

**Inquiry into the  
Ministry of Social Development's  
Exercise of Section 11  
(Social Security Act 1964) and  
Compliance with the Code of Conduct**

**Report by the Privacy Commissioner  
pursuant to section 13(1)(m) of the Privacy Act 1993**

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## Executive summary

### This paper reports on my Inquiry into the Ministry of Social Development's exercise of its information gathering powers under section 11 of the Social Security Act 1964.<sup>1</sup>

In 2018 I was approached by a community group concerned about the Ministry of Social Development's (the Ministry's) information gathering practices when conducting fraud investigations.

I have found that the Ministry's exercise of their information gathering powers is inconsistent with its legal requirements, including the Privacy Act 1993. This failure has resulted in infringements on individual privacy.

The Ministry has powers under the Social Security Act 1964 (section 11) to collect "any information" about a person in receipt of a benefit in order to assess their entitlements – including retrospectively, as is the case with fraud investigations. I recognise the importance of the Ministry being able to investigate potential abuses of the social security system as part of the effective administration of the Social Security Act.

The Ministry's exercise of its information gathering powers is regulated by a Code of Conduct (the Code)<sup>2</sup>, which requires that the Ministry first seek information from a beneficiary client before requiring the production of that information by a third party, unless to do so would prejudice the maintenance of the law. As the Code itself notes this provides some measure of privacy protection, as well as ensuring that individuals are kept informed about the nature of the enquiries being made about them.<sup>3</sup>

In 2012 the Ministry advised its fraud investigation staff that they could bypass the requirement to seek information directly from a beneficiary and instead to go direct to third parties. The Ministry believed that an amendment to the Code enabled this.<sup>4</sup> The Office of the Privacy Commissioner was consulted at the time and supported the amendment but advised the Ministry that we disagreed with its interpretation of the amendment's effect.

The 2012 practice change resulted in the Ministry using its powers to collect large amounts of highly sensitive information about beneficiaries from third parties without approaching those beneficiaries first. Information collected included, but was not limited to, text message content, domestic violence and other Police records, banking records, and billing information from a range of providers.

This change in practice was part of a suite of changes targeting beneficiary fraud. The Ministry has since advised that staff only bypass the beneficiary in certain cases deemed 'high risk'.

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<sup>1</sup> Now set out in Schedule 6 of the Social Security Act 2018.

<sup>2</sup> <https://www.msd.govt.nz/documents/about-msd-and-our-work/about-msd/legislation/code-of-conduct-section-11-ssa.pdf>.

<sup>3</sup> See the Explanatory Note of the Code of Conduct at page 9.

<sup>4</sup> The Ministry believed that by simplifying the definition of 'prejudice to the maintenance of the law' this allowed them to bypass beneficiaries under investigation for fraud in favour of requesting information direct from third parties.

On average per year between 2600 and 2300 fraud investigations are categorised as 'high risk'.<sup>5</sup>

### **The Ministry has acted improperly in its exercise of section 11 powers and infringed on individual privacy**

Since 2012, the Ministry's routine failure to ask beneficiaries for information before approaching third parties has likely impacted thousands of clients. Between 49-64% of investigations<sup>6</sup> each year result in no formal detection of fraudulent activity.<sup>7</sup>

New Zealand's Privacy Act 1993 protects people's ability to determine for themselves when, how, and to what extent their information is shared with others. Requesting information from the person concerned first is an important privacy safeguard – which is reflected in the drafting of section 11 and the Code. Accepting there will be cases where it is appropriate to approach third parties first, allowing people to provide relevant information to the Ministry themselves gives them greater control over their personal information, can assist to ensure that information is accurate, and may prevent the need for more intrusive investigations.

The Code contains additional safeguards around the types of information that can be collected; for example health care workers cannot be asked to provide comment on whether an individual is in a relationship. These safeguards were enacted in 1997 and reflected the limited nature of the data available to the Ministry at the time.<sup>8</sup> The data sources now accessible by the Ministry have increased significantly. For example, in 1997 telecommunication companies did not offer widespread text messaging services or have the capacity to provide clients' location data.

The 2012 practice change provided for the almost unrestricted collection of extensive amounts of highly personal information on a large number of beneficiary clients. This is excessive, disproportionate to the Ministry's legitimate needs and inconsistent with the Ministry's legal obligations and the information privacy principles.

As part of my Inquiry we have interviewed beneficiaries and reviewed fraud investigation files provided by the Ministry. As a result, we have seen cases where individual privacy has been infringed upon. Examples have included:

- Failing to ask beneficiary clients for information before seeking it from a third party leading to inaccurate assessments of the information;<sup>9</sup>

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<sup>5</sup> Numbers have been difficult to ascertain see para 3.5 for further explanation.

<sup>6</sup> N.B. Investigations can be into more than one individual.

<sup>7</sup> N.B. The Ministry notes that as a result of a fraud investigation individuals may have their entitlements changed i.e. their benefit adjusted or revised but no overpayment debt established, or prosecution undertaken. While these actions may result following a fraud investigation they do not result in a formal finding of fraudulent activity.

<sup>8</sup> While the Code of Conduct has been reviewed since 1997 the safeguards have not been amended as a result of any of the reviews. Reviews involve consultation with the Office of the Privacy Commissioner and concerns about the nature of the information available were not made during those reviews.

<sup>9</sup> <https://www.justice.govt.nz/assets/Documents/Decisions/2017-nzssaa-062.pdf>.

- Overly broad requests leading to the provision of unnecessary and sensitive information (e.g. a woman's birthing records);
- Requests for highly sensitive information that may be unreasonable in the circumstances (e.g. every text message sent and received by an individual over lengthy periods); and
- Disproportionate collection of information.

I am disappointed to have to be making this report given this Office's opposition to the 2012 practice change and the repeated calls on the Ministry since 1994 to improve its practices around information gathering and record keeping in fraud investigations from a range of observers.<sup>10</sup> Due to the poor record keeping practices and inconsistencies between fraud teams, we have been unable to establish whether the Ministry has been bypassing beneficiaries in all fraud investigations or only those categorised as 'high risk'. While individual files contain some records of section 11 notices being issued, it is disappointing that the Ministry does not keep centralised records of when and how many section 11 notices are issued by its staff.

I have found that the Ministry has infringed on individual privacy through its improper application of section 11, its disproportionate information gathering practices, and its failure to update its policy or practice around section 11 in line with important jurisprudence and legal developments such as the New Zealand Bill of Rights Act 1990 (the Bill of Rights Act). I note also that the Ministry is required to review the Code every three years, but it has not done so since 2012.

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<sup>10</sup> See Appendices B, C and E.

## Recommendations

### Recommendation one:

The Ministry immediately cease its blanket application of the 'prejudice to the maintenance of the law' exception when issuing section 11/schedule 6 notices.

### Recommendation two:

Without delay, undertake a comprehensive review of the Code in consultation with stakeholders and with consideration given to the findings of this report, including introducing accurate record keeping and limiting the scope and type of information requested under notice, in order to comply with the Bill of Rights Act. The Code should also be reviewed again within 12 months of this review.<sup>11</sup>

### Recommendation three:

Without delay, and in consultation with this Office develop training material and guidance for all fraud investigation teams. Training and guidance should include:

- fraud investigators' obligations under the Code;
- general privacy awareness information;
- Bill of Rights Act obligations; and
- natural justice and procedural fairness obligations.

This training should be developed in light of the State Services Commission's standards on Information Gathering and Public Trust.

### Recommendation four:

The Ministry undertake a review of section 11, in light of recent legal and administrative developments<sup>12</sup> with a particular focus on Bill of Rights Act and search and surveillance jurisprudence, including the Supreme Court decision in *R v Alsford*.<sup>13</sup>

### Recommendation five:

The Decision Support Tool used to assess allegations of beneficiary fraud should be reviewed alongside the process for assessing internal allegations in line with the Ministry's requirements to take reasonable steps to assess the accuracy and completeness of information before use.

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<sup>11</sup> The Privacy Commissioner has the ability to issue his own Code of Practice that would take precedence over the Ministry's Code of Conduct if he considers that the Ministry's review of the Code has failed to provide adequate privacy protections.

<sup>12</sup> For example, see: 'Inquiry into the Use of External Security Consultants by Government Agencies' – Doug Martin and Simon Mount QC 2018.

<sup>13</sup> *R v Alsford* [2017] NZSC 42, [2017] 1 NZLR 710.

