the Act” and held that the “relationship between the appellant and the partner on any measure lay far from the threshold for a relationship in the nature of marriage”.⁹⁷ The investigators involved in these cases allowed (and arguably prompted) the female benefit recipients to agree that they were in marriage-type relationships, even though neither relationship involved financial interdependence or sufficient emotional commitment.⁹⁸

Illegality Concerns in Relationship Status Investigations

The Ministry’s investigation powers are governed by a Code of Conduct.⁹⁹ If the Ministry does not comply with the Code, it may be in breach of its legal obligations under the Privacy Act 2020.¹⁰⁰ The Code legally requires the Ministry to first seek relevant information directly from the benefit recipient.¹⁰¹ This is to provide benefit recipients with “some measure of privacy protection as well as ensuring that they are kept informed about the nature of the enquiries being made about them”.¹⁰² The only exception to this rule is when approaching the benefit recipient directly would “prejudice the maintenance of the law”,¹⁰³ by causing delay or enabling benefit recipients to alter documents or collude with other parties.¹⁰⁴ “[M]ere

94 [2017] NZSSAA 25, above n 92, at [62] and [64].

95 At [18].

96 At [62], [70] and [71].

97 At [62] and [64].

98 See [2017] NZSSAA 25, above n 92, at [65]–[68]; and *Brown*, above n 93, at [18].

99 SSA 2018, sch 6 cl 2(4) and cl 8.

100 Stephens, above n 9, at 424. This source discusses the Privacy Act 1993 but is applicable to the Privacy Act 2020.

101 Ministry of Social Development *Code of Conduct for Obtaining Information Under Section 11 Social Security Act 1964* (12 September 2012) [Code of Conduct] at [3.1].

102 At Appendix A.

103 At [3.1].

104 At Appendix A.

administrative inconvenience” does not suffice.¹⁰⁵ If the exception applies, the Ministry may request personal information from third parties without notifying the benefit recipient.¹⁰⁶

In 2012, the Ministry introduced a policy change that advised (and arguably encouraged) investigators to “bypass the requirement to seek information directly from a beneficiary and instead to go direct to third parties”.¹⁰⁷ In 2019, the Privacy Commissioner found that this policy amounted to a breach of the Code and was inconsistent with legal requirements under the NZBORA and the Privacy Act.¹⁰⁸ If decisions about whether and how to investigate are not made consistently with the Code, then the primary decision can be judicially reviewed in the High Court.¹⁰⁹ The Ministry’s conduct raises two main areas of concern: (1) improper application of the “prejudice the maintenance of the law” test; and (2) disproportionate information gathering practices.¹¹⁰

First, the Ministry’s 2012 policy of seeking information directly from a third party without first asking benefit recipients for this information amounted to a blanket policy.¹¹¹ The investigation powers are supposed to be discretionary, meaning Ministry investigators should choose when and how to exercise these powers.¹¹² Decision makers are required to exercise this discretion “reasonably”,¹¹³ taking into account mandatory relevant

105 Privacy Commissioner, above n 47, at [4.3].

106 Code of Conduct, above n 101, at [3.1].

107 Privacy Commissioner, above n 47, at 4. When making this change, the Ministry stated it was complying with a new amendment to Code. However, it was aware at the time that the Office of the Privacy Commissioner did not support this interpretation of the amendment: see Privacy Commissioner, above n 47, at 4.

108 Privacy Commissioner, above n 47, at [1.14] and [3.1]–[3.4]. The Ministry officially accepted the Privacy Commissioner’s recommendations: see Ministry of Social Development “MSD accepts Privacy Commissioner’s recommendations” (16 May 2019) <www.msd.govt.nz>. An updated version of the Ministry’s Investigation Unit Training Package suggests, at least in terms of internal policy, the Ministry is complying with these recommendations: see Ministry of Social Development *Induction to the Ministry of Social Development and Fraud Intervention Services Training Manual: Investigative approach* at 3–4 in “Benefit fraud investigation process and domestic violence” (13 November 2020) (obtained under Official Information Act 1982 request to the Ministry of Social Development). It is difficult to know how this is operating in practice.

109 Judicial Review Procedure Act 2016, s 8. In *Wheki v Ministry of Social Development* [2020] NZHC 412 at [42], the High Court recently held that evidence obtained by the Ministry under s 11 of the SSA 1964 was not unlawfully obtained and was admissible (s 11 of the SSA 1964 is similar to sch 6 c2 of the SSA 2018). This was not a judicial review proceeding.

110 At 5–6.

111 The Ministry’s updated policy states that “[i]n the majority of cases, the Ministry would make clients aware of an investigation at its commencement”: see Ministry of Social Development, above n 52, at 5.

112 Stephens, above n 9, at 121.

113 See *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223 (CA).

considerations,¹¹⁴ including the requirements stipulated in the Code.¹¹⁵ Specifically, decision makers must consider whether approaching a benefit recipient first would “prejudice the maintenance of the law”. Blanket policies, however, are inconsistent with the exercise of discretion.¹¹⁶ The Privacy Commissioner noted that the blanket policy is “the antithesis of a case-by-case assessment and removes the ability of the Ministry to form the objective belief required to apply the exception”.¹¹⁷

Additionally, the Ministry’s use of artificial intelligence — as discussed in Part III(A) — reduces the decision-making process to a mechanical model and further fetters the required discretion of the investigator. This is because the policy automatically presumes that all “high risk” cases, as determined by the software, satisfy the exception.¹¹⁸ However, the risk assessment undertaken by artificial intelligence relates to whether fraud has occurred, as opposed to the risk of prejudice to the maintenance of the law involved in investigating that alleged offending as is required to satisfy the exception.¹¹⁹ Accordingly, investigators are not exercising the required human judgement when applying the “prejudice to the maintenance of the law” exception and are therefore not acting consistently with the Code.¹²⁰

Secondly, by applying a blanket policy to obtain information from third parties, the Ministry has collected disproportionate amounts of information on benefit recipients under investigation.¹²¹ The Ministry has a practice of making broad requests for highly sensitive information including several months of text records and several years of bank records.¹²² Relationship status investigations often involve significant intrusions into benefit recipients’ private lives,¹²³ including contacting their neighbours, service providers, children’s schools and accessing their hospital and phone records.¹²⁴ These intrusions are ostensibly justified because the person is receiving taxpayer money and therefore the state assumes responsibility for ensuring it is

114 See *New Zealand Fishing Industry Association Inc v Minister of Agriculture and Fisheries* [1988] 1 NZLR 544 (CA) at 552.

115 Privacy Commissioner, above n 47, at [4.3]–[4.6].

116 See *M v S* [2003] NZAR 705 (HC) at 716–717.

117 Privacy Commissioner, above n 47, at [4.4].

118 At [4.5].

119 At [4.5].

120 At [4.3]–[4.6].

121 At 5–6.

122 At [3.19]–[3.22], [5.16] and [5.23].

123 Joychild, above n 22, at 4.

124 Ministry of Social Development, above n 52, at 3–4.

claimed legitimately. In an investigation, the Ministry contacts on average 18 third parties before approaching the benefit recipient or notifying them of the investigation.¹²⁵ The Privacy Commissioner condemned this practice, stating it was “excessive [and] disproportionate to the Ministry’s legitimate needs and inconsistent with the Ministry’s legal obligations”.¹²⁶

The Ministry does not have “an unfettered power” to investigate benefit recipients’ relationship status.¹²⁷ It must collect information consistently with the NZBORA, in particular the “right to be secure against unreasonable search or seizure”.¹²⁸ There is arguably a distinction between benefit recipients’ personal financial information (which may be relevant) and intimate information “that touches a biographical core of personal information” (for example, requests for text messages and diaries).¹²⁹ Concerns about breaches of s 21 of the NZBORA are likely to arise when the Ministry requests the latter.¹³⁰ Some commentators may argue the breach of s 21 is justifiable under s 5 of the NZBORA because it is necessary to obtain all possibly relevant information to protect the integrity of the welfare system and the public purse.¹³¹ However, I posit that this aim cannot justify an unreasonable intrusion into the privacy of benefit recipients such that it is legitimate to collect a woman’s birthing records (including the specific procedures required), domestic violence reports from previous relationships or intimate pictures benefit recipients sent via text.¹³²

This argument is further strengthened by the fact that only 20 per cent of investigations undertaken result in the Ministry establishing an overpayment and a finding of marriage-type relationship fraud.¹³³ This means the Ministry subjects 80 per cent of investigated benefit recipients to unnecessary and unreasonable intrusions into their personal lives. As Janet Mosher and Joe Hermer argue, “[s]imply being on social assistance results in one being

125 Privacy Commissioner, above n 47, at [3.16].

126 At 5.

127 At [5.13]–[5.14].

128 Section 21.

129 See Privacy Commissioner, above n 47, at [1.24] and [1.27]–[1.28].

130 At [1.27]–[1.28].

131 *R v Hansen* [2007] NZSC 7, [2007] 3 NZLR 1 at [104].

132 See Privacy Commissioner, above n 47, at [5.2]–[5.4] and [5.19]–[5.23].

133 Fleming, above n 59.

positioned as a penal object in a climate of moral condemnation, surveillance, suspicion and penalty”.¹³⁴

IV BASKET TWO: RELATIONSHIP STATUS DETERMINATIONS

After an investigation has been completed, Ministry caseworkers and investigators assess the evidence and make determinations about whether the benefit recipient is in a relationship in the nature of marriage. As previously mentioned, the Court of Appeal decision in *Ruka* governs how these determinations are made. There appear to be three main types of situations in which contentious relationship status determinations are made: (1) where the benefit recipient is living with a flatmate (who is deemed to be their de facto partner); (2) where the benefit recipient is living apart from their de jure or de facto partner; and (3) where the benefit recipient is in a “relationship”, but domestic violence (or other negating factors) mar this “relationship”. In the following section, I will assess the “bureaucratic impact”¹³⁵ of *Ruka* on the current decision-making process of the Ministry and the SSAA, and limitations of the law in respect of these three contentious scenarios.

Interpretations and Applications of the Law

The legal test for a relationship in the nature of marriage, as set out in s 8(4) of the SSA 2018 and *Ruka*, is subject to inconsistent, arbitrary and unpredictable interpretations.¹³⁶ MacLennan argues the test provides a weak platform for making these crucial decisions because it is “open to different good-faith interpretations by officials and beneficiaries alike”.¹³⁷ It is unclear how benefit recipients are

134 See generally Janet Mosher and Joe Hermer *Welfare Fraud: The Constitution of Social Assistance as Crime* (Law Commission of Canada, July 2005) at 9.

135 See generally Marc Hertogh and Simon Halliday (eds) *Judicial review and bureaucratic impact: international and interdisciplinary perspectives* (Cambridge University Press, Cambridge, 2004). This theory is usually employed to assess the impact of judicial review cases. When assessing the bureaucratic impact of a decision, Lorne Sossin argues that “[t]here is good cause to be suspicious of the assumption that, once a court has issued a ruling, public officials simply comply with it”: Lorne Sossin “The Politics of Soft Law: How Judicial Decisions Influence Bureaucratic Discretion in Canada” in Hertogh and Halliday at 130.

136 In the Australian context, see Tamar Hopkins “Divorcing Marital Status from Social Security Payments” (2005) 30(4) *Alt LJ* 189 at 192.

137 Catriona MacLennan *Kathryn’s Story: How the Government spent well over \$100,000 and 15 years pursuing a chronically-ill beneficiary mother for a debt she should not have* (Child Poverty Action Group, June 2016) at 50.

expected to determine their relationship status confidently under the legal framework when the test remains unclear, even amongst Ministry employees and Judges.

Two decisions, by the SSAA and the BRC respectively, demonstrate that relationship status determinations in similar factual situations can result in markedly different outcomes. In *An appeal against a decision of the Benefits Review Committee* [2017] NZSSAA 20, the female appellant, who suffered significant mental health conditions and received a single benefit, was living with a supportive male flatmate who was homosexual.¹³⁸ The Ministry claimed their relationship was one in the nature of marriage due to the emotional and financial support present, although conceding there was no evidence of sexual intercourse.¹³⁹ The SSAA found, however, that this was gross distortion of their friendship.¹⁴⁰ It instead held that while there was “no doubt that the Appellant and [her flatmate] had a supportive relationship”, this was the case for “many people who do not have a relationship in the nature of marriage”.¹⁴¹ This decision meant the overpayment of \$103,838.06 against the appellant was discharged.¹⁴²

In contrast, in 2019, the Ministry and the BRC determined a benefit recipient (Ms Eyre — 62 years old) and her flatmate (Mr Modderman — 68 years old) were in a relationship in the nature of marriage because “they lived together, went on holidays together and emotionally supported each other”.¹⁴³ As a result, the woman’s benefit was reduced from \$448 to \$227 per week and they were both ordered to repay over \$150,000 in fraudulently claimed benefit payments.¹⁴⁴ As was the case in [2017] NZSSAA 20, Eyre and Modderman recognised they had a supportive friendship but were adamant they did not financially support each other and were not intimately involved.¹⁴⁵ It seems the Ministry’s only evidence that the pair were intimate was the statement from an anonymous witness, who claimed they saw Eyre and Modderman leaving a bedroom together while

138 *An appeal against a decision of the Benefits Review Committee* [2017] NZSSAA 20 at [39] and [43].