## 1.0 Introduction

- 1.1 This report sets out the findings of my Inquiry into the Ministry's exercise of its information gathering powers under section 11<sup>14</sup> of the Social Security Act and compliance with the Code which governs the use of these powers.
- 1.2 In July 2018 a community group contacted me expressing concern about the potential privacy impacts of the Ministry's exercise of its section 11 powers, specifically in regard to fraud investigations. The group was also concerned that the Ministry's practices were inconsistent with the principles of natural justice and procedural fairness. I considered the best approach to address these concerns was under my functions as authorised by section 13 of the Privacy Act and in October 2018 I launched an Inquiry under section 13(1)(m).
- 1.3 I decided to launch an Inquiry to:
- examine potential infringements on individual privacy by the exercise of the Ministry's section 11 powers;
  - establish whether those powers are being exercised in accordance with the Code; and
  - determine whether the Ministry's practices are consistent with the principles in the Privacy Act.<sup>15</sup>
- 1.4 Every person has the right to social security.<sup>16</sup> The Ministry is the lead government agency responsible for providing social services and assistance to young people, working age people, the elderly and whānau. The system is open to abuse and as part of administering these services and support, the Ministry is responsible for maintaining the integrity of the system. It is therefore important and necessary that the Ministry have powers to investigate allegations of fraudulent activity, including the ability to collect certain personal information.
- 1.5 The Ministry receives around 13,000 fraud allegations per year.<sup>17</sup> This is on top of referrals from its intelligence unit, local Work and Income offices, and through information matching programmes. The Ministry's Fraud Investigations Services (fraud team) investigates between 2300 and 5100 fraud cases a year.<sup>18</sup>
- 1.6 The Privacy Act enables agencies to collect, use and disclose information that is necessary and proportionate to their lawful requirements. The Act provides that, in general, information should be collected from an individual directly.<sup>19</sup> Section 11

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<sup>14</sup> Note the section 11 powers are now contained in Schedule 6 of the Social Security Act 2018. They remain unchanged.

<sup>15</sup> See Appendix G – Inquiry Terms of Reference.

<sup>16</sup> We note that a right to social security is also recognised in international law in article 22 of the Universal Declaration of Human Rights and article 9 of the International Covenant on Economic, Social and Cultural Rights.

<sup>17</sup> Average of last four years – data supplied by Ministry.

<sup>18</sup> Numbers have proved difficult to establish see para 3.5 for further explanation.

<sup>19</sup> Section 7 of the Privacy Act provides that an action is not a breach of the requirement to seek information from the individual directly if that action is authorised by law.

provides a mechanism by which the Ministry can compel information from persons other than the individual. Before exercising this power, however, the Ministry is required in the first instance to seek the information required from the individual directly unless there are reasonable grounds to believe that this would 'prejudice the maintenance of the law'.

- 1.7 My findings below demonstrate that the Ministry has wrongfully applied the 'prejudice to the maintenance of the law' exception and since 2012 has instituted a blanket policy of issuing section 11 notices in all cases it describes as 'high risk of fraud'<sup>20</sup> and possibly in all fraud investigations.<sup>21</sup>
- 1.8 The 2012 practice change was based on an analysis by the Ministry showing that in a large number of cases (95%) beneficiaries did not provide the information requested by investigators within the timeframes set by the Ministry, resulting in delays to the investigative process.
- 1.9 The Ministry's adoption of this policy and practice has meant that each year thousands of beneficiaries have had highly intrusive investigations undertaken into their personal affairs, sometimes without their knowledge. The Ministry has a legitimate aim of pursuing individuals who attempt to defraud the public purse. However, this aim cannot warrant unjustified infringement on individual privacy, such as the exercise of a blanket policy. This is particularly so when large numbers of the Ministry's fraud investigations are undertaken into individuals where no fraud is detected (between 49-64%<sup>22</sup> of all fraud investigations).<sup>23</sup>

## Methodology

- 1.10 In undertaking this Inquiry, I:
  - i) issued Terms of Reference;
  - ii) reviewed publicly available information;
  - iii) considered submissions received from public and private sector organisations through meetings and written correspondence with my office;
  - iv) conducted interviews with current and former beneficiary clients;<sup>24</sup>

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<sup>20</sup> A 'high risk' categorisation means that the Ministry thinks a beneficiary is 'high risk' of having committed the alleged fraud, it does not mean that the Ministry considers the beneficiary at 'high risk' of prejudicing the maintenance of the law, e.g. through tampering with evidence.

<sup>21</sup> I note that it has been exceptionally difficult for my staff and the Ministry to accurately ascertain accurate and complete records of the number of individuals affected by this policy, primarily due to the poor record keeping and inconsistent investigative practices nationally by the Ministry.

<sup>22</sup> Numbers have proved difficult to establish see para 3.5 for further explanation.

<sup>23</sup> N.B. The Ministry notes that as a result of a fraud investigation individuals may have their entitlements changed i.e. their benefit adjusted or revised but have no overpayment debt established or prosecution undertaken.

<sup>24</sup> We interviewed approximately seven current or former beneficiaries who had been or were at the time of interview under investigation by the Ministry. We approached a number of beneficiary advocacy groups for referrals to more clients, however these groups reported a strong reluctance on

- v) received documents regarding the policy, procedure and exercise of section 11 provided by the Ministry;
- vi) examined a sample of 17 of the Ministry's fraud investigation files;<sup>25</sup> and
- vii) considered comments received from the Ministry on a draft of this report.

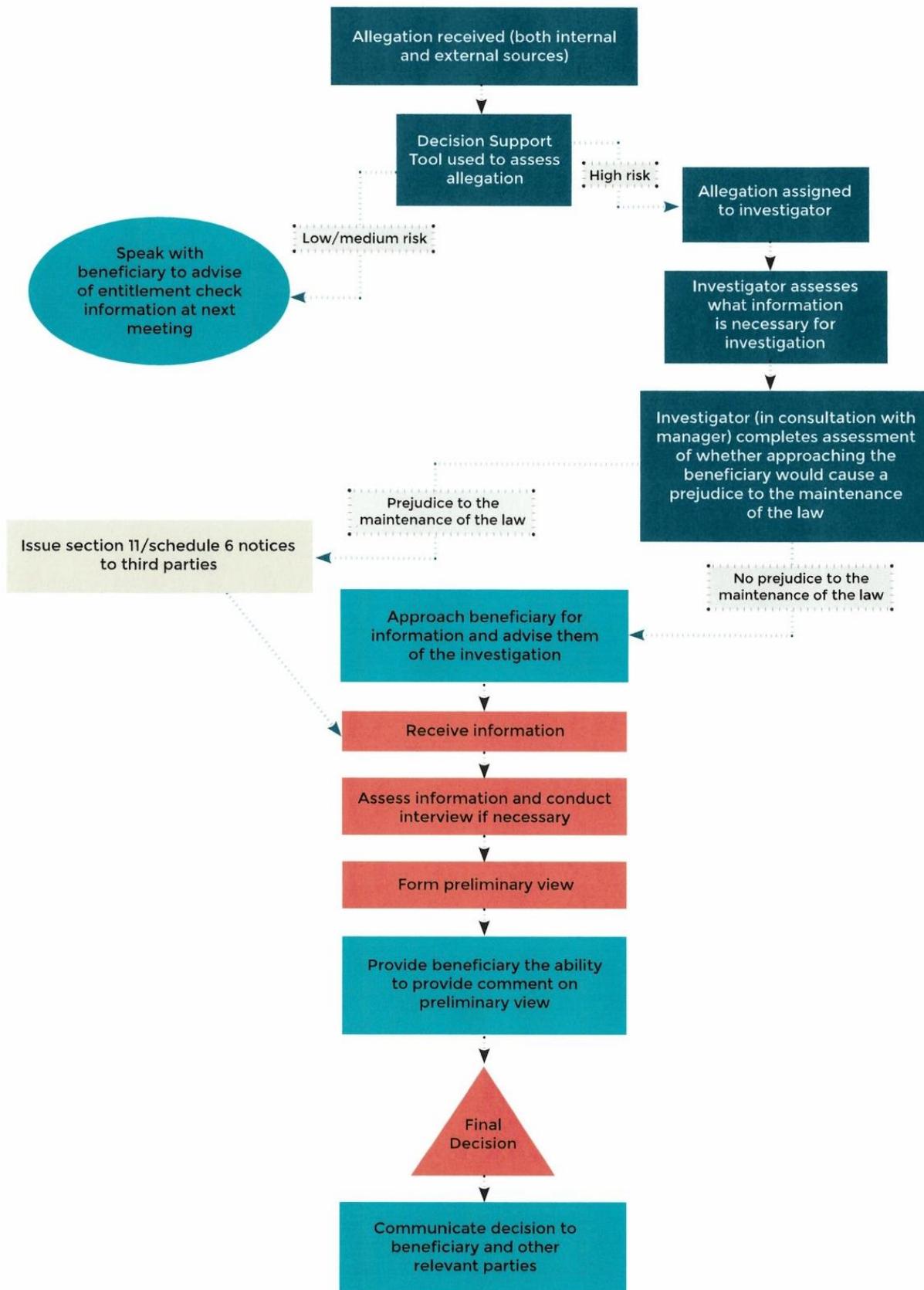
1.11 The timeline for the inquiry is attached as Appendix A.

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the part of their clients to provide information to the Inquiry out of a concern that their participation could negatively impact their relationship with the Ministry.

<sup>25</sup> These files were selected by my Office based on examples provided by third parties who received section 11 notices.