139 At [10].

140 At [64].

141 At [86].

142 At [141].

143 Isaac Davison “You can’t be friends with anybody any more’: Flatmates say Winz thought they were lovers and cut their welfare” *The New Zealand Herald* (New Zealand, 25 November 2019).

144 Isaac Davison “Auckland flatmates fail to overturn Work and Income ruling that they are lovers, face hefty bill of \$150,000” *The New Zealand Herald* (New Zealand, 24 January 2020).

145 Davison, above n 143, and Davison, above n 144.

Modderman was wearing pyjamas.¹⁴⁶ This case demonstrates the hyper-surveillance and policing of poorer people’s personal lives. Arguably, the only substantial difference between this case and [2017] NZSSAA 20 was that the sexuality of the male flatmate played a role in the former. The presumptive heterosexuality of Eyre and Modderman led the BRC to interpret their platonic friendship through the rubric of traditional marriage.

Determinations about the Beginning and End of a Relationship

People receiving benefits are required to notify the Ministry immediately about “changes to [their] living situation such as starting or ending a relationship similar to marriage”.¹⁴⁷ However, unlike marriage, it is often difficult for people in de facto relationships to determine a date on which their relationship became one in the nature of marriage.¹⁴⁸ This is because de facto relationships exist on a “continuum with enormous variation between couples as to their personal arrangements and nature of their commitment”.¹⁴⁹ Additionally, a person’s relationship status “is not a fixed state”; rather, people often go in and out of relationships throughout their lifetime.¹⁵⁰ In contrast, it is straightforward to determine when a de jure relationship (either a marriage or civil union) commenced because there is a legal contract to substantiate this date.¹⁵¹

On the other hand, it is sometimes just as difficult to determine when relationships end — both de jure and de facto.¹⁵² The factual assessment undertaken by the Ministry about the end of a relationship is the same for both de jure and de facto relationships.¹⁵³ The requirements are that benefit recipients live apart from their former partner¹⁵⁴ and repudiate those “obligations inherent in the matrimonial relationship”.¹⁵⁵ The Ministry’s guidelines warn that caseworkers “can only pay a single or sole parent rate of benefit if the relationship has

146 Davison, above n 143.

147 *Ministry of Social Development v Bray* [2017] NZDC 6587 at [6].

148 Healey and Curtin, above n 35, at 12; and CPAG, above n 88, at 17–19.

149 Joychild, above n 22, at 5.

150 Eric Krassoi Peach and Jacinta Cording *Multiple disadvantage among sole parents in New Zealand* (Social Policy Evaluation and Research Unit, Wellington, 2018) at 13.

151 Joychild, above n 22, at 5; and Māmari Stephens “*Ruka v Department of Social Welfare*” in Elisabeth McDonald and others (eds) *Feminist Judgments of Aotearoa New Zealand Te Rino: A Two-Stranded Rope* (Hart Publishing, Portland, 2017) 94 at 96.

152 Stephens, above n 9, at 156.

153 *Benseman v Baall* [2007] NZFLR 127 (HC) at [34] as cited in Stephens, above n 9, at 156.

154 SSA 2018, s 8(2)(a).

155 *Excell v Department of Social Welfare* [1991] NZFLR 241 (HC) at 246 as cited in Stephens, above n 9, at 156–157.

genuinely ended”.¹⁵⁶ For married benefit recipients, simply living in separate homes may not be sufficient to demonstrate they are no longer in a relationship.¹⁵⁷ It may require one party of the married couple to completely abandon the other (and their children) and leave the country.¹⁵⁸ I argue that it is then problematic that ss 8(3) and 8(5) of the SSA 2018 allow the Ministry to make these determinations about the beginning and end of a relationship on behalf of benefit recipients.¹⁵⁹

Ministry of Social Development v Marks and *An appeal against a decision of the Benefits Review Committee* [2016] NZSSAA 84 demonstrate the Ministry’s (and the courts’) reluctance to view married couples as separated.¹⁶⁰ In *Marks*, Mrs Marks and Mr Marks argued that the benefit application forms were confusing and they truly believed they were separated according to the ordinary meaning of the word.¹⁶¹ After separating, they lived separate lives and had separate finances but Mr Marks occasionally stayed overnight in a spare room for the sake of their children.¹⁶² Saunders J held, however, “there can be no confusion over what it means to be single” and found them guilty of benefit fraud.¹⁶³ In [2016] NZSSAA 84, the appellant allowed her former husband (who was violent towards her) to stay in a sleepout on the same property as her for the sake of their children.¹⁶⁴ The SSAA found they were not sufficiently living apart to repudiate their marriage and therefore the appellant had committed benefit fraud.¹⁶⁵

Both of these cases demonstrate the unique position of sole mothers receiving a benefit. If they attempt to foster their children’s relationship with their father,¹⁶⁶ they risk committing benefit fraud even though they may need their benefit to financially support their

156 Work and Income “Clients living in a de facto relationship” <www.workandincome.govt.nz>.

157 See *An appeal against a decision of the Benefits Review Committee* [2005] NZSSAA 64; *An appeal against a decision of the Benefits Review Committee* [2004] NZSSAA 116; and *An appeal against a decision of the Benefits Review Committee* [2012] NZSSAA 36 as cited in Stephens, above n 9, at 156–157.

158 For example, see *An appeal against a decision of the Benefits Review Committee* [2018] NZSSAA 53. For further discussion on this issue, see John Hughes “Lone Parents and Social Security” (2005) 36 VUWLR 1 at 18–19.

159 Stephens, above n 9, at 156.

160 *Ministry of Social Development v Marks* [2016] NZDC 1741; and *An appeal against a decision of the Benefits Review Committee* [2016] NZSSAA 84.

161 *Marks*, above n 160, at [74]; and see also [2016] NZSSAA 84, above n 160, at [51]–[52].

162 *Marks*, above n 160, at [24].

163 At [78].

164 [2016] NZSSAA 84, above n 160, at [9].

165 *Marks*, above n 160, at [52].