### SECTION 11 MODEL APPLICATION



## What is section 11 and the Code of Conduct?

1.12 The Ministry has wide powers to obtain personal information for a range of purposes under section 11 of the Social Security Act.<sup>26</sup> Section 11 states that any person may be required to provide, without charge and within five days of a written request, any information, documents, or records to enable the Chief Executive to:

- i) determine a person's claim for, or past or present entitlement to, a benefit or payment (including the rate that is or was applicable), or entitlement card;
- ii) conduct, review or check certain means assessments;
- iii) determine the amount a person is required to pay towards the cost of home-based disability support services supplied to that person;
- iv) establish the financial circumstances and location of someone who owes a debt under the Social Security Act, the Child Support Act 1991 or under a maintenance order; or
- v) more generally, carry out any functions concerning any benefit or welfare programme.

1.13 Accordingly, although used to investigate fraud allegations, the purposes for which the Ministry can use section 11 are broad and largely administrative. In 1994 the Social Services Committee conducted an inquiry into the operation of section 11.<sup>27</sup> Following its review the Committee recommended the development of a Code of Conduct, in consultation with the Privacy Commissioner, to govern the collection of information by the Ministry. The Committee specifically recommended that the Code require the Ministry to approach beneficiaries for information before seeking that same information from a third party. The Act was duly amended to provide for such a Code (sections 11B and 11C were inserted) and the first Code was issued in 1998.

1.14 The Code is treated as though it were a code of practice issued under Part 6 of the Privacy Act.<sup>28</sup> Failure to comply with the Code, even if that failure does not otherwise breach any information privacy principles, is deemed to be a breach of the Privacy Act.<sup>29</sup> Accordingly, a person who is required to produce information or documents under section 11, or the person who is the subject of these documents, can make a complaint to the Privacy Commissioner that the requirement breaches the Code of Conduct for section 11 requests.

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<sup>26</sup> The Social Security Act establishes a scheme to provide financial and other support to help people support themselves and their dependents while not in paid employment, and to help people find and remain in paid employment. The Social Security Act entitles people to receive benefits, once they meet the statutory criteria.

<sup>27</sup> For more information see Appendix B.

<sup>28</sup> Social Security Act, s 11B(7). This is now found at clause 12 of schedule 6 of the 2018 Act.

<sup>29</sup> Privacy Act 1993, s 53(b).

- 1.15 The Code provides various privacy safeguards to ensure this wide-ranging power is exercised fairly and proportionately. A key plank of these protections is the requirement to first seek information or documents from the beneficiary directly and give them reasonable time to provide such information. This is an informal procedure that must be exercised consistently with the Privacy Act, such as the requirements of principle 3.<sup>30</sup>
- 1.16 As the Explanatory Note to the Code says, this “provides some measure of privacy protection, as well as ensuring that clients are kept informed about the nature of the enquiries being made about them”.<sup>31</sup> Allowing a person an opportunity to provide relevant information gives them more control over their own personal information and may avert the need for more intrusive investigations. We acknowledge the Ministry’s concerns that asking an individual to provide information gives that individual the opportunity to tamper with the information. This will be a legitimate concern in some, but by no means all, cases and underlines the importance of a case by case assessment of risk.
- 1.17 The Ministry is not required to seek information from the individual directly, where the Ministry has reasonable grounds to believe that compliance would prejudice the maintenance of the law. The reasonable grounds test requires both an actual belief that the exception applies, and a reasonable basis for that belief. The belief must also be held at the time the personal information is collected. It cannot be formulated after the fact.<sup>32</sup>
- 1.18 The Code defines ‘prejudice the maintenance of the law’ as including an action that would, or would be likely, to prejudice the prevention, detection, investigation, prosecution or punishment of an offence, or the imposition of a pecuniary penalty.
- 1.19 Matters that may be relevant in these cases include the risk of collusion, or destruction of evidence that may result if the beneficiary is tipped off by a request for information. Application of the exception requires an analysis of all the relevant circumstances of the *individual case*.
- 1.20 Section 11 notices cannot be issued to any person (other than employers or former employers, financial institutions and lawyers) without reasonable cause.<sup>33</sup> Reasonable cause is defined in the Code to include:
- i) cause to suspect that the beneficiary has committed an offence, or has obtained by fraud any payment, credit or advance under the Social Security Act;
  - ii) a beneficiary or their spouse refusing or failing to provide information within a reasonable time;

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<sup>30</sup> Principle 3 contains the steps an agency must take when collecting personal information directly from an individual.

<sup>31</sup> Code of Conduct for Obtaining Information Under Section 11 Social Security Act 1964.

<sup>32</sup> See Roth *Privacy Law and Practice* at [PVA6.6(f)] and *Deeming v Whangarei District Council (Discovery)* [2015] NZHRRT 37.

<sup>33</sup> See the Social Security Act, s 11C(2) and cl 1 of the Code.

- iii) identification of a discrepancy by an authorised information matching programme;
- iv) knowledge that the beneficiary does not live at the address held by the Ministry and they cannot be contacted through that address; or
- v) the Ministry is unable to satisfactorily determine the financial circumstances of any beneficiary.

1.21 The Code has other protections for particular classes of sensitive information. These include restrictions on the types of information that can be sought from employers or former employers, and protections for confidential communications between beneficiaries and the education and health and disability sectors. The Code also prohibits the Ministry from requiring employers, former employers and those in the education and health and disability sectors from giving an opinion about whether a beneficiary is married or in a relationship in the nature of marriage.

1.22 Section 11 notices also do not require anyone to provide information or documents that would be privileged in a court of law, with limited exceptions. The Ministry's Chief Executive can challenge a claim of privilege by application to the District Court.

1.23 Finally, it is an offence to refuse or fail, without reasonable excuse, to comply with a notice under section 11, or to knowingly or recklessly provide, or attempt to provide, information that is false or misleading.

#### **What other safeguards are there on the use of section 11 powers?**

1.24 Section 11 cannot empower the Ministry to require any and all information to be produced without limitation. People seeking state assistance need to provide enough personal information about their circumstances, particularly relating to their finances, to establish that they are entitled to a benefit. While the scope of the power to obtain information under section 11 is wide, it, like any statutory power is not unfettered. The powers can only be exercised for legitimate purposes under the Social Security Act, which in itself acts as a limiting mechanism. Information requested should be necessary or relevant and be reasonably required in the circumstances of the case.

1.25 The law relating to search and seizure has developed substantially, and section 11 must be used in way that reflects these important changes, particularly when investigating criminal allegations such as fraud. I am concerned that Ministry practice has not kept up with evolving jurisprudence in this area.

#### **New Zealand Bill of Rights Act 1990**

1.26 As well as the privacy safeguards included in the Code and the Social Security Act, broader legal restraints operate on the exercise of section 11, including rights affirmed the Bill of Rights Act. In particular, section 21 of the Bill of Rights Act affirms the right to be secure against unreasonable search or seizure whether of the person, property, or correspondence or otherwise. Although the right protects a number of values including

personal privacy, freedom and dignity, section 21<sup>34</sup> primarily operates to protect reasonable expectations of privacy against unreasonable state intrusion.<sup>35</sup>

- 1.27 Section 11 notices can be used for a variety of purposes, including determining whether a person was or is entitled to receive a benefit and at what rate. This could be a purely administrative exercise to ensure someone is receiving the correct benefit or may be used to uncover overpayments or fraud. Where the privacy intrusion goes beyond administration, however, and delves into information that touches “a biographical core of personal information”<sup>36</sup> which tends to reveal intimate details of people’s lifestyle and personal choices,<sup>37</sup> for instance, where the request is overbroad, or for personal documentation, such as diaries and text messages,<sup>38</sup> section 21 is likely to be engaged.
- 1.28 While not every exercise of section 11 powers will necessarily be an unreasonable intrusion into a person’s personal affairs so as to amount to a “unreasonable search” for the purposes of section 21, the Ministry will need to ensure it is not requesting information in a manner that goes beyond what reasonable collection powers section 11 permits. In considering the question of unreasonableness, it is necessary to look at the nature of the place or object which was being searched, the degree of intrusiveness into the privacy of the person or persons affected and the reason why the search was occurring.<sup>39</sup>

### Where do fraud allegations come from and how are they assessed?

- 1.29 The majority of fraud cases are identified through external tip-offs. In the 2017/18 financial year there were 12,578 allegation line calls answered by the Ministry, resulting in 9210 allegations being recorded and 2187 being assessed as ‘high risk’. This is on top of referrals from sources inside the Ministry such as the Intelligence Unit, local Work and Income offices and through information matching programmes with other agencies. In 2017/18 there were 2735 internal referral fraud investigations.
- 1.30 External allegations are assessed using the Ministry’s Decision Support Tool (DST). Ministry call centre staff enter information into the DST based on the information

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<sup>34</sup> Section 21 of the Bill of Rights Act is engaged where a “search” or “seizure” has occurred. A “search” occurs where an individual has a reasonable expectation of privacy in the information sought, while a “seizure” is taking what is found. The search or seizure must also have been unreasonable either because it occurred at all or because of the unreasonable way it was carried out.

<sup>35</sup> *Hamed v R* [2011] NZSC 101, [2012] 2 NZLR 305 at [164] per Blanchard J.

<sup>36</sup> See *R v Alsford* [2017] NZSC 42 at [63] per William Young, Glazebrook, Arnold and O’Regan JJ.

<sup>37</sup> See *R v Alsford* [2017] NZSC 42 at [63] per William Young, Glazebrook, Arnold and O’Regan JJ.

<sup>38</sup> The Court of Appeal recently affirmed the significant privacy interests attaching to text messages and noted any unlawful acquiring of such information represents a significant intrusion on a person’s right to privacy: *Wikitera v Ministry of Primary Industries* [2018] NZCA 195, [2018] 3 NZLR 770 at [38], [41] and [46]. The Court of Appeal held that, in the context of this regulatory regime, it was lawful to request telecommunications information under s 199A of the Fisheries Act 1996. Under that provision, a fishery officer could authorise the search of any premises or place and the examination of any record or document if the officer believed grounds, that the documents would provide evidence of an offence, on reasonable grounds against the Fisheries Act. The search itself was reasonable as it was confined to information relating to incoming and outgoing calls, and text messages from and to a stipulated telephone number over a limited period.

<sup>39</sup> *Hamed v R* [2011] NZSC 101, [2012] 2 NZLR 305 at [172] per Blanchard J.

provided by the caller and the type of fraud alleged. The DST then calculates a score based on the factors recorded. This score determines whether the allegation demonstrates a high, medium or low risk of fraud.

- 1.31 The DST is a rudimentary tool that assigns points based on the response to questions.<sup>40</sup> For example, an informant is asked, among other things, whether the beneficiary and the alleged partner share household activities, companionship, leisure time, joint decision making and a sexual relationship. The more questions an informant can answer about an allegation the more likely it will be given a high-risk rating by the Ministry. As part of the DST assessment of an allegation the Ministry does not undertake any steps to verify the information provided or seek corroboration. It is the Ministry's view that a fraud investigation itself acts as a verification measure.
- 1.32 All cases identified as high risk are automatically referred to a fraud team manager for an initial assessment and assignment to an investigator if appropriate. Following an assignment, the investigator undertakes preliminary inquiries such as reviewing information held by the Ministry and publicly available (open source) information to determine whether to proceed to an investigation. If the rating is low or medium risk of fraud the case is directly referred to a local Work and Income office by the Allegation Line to be discussed the next time the client speaks with their case manager or no further action is taken.<sup>41</sup>
- 1.33 The Ministry has submitted that the 2012 policy change has resulted in all 'high risk of fraud' allegations being sent to a fraud team for assessment. Any investigation that is undertaken nearly always results in section 11 notices being issued to third parties without first seeking information from the beneficiary or notifying them of the investigation.

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<sup>40</sup> We note that the Ministry does not apply its Privacy and Human Rights and Ethics Framework (PHRaE) retrospectively meaning the DST has not been assessed against it. It may be a useful exercise to do so, especially in light of the growing body of evidence highlighting the ease of which such tools can produce negative social outcomes for societies most vulnerable - see 'Automating Inequality – how high-tech tools profile, police and punish the poor' Virginia Eubanks.

<sup>41</sup> We note that this practice has recently changed whereby all allegations regardless of rating are referred to the fraud investigation teams. In the case of low or medium risk cases investigators approach the client to discuss their entitlements and offer guidance. These cases do not result in the issuance of section 11 notices.

## TIMELINE: REVIEW OF CODE OF CONDUCT

- 1994** Social Services Committee reviews the operation of section 11 of the Social Security Act and recommends the development of a governing code of conduct to address privacy concerns.
- 1997** Social Security Amendment Bill (no. 4) is enacted. The Bill amends the Social Security Act to require the development of a code of conduct regarding the exercise of section 11, in consultation with the Privacy Commissioner.
- 1998** The Privacy Commissioner (Bruce Slane) is consulted on the first Code of Conduct. A number of issues are identified, including inadequate consultation. **The Privacy Commissioner raises particular concerns about the over-collection of information, and the Ministry providing inadequate advice to beneficiaries about their rights.** The Ministry agrees to review the Code within a year.
- 1999** The Ministry reviews the Code of Conduct. The Privacy Commissioner reiterates his concerns from 1998, and notes that individuals who are not beneficiaries should also be covered by the Code, e.g. partners of beneficiaries.
- 2000 – 2001** Consultation continues. The Privacy Commissioner continues to raise concerns with the Ministry regarding the application of the Code to individuals who are not beneficiaries. The Ministry states that this would require a legislative change.
- 2002** The Privacy Commissioner writes to the Ministry noting it had been more than three years since the Code review began and the outcome was still not finalised.
- 2003** The Privacy Commissioner (Marie Shroff) is provided with proposed amendments to the Code. The Commissioner broadly supports the proposed amendments but does not support amendments to the definitions of 'prejudice to the maintenance of the law' or 'reasonable cause'. In her view these appear to be included for 'administrative convenience' and are subverting the original intent of section 11. **The Ministry agrees to amend the Code in line with the previous Commissioner's comments to also cover individuals who are not beneficiaries.** The Code is passed into effect.
- 2004 – 2005** The Privacy Commissioner is told the Ministry is reviewing the Code. **The Commissioner reiterates comments provided in 2003 regarding the 'prejudice to the maintenance of the law' and 'reasonable cause' definitions.** The Ministry does not amend the Code in line with these comments.
- 2008** The Code is due for review. No review is undertaken.
- 2012** **The Code is reviewed by the Ministry. The definition of 'prejudice to the maintenance of the law' is simplified and that change is supported by the Privacy Commissioner.**  
The Ministry advises that it interprets this amendment as providing them with the legal basis to bypass all beneficiaries under investigation for fraud. **The Privacy Commissioner advises that the amendment does not alter the Ministry's legal obligations and it is required to approach beneficiaries first for information, unless to do so would prejudice the investigation.**  
Beneficiary advocacy groups submit on the revisions and raise significant concerns about the proposal both affecting the privacy and natural justice rights of beneficiaries, and it potentially being discriminatory. The Code passes into effect without amendment.
- 2015** The Code is due for review. No review is undertaken.
- 2018** The Code is due for review. No review is undertaken.
- October 2018** **The Privacy Commissioner launches an Own Motion Inquiry into the exercise of the section 11 power and the Ministry's compliance with the Code of Conduct.**

## 2.0 2012 Review of the Code of Conduct

- 2.1 In 2012 the Ministry notified then Privacy Commissioner Marie Shroff of its intention to review the Code. The Ministry proposed simplifying the definition of the 'prejudice to the maintenance of the law' exception to:

*“prejudice the maintenance of the law includes an action that would, or would be likely to prejudice the prevention, detection, investigation, prosecution or punishment of an offence, or the imposition of a pecuniary penalty”*

- 2.2 The Ministry also included in the revised Code an explanatory note that prejudice to the maintenance of the law can include:

*“situations where the Ministry believes that asking the individual for their information before going to a third party would prejudice our investigation. This can be on the basis of the delay it would cause, the risk of alterations to documents, or the risk of colluding with other parties”*

- 2.3 As part of the public consultation document on the proposed changes the Ministry noted that the requirement to seek information first from beneficiaries before approaching third parties was impeding their investigations and causing delay. The Ministry maintained that as a result of the proposed changes to the Code, including the simplified definition of 'prejudice to the maintenance of the law' and the accompanying explanatory note,

*“most beneficiary clients will no longer be asked for information before the information is requested from third parties”*

- 2.4 The Office of the Privacy Commissioner (OPC) supported the simplification of the definition but disagreed with the Ministry's interpretation of its effect. While the Ministry asserted that it would improve the operational effectiveness and efficiency of section 11, OPC said:

*“the proposed change to the definition in the Code does not change what [the Ministry] can legally do, it merely simplifies the wording of the provision. It is misleading and inaccurate to imply a change in the Code would impact investigation effectiveness”*

- 2.5 The Ministry stated that in 95% of historic fraud investigations the beneficiary had been unable to provide the information requested or did not do so within the time required and this was causing an unnecessary and unreasonable delay to the Ministry's investigations.

- 2.6 A Cabinet paper presented to the Social Policy Committee by the Associate Minister for Social Development stated that:

*the “[r]equirements of the Code include first informing the beneficiary that they are under investigation and the reason for this, and [the Ministry] approaching the*

*beneficiary first for information. [...] This requirement defies logic as it hinders investigations”<sup>42</sup>*

- 2.7 The Ministry and the Cabinet paper maintained that these historic delays could inform future application of the prejudice exception in fraud cases and justify its interpretation of the exception based primarily on the risk of delay.
- 2.8 As noted in the Cabinet paper, requesting information from the beneficiary in the first instance also serves the purpose of notifying the individual of the investigation and allowing them to provide comment. The Code was established to enhance privacy, natural justice, and procedural fairness for beneficiaries being investigated. It was not established to enable the Ministry to collect information without reference to these fundamental protections, except where reasonably necessary.
- 2.9 OPC’s final comments to the Ministry on the amendment noted:

*“we have significant concerns about the internal FAQ [(regarding the Code of Conduct)] as currently drafted. Communication documents as relating to the change must not represent the change in definition as a change to [the Ministry’s] legal obligations or as legally enabling changes to [the Ministry’s] practice.”<sup>43</sup>*

- 2.10 The changes to the Code passed into effect in late 2012. Despite OPC asking for an update on Code amendments in October 2012 from the Ministry, no response was provided.
- 2.11 Clause 2.4 of the Code requires three yearly reviews of the Code. The Ministry was obliged to complete a review in 2015 and 2018 however it has not done so.