166 As they are required to in other areas of the law, such as family law: see Vivienne Elizabeth “Custody stalking: A mechanism of coercively controlling mothers following separation” (2017) 25(2) Fem Leg Stud 185 at 189.

children. Khylee Quince further complicates this picture in relation to Māori women. As Olive Brown notes, Quince argues that “in tikanga Māori, an ex-partner is likely to be included within the whanau framework due to their shared descendants and enduring obligations of whanaungatanga”.¹⁶⁷ The policy and statutory context only allows for black and white determinations of the existence of a relationship. It does not provide a middle ground for relationships that have freshly started or ended, and no guidance is provided to benefit recipients (or Ministry employees) on when and how “dating turn[s] into a financially dependent relationship”.¹⁶⁸

Exercise of Discretion and the Ministry of Social Development’s Guidelines and Practices

Sections 8(2) and 8(4) of the SSA 2018 provide the Ministry with discretionary powers to determine benefit recipients’ relationship status. I argue that the majority decision in *Ruka* (of Richardson P, Blanchard and Thomas JJ) did not sufficiently consider or recognise the broad discretionary nature of the Ministry’s powers when making relationship status determinations.¹⁶⁹ Instead, their judgment focused on assessing whether a relationship in the nature of marriage existed.¹⁷⁰ However, even after this assessment, the broad nature of the discretion granted to the Ministry under the SSA 2018 allows the decision maker “to regard the applicant as single for the purposes of benefit entitlement”.¹⁷¹ The Judges (and the Ministry) failed to address the proper use of discretion in this context. Henry J, delivering the minority judgment in *Ruka*, recognised and articulated the two-step discretionary nature of the statutory test. He stated the decision maker must first decide whether “the relationship in fact exists, and then a further decision whether or not to exercise [their] discretion to regard the parties as husband and wife”.¹⁷²

To curb inappropriate and arbitrary exercises of discretion, caseworkers rely on Ministry guidelines and policy manuals to aid in the exercise of their discretion under s 8 of the SSA 2018.¹⁷³ Official

167 Khylee Quince *Section 27 Cultural Report* (Unpublished report, 2018) as cited in Olive Brown “Benefiting Women? An inquiry into the prosecution of women in violent relationships receiving the Sole Parents Support Benefit” (LLB (Hons) Seminar Paper, University of Auckland, 2019) at 20.

168 Healey and Curtin, above n 35, at 12.

169 Stephens, above n 9, at 160–161.

170 At 160–161.

171 At 160–161.

172 *Ruka* (CA), above n 2, at 168.

173 Wiseman, above n 5, at 975; and Brown, above n 167, at 9.

guidelines are “soft law” as they are not legally binding.¹⁷⁴ Rather, these guidelines simplify the legal test provided by *Ruka* to make it workable for caseworkers and the everyday decision-making process.¹⁷⁵ The Work and Income website provides guidance to benefit recipients on how the Ministry determines their relationship status, stating that a relationship in the nature of marriage:¹⁷⁶

[M]eans you and your partner have a degree of companionship that includes being:

- emotionally committed to each other for the foreseeable future, and
- financially interdependent.

These overarching guidelines are followed by a series of bullet points:

To give you a better idea of what we mean by this, think about whether your relationship includes some of these things:

- you live together at the same address most of the time
- you share responsibilities, eg bringing up children (if any)
- you socialise and holiday together
- you share money, bank accounts or credit cards
- you share household bills
- you have a sexual relationship
- people think of you as a couple
- you give each other emotional support and companionship
- your partner would be willing to financially support you if needed.

While the overarching guidelines are framed in a way that is ostensibly *Ruka*-consistent, the bullet points that follow look substantially similar to the checklist articulated in *Thompson v*

174 Soft laws are “a range of non-legislative guidelines, rules and administrative policies”: see Sossin, above n 135, at 130.

175 Wiseman, above n 5, at 975.

176 Work and Income “Are you in a relationship?” <www.workandincome.govt.nz>.

Department of Social Welfare,¹⁷⁷ which was overturned by *Ruka*. Furthermore, in practice the Ministry’s current guidelines still operate as “an arbitrary checklist” for Ministry caseworkers.¹⁷⁸ It is important that the guidelines simplifying the Court’s decision are accurate because, while they are not binding, they arguably create a “legitimate expectation”¹⁷⁹ that they will be followed by the Ministry.¹⁸⁰

The Court of Appeal in *Ruka* acknowledged that a checklist may provide “assistance in deciding some cases”.¹⁸¹ However, Thomas J in *Ruka* warned there were dangers with a checklist approach, in that the key elements of the relationship may not receive the appropriate weight required.¹⁸² Crucially, the willingness of the parties to financially support each other may not be given sufficient weight.¹⁸³ Further, under the checklist approach, too much weight may be given to less crucial factors such as the existence of a sexual relationship and how the outside world perceived the relationship.¹⁸⁴ The Court in *Ruka* instead emphasised the importance of the statutory context and the purpose of the legislation when conducting their two-part test of financial support and emotional commitment.¹⁸⁵

Below, I argue that: (1) the factors that contribute to a finding of financial interdependence stipulated in the Ministry’s guidelines are premised on patriarchal and heteronormative notions; and (2) evidence of domestic violence is systematically devalued and ignored in the Ministry’s relationship status decisions.

1 *Financial interdependence*

Blanchard J explains that financial interdependence amounts “to a willingness to [financially] support, if the need exists”.¹⁸⁶ Ministry guidelines state that financial interdependence is not only demonstrated by evidence “that the financial support already exists”; rather, all that is required to satisfy this limb is a “willingness” to support their partner “if needed” in the future.¹⁸⁷ Jessica Wiseman

177 *Thompson v Department of Social Welfare* [1994] 2 NZLR 369 (HC) at 373.

178 Healey and Curtin, above n 35, at 11–12.

179 See *CCSU*, above n 75, at 401.

180 Lorne Sossin “The Rule of Policy: Baker and the Impact of Judicial Review on Administrative Discretion” in David Dyzenhaus (ed) *The Unity of Public Law* (Hart Publishing, Oxford, 2004) at 94.

181 *Ruka* (CA), above n 2, at 161.

182 At 184.

183 Joychild, above n 22, at 41.

184 Hughes, above n 4, at 115–116.

185 *Ruka* (CA), above n 2, at 161 and 182–183.