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<sup>42</sup> Cabinet Social Policy Committee – Tackling Welfare Fraud: Proposed Approach. Associate Minister for Social Development. SOC Min (12) 12/2.

<sup>43</sup> The Ministry has advised that they do not consider OPC’s 2012 advice to be sufficiently explicit. In particular the Ministry notes that OPC’s advice does not explicitly state that the policy change would be inconsistent with their legal obligations nor does it clearly state that the new practice would result in non-compliance with the Code.

### 3.0 Effect of the 2012 change

- 3.1 At the time of the 2012 change the Ministry issued guidance to all fraud investigators on how the Code was to be interpreted. This guidance said that all cases “under a fraud investigation do not need to go through the current process” of approaching the beneficiary client first for information. While it noted that fraud investigators should ensure they have “cause” to ask for information, “cause” related only to the individual’s likelihood of having committed fraud rather than a case by case assessment that they would cause prejudice to the maintenance of the law, such as by collusion.<sup>44</sup>
- 3.2 The Ministry has told us that it only considers approaching third parties, without approaching the beneficiary first, if the individual has a ‘high risk’ rating.
- 3.3 The Code does not draw a distinction between cases deemed ‘high risk’ and those not. The distinction is an internal categorisation the Ministry has developed independently from its legal obligations. The Code requires that in all fraud investigations the Ministry seek information from the beneficiary first before approaching third parties unless to do so would cause ‘prejudice to the maintenance of the law’.
- 3.4 Through its failure to appropriately consider whether prejudice to the maintenance of the law would occur in each fraud investigation where a section 11 notice has been issued, the Ministry has acted in breach of the Code and the Privacy Act. This policy and practice is therefore an unlawful gloss on the statute and Code obligations.

#### Statistics regarding Fraud Investigations

- 3.5 Over the course of this Inquiry the Ministry has given us a number of different versions of the its fraud statistics from the last four years. The numbers have varied considerably over the course of the Inquiry. For example, the number of fraud investigations completed by the Ministry per year has ranged on average from 5100 – 2300. Similarly, the number of investigations where there is a finding of fraud has ranged on average from 1800-1100.
- 3.6 The Ministry does not keep statistics on the number of section 11 notices issued. We we are therefore unable to state with any precision the total number of individuals affected by the Ministry’s blanket policy.
- 3.7 The Ministry has however told us that section 11 notices have likely been issued in all cases where an investigation is deemed ‘high risk’. The number of ‘high risk’ investigations a year has ranged in Ministry statistics, from 4249 to 1468. On average across the four years of data reported to us this has ranged from 2600-2300 high risk investigations. Our most conservative estimate of individuals affected, on average, by this blanket policy each year is therefore 2300.<sup>45</sup>
- 3.8 For the remaining cases not deemed ‘high risk’ section 11 notices may have been issued but the Ministry cannot determine the exact number.

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<sup>44</sup> The Ministry considered that a ‘high risk’ rating, from the DST, constituted “cause”.

<sup>45</sup> N:B An investigation can involve more than one individual.

- 3.9 In 1994 the Social Services Select Committee noted in its report that the lack of information available from the Ministry about the use of section 11 had hampered its inquiry.
- 3.10 In 1998 the then Privacy Commissioner, Sir Bruce Slane, echoed these concerns to the Ministry. He noted the Ministry's failure to keep figures on the use of section 11, inhibited its ability to know how the Code is working in practice, including whether beneficiaries were approached first and whether 'reasonable cause' had been established.
- 3.11 My Office has found that the Ministry has continued to fail to keep comprehensive, accurate and readily retrievable records of the number of section 11 notices and the justification for their use.

### Fraud investigation file sample analysis

- 3.12 My Office reviewed a sample of seventeen fraud investigation files.<sup>46</sup>
- 3.13 The files reveal that **only one individual was notified of an investigation prior to a section 11 notice being issued**. In all other cases the file either did not record whether the individual had been notified or it was clear that they had not been notified prior to the section 11 notices being issued.
- 3.14 **Fourteen of the seventeen files reviewed involved allegations of 'marriage type relationships'**. **Eight** of these allegations came through the Ministry's **anonymous tip off line**. As noted above, an allegation receiving a 'high risk' rating/score through the Ministry's DST will result in referral to a fraud Manager for consideration as to whether an investigation will be commenced.
- 3.15 **Seven of the seventeen files reviewed involving investigations of 'marriage type relationships' contained indications of domestic violence/abuse**. In **over half** of these files a **debt was established against the individual/s**. Two files were still under investigation and one cleared the individual of the allegation.
- 3.16 On average in each file **eighteen third party agencies** (e.g. telecommunications providers, banks etc) were approached for information about an individual by the Ministry prior to an individual being notified of the investigation or asked for comment. In three of the seventeen files reviewed over thirty agencies were approached prior to the individual knowing they were under investigation.
- 3.17 The **most common types of agencies** to be approached by the Ministry were:
- Telecommunications providers
  - Banks/lenders
  - Police

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<sup>46</sup> The files reviewed were selected by my Office from samples of section 11 notices provided to us by third party agencies who receive section 11 notices. The total sample size was 17 files. See Appendix F for further case summaries.

- 3.18 The **most common types of information** requested from these agencies were:
- Text messages
  - Call logs
  - Bank statements
  - Loan agreements
  - Police history/incident reports
- 3.19 Our analysis of these files reveals that these requests elicit voluminous responses. For example, **the Ministry requests several months of an individual's text message records. This is largely unfiltered and commonly includes every text message sent and received.**
- 3.20 In order to limit the amount of personal information able to be disclosed we heard from one telecommunications provider that they are now routinely delete text message data older than ninety days so as to limit the intrusion on their customers' privacy.<sup>47</sup>
- 3.21 The Ministry's files also show they request several years' worth of individuals' bank records (in the files we saw this was up to eight years). The scope was similar for Police records. We acknowledge that fraud investigations can span several years and that in some cases the requests may be necessarily broad. However, this should be determined on a case by case basis.
- 3.22 These requests result in a vast amount of information being provided that is, in my view, often disproportionate to the legitimate investigative aims of the Ministry and is unreasonably intrusive on the privacy of the individuals involved – including their friends and family.
- 3.23 A number of section 11 notices reviewed contained the phrase:
- "This notice is approved by the Privacy Commissioner and means we meet our legal responsibilities"*
- 3.24 This was a concerning discovery. My Office does not review or provide approval for any information request made by the Ministry. The Ministry has informed me that staff have been instructed not to use this wording in any future notices.
- 3.25 This issue is indicative of a wider issue of inconsistency. Section 11 notices are not nationally consistent, nor do they contain consistent information about the purpose of, and restrictions on, what is being requested. This is concerning given the large numbers of these requests and the scope of the information being requested.
- 3.26 As discussed above, the Ministry asserted that its 2012 policy change was justified primarily because of a pattern of delay in investigating historic fraud cases and that to approach third parties for information would lessen the risk of delay.

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<sup>47</sup> The Ministry accepts this concern has been raised with it but considers the focus of the concerns raised was on the cost and time invested by third parties in extracting the data, rather than on privacy.

- 3.27 Fraud is detected in an average of between 36-51% of all fraud investigations per year<sup>48</sup>, resulting in the establishment of between \$49.6 and \$82.8million worth of debt each year. The remaining cases (between 49% and 64%<sup>49</sup>) investigated result in no such detection (i.e. no prosecution and no debt established). In real terms, this means on average **at least 1100 people a year have their lives subjected to often intrusive inquiries by a state agency with no fraud established.**
- 3.28 Regardless of whether a person is ultimately found to have committed fraud, the Ministry remains obligated to seek information from the subject directly, unless to do so would prejudice the maintenance of the law. Administrative convenience alone cannot justify departing from standards designed to strike the balance between individual privacy and the maintenance of the law.

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<sup>48</sup> Numbers have proved difficult to establish. See para 3.5 for further explanation.