186 At 161.

187 Work and Income “Financial interdependence” <www.workandincome.govt.nz>.

posits that this is a slight misinterpretation of *Ruka*, which emphasised a “present” and “available” willingness to support.¹⁸⁸

The requirement of financial interdependence is a conceptually problematic tool for determining relationship status.¹⁸⁹ Finances in relationships can be managed in various ways.¹⁹⁰ However, the current legal framework assumes new partners of benefit recipients will financially support them and their children,¹⁹¹ even though this is legally unenforceable.¹⁹² This assumption is premised on traditional, heteronormative conceptions of relationships, where women were financially dependent on their male partners.¹⁹³ Moreover, this assumption may negatively impact female benefit recipients in these relationships because it creates a structure of dependency that may leave them vulnerable and indebted to their new partner.¹⁹⁴

Female benefit recipients prosecuted for marriage-type benefit fraud have expressed concern about whether their relationships were “sufficiently strong” to rely on their new partner to support their children from previous relationships.¹⁹⁵ In contrast, some couples in less serious, “girlfriend-boyfriend” relationships may be in a position to financially support each other if needed, but it would be a “distortion” to characterise their relationship as one in the nature of marriage.¹⁹⁶ Arguably, it is the same for close friendships where one friend financially relies on another during a period of hardship but the nature of their friendship does not change to marriage.

Analysing how the Ministry and the SSAA assess financial interdependence sheds further light on this problematic concept. The Ministry has recently used evidence that a benefit recipient’s partner had authority over their television accounts to demonstrate financial interdependence.¹⁹⁷ It argued that the partner’s “readiness to claim responsibility for [the Sky TV account] shows a commitment by him

188 Wiseman, above n 5, at 983; and *Ruka* (CA), above n 2, at 161.

189 At 995.

190 *Ruka* (CA), above n 2, at 167; and see generally Vivienne Elizabeth “Managing money, managing coupledom: a critical examination of cohabitants’ money management practices” (2001) 49(3) *Sociol Rev* 389.

191 Healey and Curtin, above n 35, at 10. *Cameron v R* [2015] NZCA 363 at [76] held that financial independence also amounts to a willingness to support the benefit recipient’s children.

192 Wiseman, above n 5, at 997; and Hopkins, above n 136, at 191.

193 Healey and Curtin, above n 35, at 8; and Hopkins, above n 136, at 190.

194 Healey and Curtin, above n 35, at 10.

195 *Ghanbari v Ministry of Social Development* HC Auckland CRI 2007-404-0004, 2 September 2008 at [14]; and *Ministry of Social Development v Cleary* [2016] NZDC 3095 at [35].

196 Wiseman, above n 5, at 996.

197 See *An appeal against a decision of the Benefits Review Committee* [2018] NZSSAA 39 at [26.5]; *An appeal against a decision of the Benefits Review Committee* [2018] NZSSAA 38 at [23.5]; and [2017] NZSSAA 62, above n 77, at [30] and [50].

to provide both financially and emotionally for Ms XXXX and his family”.¹⁹⁸ In [2017] NZSSAA 25, the Ministry tried to argue that a payment of \$792 to the benefit recipient demonstrated financial interdependence.¹⁹⁹ In [2017] NZSSAA 62, the Ministry submitted that a benefit recipient’s grocery bills were not enough “for a family of four” and her partner must have been financially supporting her by providing the extra food needed.²⁰⁰ These cases illustrate the minute details the Ministry obtains in order to demonstrate financial interdependence, without considering the financially precarious position of the benefit recipient overall.

2 Domestic violence

The majority in *Ruka* held relationships marred by domestic violence do not meet the level of emotional commitment required to be considered in the nature of marriage.²⁰¹ Ms Ruka suffered “vicious and regular beatings and rapes” at the hands of her abuser (“partner”), who also isolated her from her friends and family and often threatened her with a gun.²⁰² Her “relationship” was characterised as similar to a “master and slave relationship”.²⁰³ Julia Tolmie and others argue that domestic violence needs to be conceptually understood “as a gendered pattern of harm that operates as a form of social entrapment”.²⁰⁴ Domestic violence includes coercive and controlling behaviours that come in many interconnected forms including physical or sexual abuse, financial abuse (where money and resources are withheld from the female benefit recipient and controlled by the male partner)²⁰⁵ and psychological abuse (where the woman is isolated, destabilised and manipulated).²⁰⁶

In the context of relationship status determinations, it is essential for the Ministry to recognise the impact of domestic violence

198 [2017] NZSSAA 25, above n 94, at [30].

199 At [49]. The SSAA held that this did not amount to financial support.

200 At [48].

201 *Ruka* (CA), above n 2, 162–163 and 182–184.

202 Hughes, above n 4, at 109; and see *Ruka* (CA), above n 2, at 157–158 and 174–177 for a detailed summary of the domestic violence suffered by Ms Ruka.

203 *Ruka* (CA), above n 2, at 176.

204 Julia Tolmie and others “Social Entrapment: A Realistic Understanding of the Criminal Offending of Primary Victims of Intimate Partner Violence” (2018) 2 NZ L Rev 181 at 184.

205 Patricia Eastaer and Derek Emerson-Elliott “Domestic Violence and Marriage-like Relationships: Social Security law at the crossroads” (2009) 34(3) Alt LJ 173 at 173.

206 Tolmie and others, above n 204, at 187. For the definition of psychological abuse, see Family Violence Act 2018, s 11.

because it changes how it should interpret “objective” facts. As Thomas J explains:²⁰⁷

... the fact that the parties may be said to have a sexual relationship loses its significance as an indicia of marriage if the woman’s consent to sexual intercourse is coerced and she is regularly raped. Nor can it properly be concluded that the woman is offering the man emotional support and companionship when any such apparent support is induced by the man’s violence and can more accurately be described as “traumatic bonding”. The fact that the parties may socialise together and attend activities and go on holidays as a couple would also need to be given less weight when the wife’s involvement is compelled by fear of the man’s irrational violence.

More specifically, the act of committing marriage-type relationship fraud takes on a different meaning when the female benefit recipient does it “in order to pay for rent and food when their abusive partner refuses to financially support them and their children and/or undermines their own capacity to provide that support”.²⁰⁸

Ms Ruka experienced an extreme level of violence. An interrogation of subsequent relationship status determinations reveals that the Ministry (and indeed the SSAA) view the level of domestic violence in *Ruka* as an exceptional case.²⁰⁹ I argue that, in practice, *Ruka* is used to minimise and factually distinguish other instances of domestic violence. The Ministry (and SSAA) do this by assessing the severity of the violence in the particular case, comparing it to the level experienced by Ms Ruka and concluding it was not severe enough.²¹⁰ For example, in *An appeal against a decision of the Benefits Review Committee* [2016] NZSSAA 84, the SSAA stated they were “not satisfied that the appellant was subject to the type of unremitting violence considered in the case of *Ruka v Department of Social Welfare* which might negate the proposition of a continuing marriage relationship”.²¹¹

This practice illustrates a complete disregard for the majority reasoning in *Ruka* and lack of understanding about the impacts of

207 *Ruka* (CA), above n 2, at 182; see also *Department of Social Welfare v Te Moananui DC Henderson* CRN 5090016020-21, 5090015857-60, 18 March 1996 at 7.

208 Tolmie and others, above n 204, at 182.

209 Sleep, above n 46, at 8 and 10 came to a similar conclusion.

210 At 8, 10, 20 and 51. See, for example, [2017] NZSSAA 20, above n 139, at [113]; [2017] NZSSAA 25, above n 95, at [34]; *An appeal against a decision of the Benefits Review Committee* [2015] NZSSAA 84, at [69]; and *An appeal against a decision of the Benefits Review Committee* [2015] NZSSAA 1 at [19].

211 [2016] NZSSAA 84, above n 161, at [48].

abuse on women in violent relationships.²¹² The extent of violence and abuse suffered by the benefit recipient is not relevant to the decision.²¹³ It appears no publicly available SSAA decision has held that the level of violence experienced by a benefit receipt was “severe enough” to negate the existence of a relationship.²¹⁴

Further, the Ministry and the SSAA have used the absence of police reports and protection orders as evidence that the violence did not meet the same standard as in *Ruka*.²¹⁵ Lyndal Sleep astutely observed “[i]t is not clear what would be regarded as severe enough abuse to be considered comparable to that in *Ruka*”.²¹⁶ The appellant in [2015] NZSSAA 84 was repeatedly choked by her male partner, who was even prosecuted for assaulting her.²¹⁷ However, this was still held to be an insufficient level of violence.²¹⁸ Sleep argues this was because the SSAA viewed her as a provocateur who encouraged these violent attacks.²¹⁹

It could reasonably be argued that by denying domestic violence victims/survivors access to independent financial support (through single rate benefits), the Ministry compounds the harm of social entrapment.²²⁰ It becomes “part of the abusive apparatus” by reinforcing women’s dependency on violent male partners,²²¹ “financially entrap[ping]” them in vulnerable and abusive situations.²²² Domestic violence victims/survivors are at their most vulnerable when they attempt to leave their relationship.²²³ But the Ministry, by denying them access to sufficient financial support, limits their means to escape.

There are at least two areas in which domestic violence should be accounted for as a vitiating factor in relationship status determinations. First, domestic violence should be considered when assessing the emotional commitment present in the relationship. This

212 See Easteal and Emerson-Elliott, above n 205, at 175.

213 Stephens, above n 9, at 100–101.

214 Sleep, above n 46, at 51 and 55.

215 At 20. See, for example *An appeal against a decision of the Benefits Review Committee* [2010] NZSSAA 65 at [54]; *An appeal against a decision of the Benefits Review Committee* [2003] NZSSAA 62 at [10] and [40]; [2016] NZSSAA 84, above n 172, at [48]; and CPAG, above n 88, at 17–19. See generally Lyndal Sleep “Entrapment and institutional collusion: Domestic violence police reports and the ‘couple rule’ in social security law” (2019) 44(1) *Alt LJ* 17.

216 Sleep, above n 46, at 20 and 51.

217 [2015] NZSSAA 84, above n 210, at [67].

218 At [76].

219 Sleep, above n 46, at 51–52.

220 See Tolmie and others, above n 204.

221 Brown, above n 167, at 19.

222 Sleep, above n 46, at 5; and Hopkins, above n 136, at 192.

223 Family Violence Death Review Committee *Fifth report data: January 2009 to December 2015* (Wellington, 2017) at 37.

is how the majority in *Ruka* dealt with the evidence of domestic violence.²²⁴ Under this avenue, it is the extent to which “violence affects the relationship’s fundamental characteristics”²²⁵ that must be considered when determining whether the benefit recipient possessed “the requisite mental and emotional commitment to the relationship”.²²⁶ Secondly, domestic violence should be accounted for when exercising the decision maker’s discretion under s 8. After deciding whether a relationship in the nature of marriage existed, the decision maker has the discretion (taking into consideration the individual position of the benefit recipient) to determine that the presence of domestic violence vitiates the relationship.²²⁷

V BASKET THREE: CONSEQUENCES OF RELATIONSHIP STATUS DECISIONS

Benefit recipients face several adverse consequences if the Ministry determines they have committed benefit fraud by failing to declare themselves as being in a relationship in the nature of marriage. These consequences include fines, debt, prosecution and imprisonment.²²⁸ The Ministry may also suspend or terminate a person’s benefit if it establishes that the person is ineligible to receive that support.²²⁹

Criminal Prosecution

Benefit recipients who commit marriage-type relationship fraud, by supplying incorrect information about their relationship status (or by failing to update this status) may be prosecuted under either the SSA 2018 or the Crimes Act 1961.²³⁰ Joychild notes most benefit recipients who are prosecuted for marriage-type relationship fraud “drift into” these situations, rather than intentionally committing a “premeditated”

224 Ministry of Social Development, above n 111, at 4.

225 Hughes, above n 31, at [10].

226 *Ruka* (CA), above n 2, at 183.

227 See *Tolmie and others*, above n 204, at 183; and in an Australian context, see *Eastale and Emerson-Elliott*, above n 205, at 174.

228 Work and Income “Relationship changes” <www.workandincome.govt.nz>.

229 See SSA 2018, ss 306–307. The Ministry now requires two seniors staff members to sign off on a decision to terminate any benefit. See Carmel Sepuloni “Changing face of Work and Income launched today” (press release, 26 June 2018).

230 Ministry of Social Development *Induction to the Ministry of Social Development and Fraud Intervention Services Training Manual: Offences* at 2–5 in “Benefit fraud investigation process and domestic violence” (13 November 2020) (obtained by R Gavey under Official Information Act 1982 request to the Ministry of Social Development); SSA 2018, s 290; and Crimes Act 1961, ss 228(1), 240 and 241(a).

offence.²³¹ For instance, many women honestly believe they are not in a de facto relationship in the nature of marriage, which calls into question the mens rea of these crimes.²³² Unintentionally failing to declare a new relationship due to a lack of understanding is very different from purposefully claiming an unemployment benefit while still working, for example.²³³

In 2014, a new offence was created for spouses or partners who knowingly benefit from marriage-type relationship fraud.²³⁴ Before this offence, only the party in receipt of the benefit was liable for prosecution.²³⁵ This created inequities because, as Associate Social Development Minister Chester Borrows MP noted, “[r]elationship’ welfare fraud is different from most fraud in that it can by definition only be committed by two people”.²³⁶ This offence now covers situations where a former partner “dobs in” the benefit recipient for fraud even though they gained a pecuniary advantage from the benefit fraud themselves and may have even coerced their partner to fraudulently claim a benefit in the first place.²³⁷