<sup>49</sup> N.B. The Ministry notes that as a result of a fraud investigation individuals may have their entitlements changed i.e. their benefit adjusted or revised but have no overpayment debt established or prosecution undertaken

## 4.0 Ministry failed to apply the Code of Conduct appropriately

### The Ministry exercised a blanket policy of approaching third parties

- 4.1 The Ministry categorises fraud allegations as low, medium or high risk using the DST. The Ministry has said that after the practice change in 2012, only high-risk cases were deemed to come within the prejudice to the maintenance of the law exception, even though policy documents from 2012 suggest that the exception could be applied to *all* fraud investigations. In either case, this meant that the Ministry authorised and encouraged investigators to go straight to third parties for information using their compulsion powers, rather than approach the beneficiary first.
- 4.2 Guidance setting out how powers under section 11 and the Code ought to be exercised is entirely appropriate for the Ministry to produce. A clear policy ensures consistency and fairness when the exercise of potentially intrusive powers is delegated to many people. However, a policy cannot negate a legal obligation.

### The Ministry failed to undertake case by case assessments of risks that may prejudice the maintenance of the law

- 4.3 As this Office noted in 2012, the “streamlined” definition of ‘prejudice to the maintenance of the law’ did not change the threshold provided by the Code. While delay can potentially prejudice the maintenance of the law, for instance when an investigation is serious and time sensitive, prejudice will not result from delay that causes mere administrative inconvenience. As the evidence required in fraud investigations is often held by neutral third parties, such as banks, it is less likely that going to the beneficiary first could lead to the destruction or doctoring of evidence.<sup>50</sup>
- 4.4 Application of the maintenance of the law exception requires a case-by-case assessment. Whenever exercised, the Ministry must not only believe the exception applies, but that belief must be based on objectively reasonable grounds. The exercise of a blanket policy is, by design, 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.
- 4.5 The Ministry’s policy and practice is based on the risk that fraud has occurred (i.e. cases with a ‘high risk’ rating), rather than an assessment of the risk of prejudice to the maintenance of the law involved in *investigating* that offending. This is a clear misapplication of the exception.
- 4.6 Therefore, I consider the Ministry’s use of a blanket policy, rather than undertaking a case-by-case analysis breaches the Code and likely section 21 of the Bill of Rights Act.

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<sup>50</sup> The Ministry notes that as ‘technology’ becomes more ubiquitous it acts more as an enabler for tampering, increasing the need to seek information from third parties. We caution that this position presupposes that all individuals the Ministry defines as ‘high risk’ are going to tamper with documents when investigated. Such an approach may lead to the adoption of blanket policies such as the policy discussed in this report.

## 5.0 Ministry has infringed on individual privacy

### Purpose and necessity

- 5.1 Purpose and necessity are central considerations when agencies are collecting personal information.
- 5.2 Where the Ministry is investigating fraud, information should only be collected where it is lawful to do so (i.e. consistent with the Social Security Act and the Code) and necessary for the purpose of investigating fraud.
- 5.3 However, we have seen a number of examples where the Ministry has collected information that appears to have no relevance to a fraud investigation. For example, in one case a record of a woman's birth, including the fact that she had a ventouse procedure, was collected using section 11 from a District Health Board (DHB).
- 5.4 We are aware that Ministry investigators often request admission forms from DHBs to see who an individual has listed as their emergency contact. These requests are normally limited to purely administrative information devoid of any medical information. It is difficult to conceive of a scenario in which a record of the procedures performed while a woman gives birth is necessary to establish benefit fraud.<sup>51</sup>
- 5.5 The Ministry must ensure that its staff are clear on the purpose for making section 11 requests (for example investigating fraud) and that the type of information being requested is necessary for that purpose.

### Failure to ask individual for the information first

- 5.6 The Ministry's failure to first seek information directly from the individual has a number of potential flow-on effects, such as unnecessary collection, failure to confirm the accuracy of information, and the misinterpretation of evidence.
- 5.7 We have seen cases where the failure to advise an individual they are under investigation and ask them for information relevant to that investigation has meant that the Ministry has made assumptions that are later demonstrated to be incorrect. One concerning example is a 2017 case that went before the Social Security Appeals Authority.<sup>52</sup> The Ministry was found to have wrongly interpreted the information collected and made assumptions about its accuracy without checking it with the individual. The Authority commented it was concerned that, based on the leading questions asked by the investigator during the interview, the Ministry had "predetermined the outcome of [its] investigation".<sup>53</sup> The beneficiary in that case was aided by Community Law and was eventually successful in her appeal against having her benefit stopped and a debt established.
- 5.8 However, not all beneficiaries are represented or supported by a lawyer or advocate. The Ministry's ability to undertake wide-ranging evidence gathering prior to engaging

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<sup>51</sup> The Ministry accepts that this collection was unnecessary.

<sup>52</sup> *An appeal against a decision of the Benefits Review Committee* [2017] NZSSAA 62.

<sup>53</sup> See para [55].

with the subject of an allegation, means a beneficiary is often first formally advised of the investigation as a result of being asked to attend a meeting with a fraud investigator.

- 5.9 We heard from both beneficiaries and beneficiary advocates that beneficiaries often attend these meetings without knowing what the allegations against them are, and without understanding the serious nature of the meeting. Beneficiaries often attend alone and with no preparation.<sup>54</sup>
- 5.10 An advocacy group we spoke to expressed concern that since the 2012 changes, they have seen fewer people approach them for help in handling a fraud investigation by the Ministry. The group is concerned that more people find themselves confronted by large volumes of their personal data in challenging circumstances (an evidential interview at a Ministry office) and feel compelled to accept a debt without a proper chance to assess their case.
- 5.11 We have also seen cases where there has been potentially unnecessary collection of information. In one fraud investigation file we reviewed, the Ministry collected information from seventeen different agencies, including the beneficiary's text messages and bank records. The Ministry then closed the investigation having decided there was insufficient evidence to establish a relationship in the nature of marriage. While the beneficiary was informed at the conclusion of the investigation that an investigation had occurred, the beneficiary was not provided an opportunity to provide information or informed of the allegation which may have averted the need to use section 11 powers at the outset of the investigation.
- 5.12 The law requires that the Ministry collect information from individuals directly unless there is a good reason not to, for example if to do so would prejudice the maintenance of the law. This requirement provides for individual autonomy and should guide the Ministry's decision making when collecting information.

### Over collection

- 5.13 The prospect of collecting sensitive information such as Police records and health information should cause Ministry investigators to pause and seek guidance on the appropriateness of the collection. Section 11 is not an unfettered power to collect any and all information and the Ministry's processes and procedures for investigators should reflect this through clear policies with escalation paths, and audit trails where sensitive information is sought.
- 5.14 Requests for information must be proportionate to the need for the information. For example, if an individual has been in receipt of a benefit between 2013 and 2015 and accused of fraud it could be disproportionate to request their bank statements from 2012.
- 5.15 We have seen cases where banking records have been requested beyond the alleged fraud period and where individuals' entire Police history has been requested. There may

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<sup>54</sup> The Ministry maintains that the purpose of these meeting is to inform clients of the allegations against them. This may be the case. However, these meetings are also to gather evidence that could have criminal implications and therefore it is critical the Ministry is transparent in its process.

be exceptional cases where this is necessary however it would be concerning if this was regular practice.

- 5.16 Bank records are inherently sensitive and contain a large amount of personal information including spending habits, relationships and location information. The information now available is much richer than when the Code was first drafted. While the collection of such information by the Ministry may be necessary in some cases, the collection of records outside the scope of any alleged fraud or benefit payment period may be disproportionate to the Ministry's legitimate aims in others.
- 5.17 Similarly, it is difficult to imagine circumstances under which the collection of an individual's entire Police history, including their victim and witness records, would be necessary or relevant to a fraud investigation.
- 5.18 A number of agencies, both public and private sector have informed me that they have concerns with the type of information they are compelled to provide to the Ministry. From a public sector perspective, concerns were expressed that the manner in which the Ministry exercises its information gathering powers differs noticeably from other public sector agencies and it is unclear why. From a private sector perspective, agencies noted that, out of concern for their customers' privacy, they have taken active steps to reduce the amount of time they hold customer data before permanently deleting it as a direct result of the volume and scope of requests from the Ministry.<sup>55</sup>

### Highly intrusive collection

#### *Domestic violence records*

- 5.19 Domestic violence records contain a large amount of highly sensitive information about the individuals involved. In some cases, the records contain details of sexual assaults.
- 5.20 The Ministry generally frames its requests as demands for all '*Police reports of domestic incidences involving the above-named persons, for the purpose of confirming a marriage type relationship*'. Many of the requests we have reviewed ask for up to a decade's worth of information about individuals.
- 5.21 Even where the Ministry has legitimate reasons for collecting this type of information, it is nevertheless highly intrusive.

#### *Text messages*

- 5.22 In almost all of the fraud files we reviewed the Ministry had requested copies of all text messages sent and received by individuals over several months.

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<sup>55</sup> Further concerns raised by private sector agencies include the level of resource they are required to invest in servicing disproportionately large requests for information under section 11 and that their agency could face a conviction should they take a stand against disproportionate information gathering by the Ministry. The Ministry notes that this point has not been raised independently with it.

5.23 Text messages are an intimate window into the lives of the individuals concerned. Files we reviewed contained text messages between parties in a relationship, sometimes of sexual, familial, or otherwise intimate nature. In one instance, a beneficiary described to us how an intimate picture shared by that individual with a sexual partner was produced at an interview by Ministry investigators seeking an explanation for it.