The Ministry has discretionary power to decide whether to prosecute a person for marriage-type relationship fraud.²³⁸ In May 2018, the Ministry established the Fraud Prosecution Review Panel.²³⁹ Members of this Panel make the final decision as to whether to prosecute each case of benefit fraud.²⁴⁰ When deciding, the Panel considers whether there is sufficient evidence to “provide a reasonable prospect of conviction” and whether prosecution is in the interests of the public.²⁴¹ The purpose of prosecution is “to deter not only [the individual in question] but others who may similarly feel that they can act dishonestly in terms of their benefit”.²⁴²

The Ministry’s approach to prosecuting benefit fraud has changed over recent years. In 2011, the Ministry stated: “[w]here we

231 Joychild, above n 22, at 8 and 66.

232 Brown, above n 167, at 4–5; and Healey and Curtin, above n 35, at 13.

233 Healey and Curtin, above n 35, at 13; and in a Canadian context see also, Mosher and Hermer, above n 134, as cited in Morton and others, above n 33, at 122.

234 SSA 2018, s 291; and Social Security (Fraud Measures and Debt Recovery) Amendment Act 2014, s 13.

235 Chester Borrows “New welfare fraud measures come into force” (press release, 7 July 2014).

236 Borrows, above n 235.

237 St John and others, above n 29, at 15.

238 See Ministry of Social Development *Prosecution Policy* at 2.

239 Letter from George Van Ooyen (Group General Manager Client Service Support) to Anonymous regarding Funding for the fraud investigation team over the last three financial years (20 December 2019) at 2 (obtained under Official Information Act 1982 request to the Ministry of Social Development).

240 At 2.

241 At 2.

242 *Ministry of Social Development v Meynell* [2019] NZDC 6247 at [6].

find evidence of fraud, we prosecute.”²⁴³ This represented a tough stance against benefit fraud, which was viewed as a “major crime against the public, one that is deserving of widespread moral condemnation and intensive policing and punishment”.²⁴⁴ In the 2014/15 financial year, the Ministry successfully prosecuted 319 people for marriage-type relationship fraud and completed 958 successful benefit fraud prosecutions.²⁴⁵ In the 2017/2018 financial year, the Ministry only successfully prosecuted 180 benefit recipients for marriage-type relationship fraud and completed only 291 overall prosecutions.²⁴⁶ In March 2020, the Ministry of Social Development Client Service Manager George Van Ooyen stated, “[t]he ministry is now focused on prosecuting only the more serious cases of fraud that, for example, occurred over longer periods or involved bigger overpayments.”²⁴⁷

Benefit recipients convicted of marriage-type relationship fraud have, in the past, received prison sentences. In 2001, Judge Macdonald did not consider the welfare and safety of the benefit recipient’s children when sentencing her to 15 months in prison.²⁴⁸ Child Poverty Action Group argues “[i]t is immensely damaging for children to be separated from their mothers, particularly in the very traumatic circumstances of a jail sentence being imposed”.²⁴⁹ The Ministry now claims to be “conscious that prosecution can negatively impact clients and families who are already in a vulnerable and difficult situation”.²⁵⁰ In recent sentencing judgments between 2017 and 2019, there is some indication that home detention and community work is now preferred over prison time for moderate instances of benefit fraud.²⁵¹ Charlotte Austin notes however that

243 Ministry of Social Development *Annual Report 2010/2011* (October 2011) at 31 as cited in Hutton, above n 72.

244 Mosher and Hermer, above n 134, at 5.

245 Ministry of Social Development, above n 43, at 7.

246 At 7.

247 Sam Kilmister “Benefit fraud prosecutions down in Manawatu” *Stuff* (New Zealand, 16 March 2020). This was confirmed in Ministry of Social Development, above n 52, at 6. See also Stephens, above n 9, at 416.

248 I was unable to locate the District Court decision, but see discussion in MacLennan, above n 137, at 39 and *R v Harlen* (2001) 6 HRNZ 440 (CA).

249 CPAG, above n 88, at 33–34.

250 Ministry of Social Development, above n 6, at 4.

251 See *Meynell*, above n 242, at [7]; *Brown*, above n 93, at [32]; *Ministry of Social Development v Wilson* [2017] NZDC 16662 at [19]; *Ministry of Social Development v Cooper* [2017] NZDC 28693 at [20]; *Bray*, above n 147, at [35]–[36]; and *Ministry of Social Development v Naidanovici* [2017] NZDC 9019 at [17]. See also Stephens, above n 9, at 443; and *Ransom v R* [2010] NZCA 390 at [39] and [42].

while “the imprisonment rate [for benefit fraud] has reduced ... the average prison sentence length has increased”.²⁵²

The discourses in sentencing judgments continue to suggest the system is still embedded with sexism and racism. In *Ministry of Social Development v Chong*, the District Court praised a solo father who committed relationship fraud for his “commitment to bringing up [his] daughter on [his] own”, which the Judge stated he had “done incredibly responsibly”.²⁵³ The Judge also noted the father was someone “who I would not expect to be before the Court for doing this”.²⁵⁴ This contrasts with *Ministry of Social Development v Cooper*, in which the Judge condemned the solo mother for abusing the system,²⁵⁵ stating it “simply amounts to straight-out theft from the community”.²⁵⁶ In 2014, a woman was imprisoned for two years and ordered to pay \$132,000 in reparation.²⁵⁷ The Ministry argued that home detention was not appropriate in that case, claiming “[w]hat would the man on the street think to hear that such serious offending received home detention? My submission is that he would be surprised.”²⁵⁸

Debt Recovery

Instead of prosecution and imprisonment, the Ministry is shifting its focus to internal means of debt recovery and punishment.²⁵⁹ The purpose of debt recovery is “to protect the integrity of the welfare system”.²⁶⁰ Section 362(1) of the SSA 2018 states that the Ministry has a duty “to take all reasonably practicable steps to recover” all benefit fraud debts. The Ministry’s internal policy manuals and

252 Alice Charlotte Austin “Consistency of Sentencing between Welfare Fraud and Tax Evasion: A Longitudinal Comparative Study” (1 May 2017) Social Science Research Network at 28.

253 *Ministry of Social Development v Chong* [2018] NZDC 12583 at [5].

254 At [5].

255 *Cooper*, above n 251, at [8].

256 At [9].

257 CPAG, above n 88, at 17–19.

258 At 17–19.

259 See Ministry of Social Development *Induction to the Ministry of Social Development and Fraud Intervention Services Training Manual: Obligations, Reviews and Debt* at 7 in “Benefit fraud investigation process and domestic violence” (13 November 2020) (obtained by R Gavey under Official Information Act 1982 request to the Ministry of Social Development).