5.24 In other parts of the criminal justice system, access to telecommunications content requires a very high threshold i.e. a reasonable belief, usually coupled with independent judicial oversight. I share the concerns of the telecommunications companies that obtaining this type of information represents an unwarranted intrusion into the affairs of individuals under investigation, as well as their friends and families and should cease immediately.

### TOOLS USED FOR OBTAINING PERSONAL INFORMATION

	IPP 2 / 11	Statutory authority - No oversight	Statutory authority - With judicial oversight	Warrant with judicial/ministerial oversight
MSD				
Police				
IRD				
Intelligence and Security Agencies				

= Used to collect communications information of individuals, such as text messages and phone call data

= Used to collect personal information

## Relationships in the nature of marriage

- 5.25 The most common type of benefit fraud reported to the Ministry through its tip-off line is about relationships. The Ministry is interested in whether individuals are in a relationship 'in the nature of marriage' in order to establish whether they are entitled to a single person or a couple rate of assistance (the former being higher than the latter). *Ruka v Department of Social Welfare* makes plain that a relationship 'in the nature of marriage' must involve financial support or interdependence, accompanied by a continuing emotional commitment.<sup>56</sup> The judgment observed that there is a level of violence that if present in a relationship would serve to negate or undermine any emotional commitment.<sup>57</sup>
- 5.26 Because a relationship is made up of many elements it can be difficult to establish whether it is of the significance anticipated by the term 'in the nature of marriage'. The views of the individual accused of being in such a relationship should therefore be sought, particularly in cases where the Ministry suspects that violence may be present in the relationship.
- 5.27 There may also be a risk to the personal safety of an individual in a potentially violent relationship if assessments are not made on a case by case basis as to the most appropriate manner to engage with parties. This could be the individual or third parties. The Ministry assures us that in this area, case-by-case assessments are standard practice. It is my view that if the Ministry wish to know whether an alleged relationship contains violence they should ask the individual involved, unless to do so would put that individual at risk.
- 5.28 I am concerned that if the Ministry's practice of gathering this type of information were widely known, individuals could be discouraged from seeking Police support out of fear the Ministry could use the information against them in the future.

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<sup>56</sup> *Ruka v Department of Social Welfare* [1997] 1 NZLR 154 (CA) at pp 161-3 per Richardson P and Blanchard J.

<sup>57</sup> We note that the Family Violence Act 2018 (due to come into force in July 2019) contains an updated definition of family violence (see sections 9-11) which includes psychological abuse. Emotional and psychological abuse is unlikely to be found in Police reports and therefore underscores the importance of speaking to individuals directly. The Ministry may wish to review its guidance to staff on the application of *Ruka* in light of the updated definition.

## 6.0 Conclusion

- 6.1 No one contributing to this Inquiry has questioned the necessity and importance of the Ministry having effective information gathering powers at its disposal. Nor do I.
- 6.2 However, I share concerns with many of the agencies and individuals who have put evidence before this Inquiry that the lawful and proportionate use of those powers by the Ministry is of paramount importance given the power imbalance inherent between the Ministry and beneficiaries and the wide scope of section 11 powers, which stand out among public sector agency powers for their potential intrusiveness and lack of judicial oversight.
- 6.3 The Code incorporated into section 11 in 1997 acts as an important privacy protection for individuals and a check on the exercise of these powers. For the Ministry to develop policy that, in a blanket manner, renders the requirements of that Code irrelevant for a significant group of individuals is both concerning and open to abuse.
- 6.4 The Ministry's primary rationale for using a blanket policy to ignore the requirements in the Code (potential delay to investigations/administrative convenience) holds little weight when balanced against the level of state intrusion into individual privacy.
- 6.5 The scope and availability of the personal information able to be collected by the Ministry could not have been contemplated at the time the Code was first drafted. Search and seizure jurisprudence has developed significantly since that time to reflect this. However Ministry policy and practice has failed to keep up, to the extent that the Ministry may well be engaged in activity that breaches the Bill of Rights Act.
- 6.6 Throughout my inquiry the Ministry has cooperated fully with my staff and expressed a willingness to make changes to address concerns. However, I am concerned and disappointed to note that this report is not the first time many of the issues identified in this report have been raised with the Ministry either publicly or through policy advice offered by my Office and others.<sup>58</sup>
- 6.7 I look forward to building on a positive relationship with the Ministry and to assist it implement the recommendations contained in this report so that the Ministry retains appropriate powers to enable it to effectively administer the social security system while protecting and respecting individual privacy.

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<sup>58</sup> See Appendix E.

## Appendix A: Inquiry timeline

### 18 July 2018

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A community group wrote to the Privacy Commissioner raising concerns that the Ministry was applying the 'prejudice to the maintenance of the law' exception to collecting information from the individual directly in a blanket manner. They also raised concerns that this practice was inconsistent with the Code of Conduct governing the use of section 11.

### 8 October 2018

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The Privacy Commissioner wrote to Chief Executive Brendan Boyle to inform him of the Privacy Commissioner's intention to conduct an inquiry into the Ministry's exercise of its section 11 powers. The Commissioner's letter outlined the purpose of the inquiry and the process we would follow. The Commissioner also provided a copy of the Inquiry's terms of reference.

### 23 November 2018

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The Ministry provided the Office of the Privacy Commissioner with a package of documents including:

- Statistical estimates of the use of section 11, the source of allegations and the outcome of investigations;
- Investigative training manuals for fraud investigators;
- Information regarding the Decision Support Tool;
- Copies of public statements regarding the 2012 change;
- Information from the Ministry's own website;
- Examples of section 11 notices;
- Copies of feedback provided by the Office of the Privacy Commissioner in 2012.

### October 2018 – February 2019

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Office of the Privacy Commissioner staff met with a number of private and public sector agencies as well as current and former beneficiaries to discuss their concerns about the Ministry's exercise of its section 11 powers and analysed the information provided by the Ministry.

### January – February 2019

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Requested and received samples of Ministry fraud investigation files for analysis.

### April - May 2019

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A draft version of the report was sent to the Ministry for its consideration and views. Meetings held with various Ministry officials to discuss findings of the report.

### 3 May 2019

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The Ministry's response to the draft report is received.

### 16 May 2019

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Final report issued.

## Appendix B: Timeline of Code of Conduct amendments

### 1994 – 1997

1. In 1993, as part of a package of measures to reduce social welfare benefit fraud and abuse of all forms of privilege previously available under section 11, except legal professional privilege and privilege against self-incrimination, were removed. This enabled the Ministry to request information from persons who were no longer covered by the forms of privilege available to witnesses in a court of law.
2. The removal of these privilege provisions and the Ministry's use of section 11 following the 1993 amendments raised public and Ministerial concerns and brought these to the attention of the Social Services Committee (the Committee).
3. The New Zealand Medical Association (the Medical Association) raised strong objections to Ministry requests for information about beneficiaries from medical professionals. The Medical Association submitted that medical ethics require the doctor to respect the confidential nature of all medical and personal details relating to the patient. An example of a section 11 request was provided to the Committee where the Ministry had requested details such as a patient's current address, marital status, next of kin and whether the father of the child was present during the birth and his name.
4. In 1994 the Committee resolved to undertake an inquiry into the operation of section 11 with a focus on the remaining privilege provisions and the impact of the 1993 amendments.
5. The Committee recommended:
  - a) The Ministry retain statutory authority to compel information from employers and financial institutions, as allowed under the current provisions of section 11 of the Act. The coercive power should only apply to specified information such as employee details of dates of employment, hours and wages. The Ministry should not be able to request other details such as marital status or current addresses under this coercive power.
  - b) Any amendments to section 11 should comply with the New Zealand Bill of Rights Act 1990 and be consistent with the information privacy principles of the Privacy Act 1993.
  - c) The Ministry obtain the written consent of the beneficiary, at the time of application for a benefit, authorising the Ministry to make specific kinds of enquiries in order to establish the applicant's initial eligibility for the benefit.
  - d) In all cases where the Ministry initiates a section 11 investigation after a benefit has been granted, the Ministry first seek the information from the beneficiary. The Ministry must notify the beneficiary before making requests to third parties and allow the beneficiary time to provide verification details or to consent to the Ministry making requests to verify information provided by the beneficiary, unless to do so would prejudice the maintenance of the law or it would not be reasonably practicable to do so.