260 Ministry of Social Development *Induction to the Ministry of Social Development and Fraud Intervention Services Training Manual: MSD & Fraud History* at 11 in “Benefit fraud investigation process and domestic violence” (13 November 2020) (obtained by R Gavey under Official Information Act 1982 request to the Ministry of Social Development) at 1. These intentions do not translate in the same way to the tax system: see Lisa Marriott “Unpaid Tax and Overpaid Welfare: A Comparison of the Debt Recovery Approaches in New Zealand and Justice and the Justice System” (2014) 20 NZJTL 46.

practice suggest the Ministry seeks to recover the full amount of the established overpayment and does not deduct the benefit recipient's notional entitlement.²⁶¹ Under s 354, the Ministry can impose a penalty of three times the original debt for benefit fraud cases. If the person is still receiving a benefit, the Ministry has the power to deduct up to \$40 per week to repay this debt.²⁶² If the person is no longer receiving a benefit, the Ministry (through the MSD Collections Unit) can recover the money owed from the person's wages and bank account.²⁶³ A recent "relationship debt sharing" law also enables a benefit recipient's partner or former partner to be liable to repay a portion of the debt where they knowingly benefited from the fraud.²⁶⁴

Before 2014, the Ministry had discretion as to whether to recover the debt.²⁶⁵ When exercising this discretion, the Ministry was required to consider "the financial resources of individual debtors ... and the impact of repayments upon such beneficiaries and any dependent children".²⁶⁶ The Ministry now has no power to consider these factors because it is under a positive duty to recover overpayments.²⁶⁷ This duty has very limited exceptions.²⁶⁸ It is common for the debt to burden benefit recipients for the rest of their lives and only a small fraction of debts are realistically able to be paid.²⁶⁹ These debt recovery practices sit in stark contrast to reparation orders in the criminal justice system, where the judge must consider the financial capacity of the offender.²⁷⁰ Often, the judge will not order reparation if the offender cannot repay the debt within five years.²⁷¹

Judge Blackie's warning that "the Ministry has a long memory and they might come calling again sometime in the future" looms over

261 Ministry of Social Development, above n 259, at 7. Notional entitlement is the amount the benefit recipient would have been entitled to during the relevant period. The Ministry's process is at odds with *Ioane v Department of Social Welfare* [1994] 11 CRNZ 489 (HC) and *Cameron*, above n 191. However, Ministry of Social Development, above n 52, at 2 creates uncertainty about the current approach adopted by the Ministry.

262 Ministry of Social Development "Overpayment of benefit resulting from fraud – Doogle" <<http://doogle.ssi.govt.nz>> at 2 in "Documents in the Investigation Unit Training Package" (14 March 2018) (obtained under Official Information Act 1982 request to the Ministry of Social Development); and Welfare Expert Advisory Group *Understanding Benefit Debt* (November 2018) at 5.

263 Ministry of Social Development, above n 262, at 5.

264 SSA 2018, s 359.

265 *Harlen v Ministry of Social Development* [2012] NZHC 669, [2012] NZAR 491 at [35]. See also SSA 1964, s 86.

266 Stephens, above n 9, at 427.

267 St John and others, above n 29, at 36.

268 See SSA 2018, s 444(2)(b).

269 CPAG, above n 88, at 29–31.

270 Sentencing Act 2002, s 33.

271 CPAG, above n 88, at 29–31.

benefit recipients.²⁷² This statement refers to the fact that even if a benefit recipient has been prosecuted, the Ministry “continue[s] to seek recovery of any debt to the Crown regardless of any sentence that may be imposed”.²⁷³ The SSAA accordingly stated “whilst imprisonment is about punishment for [the] offending it does not constitute restitution of [the] debt”.²⁷⁴ This looming shadow of debt has potentially long-term detrimental impacts on a person’s life and that of their children.²⁷⁵ For example, in November 2019, an Auckland woman reportedly owed the Ministry \$188,000 in overpayments, 18 years after spending 18 months in prison for marriage-type relationship fraud when she was 19 years old (even though her partner at the time provided her no financial support).²⁷⁶

VI CONCLUSION

Over 24 years have passed since the Court of Appeal in *Ruka* delivered its seemingly radical judgment. However, an interrogation of the Ministry’s three interconnected baskets of “dirty laundry” (investigations, determinations and consequences) reveals that this judgment has had minimal impact on its operational practices. Serious issues continue to exist at the level of law and policy, as well as the practical level in terms of the Ministry’s implementation of the law. Throughout this article, I have illustrated that the current approach to social security, in which benefit entitlements are based on benefit recipients’ relationship status, is fundamentally flawed on three levels.

First, the Ministry continues to adopt penal policies and investigative practices, thereby misusing their discretion and breaching the NZBORA and natural justice requirements. Secondly, recent relationship status determinations by the Ministry and the SSAA highlight the misapplication of *Ruka*. Decision makers continue to use a checklist approach, which minimises evidence of domestic violence and lack of financial support and fails to reflect the discretionary nature of their statutory decision-making powers. Thirdly, the Ministry’s duty to establish large debts for marriage-type relationship fraud does not afford decision makers the necessary

272 *Wilson*, above n 251, at [23].

273 Ministry of Social Development, above n 259, at 7.

274 See MacLenman, above n 137, at 3.

275 See *St John and others*, above n 29, at 17.

276 Alastair Lynn “Auckland woman owes Government \$188,000 after lying about relationship” *Newshub* (New Zealand, 25 November 2019).

discretion to consider individual circumstances of extreme financial hardship. These debts hang over benefit recipients for the rest of their lives and a high proportion can never pay back the full amount.

It is beyond the scope of this article to critically assess potential options for legal reform. The Welfare Expert Advisory Group recommended the Ministry consider a range of measures to simplify benefit eligibility requirements.²⁷⁷ Further research could explore simplifying the de facto relationship test in line with the Property (Relationships) Act 1976 (which implies that financial interdependence can be assumed after a three year duration),²⁷⁸ reducing the monetary difference between the coupled and single benefit rates,²⁷⁹ or individualising entitlement to benefits, thereby removing the need to investigate and determine benefit recipients' relationship status.²⁸⁰ It is clear that no matter the solution adopted, Aotearoa New Zealand's welfare system urgently requires change.

277 WEAG, above n 37, at 113–118.

278 Section 2E; and Healey and Curtin, above n 35, at 28.

279 WEAG, above n 37, at 10.

280 Brown, above n 167, at 28; and CPAG, above n 88, at 13–14.