- e) A “reasonable cause” requirement be inserted into section 11 of the Act, for all requests other than those made to employers and financial institutions, to act as a check on the Ministry’s exercise of its powers under section 11.
  - f) Section 11 of the Social Security Act 1964 provide for the development of a Code of Conduct.
  - g) The Government expand the application of privilege to a wider range of comparable relationships.
6. It was noted by the Committee that the requirement to notify the beneficiary first would ensure the legislation complies with Information Privacy Principle 2 of the Privacy Act. It would also bring the statutory authority of the Ministry in line with the statutory powers of the New Zealand Police, who have no general power to compel information when making general enquiries. Police do not have the ability to impose a penalty for non-compliance with requests for information.
7. The Committee noted section 11 gives the Ministry broad powers of compulsion compared with government agencies such as the Department of Inland Revenue and Police. It was considered that such broad powers given to the Ministry were not balanced by adequate procedural checks on the Ministry’s exercise of these powers. The Code was instituted to provide the minimum level of procedural checks on the exercise of section 11.
8. Recommendations c and d (in part), were accepted by the Government. These recommendations led to the 1997 Social Security Amendment Bill (No 4), which amended the requirement for the section 11 information gathering powers to be governed by a Code of Conduct (the Code), as provided for in sections 11(1), 11B and 11C. The amendments stipulated what had to be included in the Code (including protections for employment and medical information) and that the Code must be consulted with the Privacy Commissioner.

### 1998 – 1999

9. In early 1998 then Privacy Commissioner Bruce Slane was given just one week to review the first Code. Other agencies consulted, such as the Medical Association were given just three working days for a response. The Medical Association’s submission to the Ministry expressed serious concerns over the three working days consultation period and that the Code was to be published the day after the submission close. The submission questioned whether the Ministry had the intention of reviewing the draft code in light of submissions received or whether this consultation is nothing more than the fulfillment of a proscribed process.<sup>59</sup> It was the Medical Association’s initial concerns about the use of section 11 that was one of the key reasons for the Government asking the Social Services Select Committee to originally inquire into the matter.

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<sup>59</sup> 15 December 1997 New Zealand Medical Association submission on the draft Code of Conduct applying to obtaining information under section 11 of the Social Security Act 1964.

10. Privacy Commissioner Bruce Slane raised his concerns about the inadequate consultation period with the Minister of Justice and the Director-General of the Department of Social Welfare (the Ministry). The Ministry did not agree that the consultation period was inadequate in the circumstances, however in light of the concerns raised agreed that, in consultation with the Privacy Commissioner, it would review the operation of the Code within 12 months of it being issued.
11. In late 1998 this review began. There were five common themes amongst submissions:
  - Five working days is not reasonably practicable for a beneficiary to respond to an information request;
  - The need for beneficiaries to be informed of their rights and obligations prior to the Ministry requesting information under section 11;
  - The process for issuing a section 11 notice is not transparent, this includes the restriction on the information sought are not well known by relevant agencies;
  - No natural justice afforded to the beneficiaries before action is taken;
  - The Ministry has a disregard for the Code.
12. Several submitters also raised concerns with the 'reasonable cause to suspect' threshold for exercising the prejudice to the maintenance of the law exception and thought that this was too low a bar for the exception to be utilised.
13. The Law Commission also recommended that the 'prejudice to the maintenance of the law' exception be strengthened so that the Ministry must establish a 'serious prejudice' before the exception could be utilised.
14. The Ministry of Justice submitted that beneficiaries should be advised of their rights to make a complaint to the Privacy Commissioner if the beneficiary considers there is an alleged breach.
15. In March 1999 the Privacy Commissioner echoed many of these concerns and filed a submission to the Ministry, which stated:
  - The Code should provide clear and specific guidelines as to what information could be sought from whom and where. For example, the Code should specify clearly categories of information and documents which may and may not be demanded and from whom. This was accepted by the Select Committee in its 1994 report;
  - The Code should go beyond what is prescribed in legislation i.e. it should provide specific and clear guidance to staff on when and why the exception can be used;
  - Five working days for a beneficiary to respond to an information request is too short and should be at minimum 10 working days;

- The Code should provide clarity on what constitutes ‘reasonable cause to suspect a prejudice to the maintenance of the law’;
  - The Code and rights under it are not as widely known as intended. The Code should be made available at Work and Income offices. Beyond this, the Code should require that beneficiaries are informed of the Code, complaint mechanisms, provide that section 11 notices advise of the existence of the Code, basic rights and where to obtain a copy;
  - There should be further restrictions of information sought from the education and health sectors. For example, the range of health professionals are too limited and exclusion of confidential information on forms from the education sector;
  - The Ministry has failed to keep figures on use, to know how the Code is working in practice, for example, whether beneficiaries are approached first, and whether there was “reasonable cause”. Noting, the Select Committee in 1994 commented adversely on the lack of information available from the Ministry for its inquiry and the situation does not appear to have been improved; and
  - Section 11 appears to be used widely and as a method for “fishing expeditions”.
16. Following the submission, the Privacy Commissioner was contacted by the New Zealand College of Midwives and the Police regarding concerns they held over requests received from the Ministry. The College of Midwives reported that midwives had been approached in person for information by the Ministry, in one case a Christchurch midwife reported she had been asked if there were men’s clothes in the house she had visited and told she must answer the official’s questions under section 11. Subsequently she was summonsed by the investigating officer to court. The Police were also concerned about the breadth of the requests they were receiving, specifically that they were being asked for domestic violence reports. Both agencies reported feeling uncomfortable about disclosing such information but felt that the Ministry’s powers were so broad they were compelled to.
17. The Privacy Commissioner raised the midwives concerns with the Ministry and stated its view there was a breach of the Code in requesting such information. Specifically, that the Ministry must not require any midwife to give an opinion on whether a beneficiary is married or in a relationship in the nature of marriage. Additionally, that any request for information must be made in writing not in person. The Privacy Commissioner also noted that this example showed there was inadequate publicity around the Code and people (such as the midwife) are not aware of their relevant rights under it.
18. The Privacy Commissioner asked the midwife concerned if it could initiate an investigation into her complaint. The investigation was not pursued as the midwife did not wish to be named or to name her client.
19. In July 1999 the Ministry provided the Privacy Commissioner with proposed initiatives and responses to submissions and a draft of the revised code. The Ministry stated that it did not intend to change the clauses in the Code as a result of submissions. It also suggested that a further review of the Code should only be carried out on an ‘as needs’

basis and any subsequent review should only be triggered by events e.g. cumulative allegations of a serious breach. The Ministry suggested if the Privacy Commissioner did not agree with this strategy, that any subsequent review take place no earlier than 5 years from the date of completion of this review process.

20. The Ministry initiatives were:

*The Code*

- Amend terms of the Code, in consultation with the agreement of the Privacy Commissioner, and re-issue.
- Prepare a “plain English” booklet explaining the Code. This is then to be made available to all Departmental Offices for Customers, agencies and all interested parties.
- Attach a copy of the “plain English” booklet to all letters of request to Customers and section 11 request. This can be done electronically.

*Department Staff Initiatives*

- Increase staff awareness of the Code.
- Review and update staff training on the terms and use of the Code.
- Ensure that the delegated authority to use section 11 powers is understood and exercised properly by all staff using this power.

*Operational*

- Review all standard section 11 letters to ensure that they conform to the Code and follow good practice.
- Prepare a set of operational instructions or guidelines for staff to ensure conformity to good practice.
- Clarify 5-day time period. Allows additional days for postage but this varies throughout the units. Should be standardised to additional 5 days for postage (so 10 days to respond).
- Clarify what is meant by “respond” and as to what is expected of the recipient.

21. In August 1999 the Privacy Commissioner responded to the Ministry’s proposed initiatives, and noted:

- Five years is too long for a future review. Three years would provide a useful period for the amended Code to be reviewed and monitored.

*The Code*

- Agreed with the Ministry’s proposed initiatives with the proviso that some of these proposals be set out in the Code itself to ensure that they are implemented.
- Noted that the Privacy Commissioner wished to be consulted on the “plain English” booklet.
- Considered that when the Ministry sent out information about the Code, it should be sent with all requirements.

### *Department Staff Initiatives*

- Noted that the Ministry should explain who has delegated authority for the exercise of section 11 powers and that this should also be included in the booklet.

### *Operational*

- The section 11 letter sent out to agencies should have explicit references on obtaining information contained in them.

### *Draft Revised Code*

- “reasonable cause” appeared to be an overly low threshold to trigger issuing a requirement.
- Agreed with the extension of time to 10 days but considered it should be 10 working days.

### *Further issue*

- The Privacy Commissioner also raised concerns about the position of the person other than a beneficiary about whom information is sought under section 11, for example, a landlord or alleged de facto partner. At the time the Code did not cover these requests. The Privacy Commissioner noted that it should be that the Ministry ask the information from the person first, as is the same for the case of beneficiaries.

22. In December 1999 the Ministry responded to the Privacy Commissioner’s submissions. The Ministry considered that the concerns raised about ‘reasonable cause’ test is a higher test than the Act requires. The Ministry considered this was in line with other legislation. The Ministry found that some of the Privacy Commissioner’s proposals would require a change to the legislation and the Code cannot patch up anomalies in the legislation.<sup>60</sup>

## **2000 – 2003**

23. In April 2000 the Privacy Commissioner again raised the matter of the Ministry seeking information about persons who are not beneficiaries (such as an alleged de facto partner) from beneficiaries or third parties such as banks. The Commissioner wanted the individual concerned to be approached by the Ministry first to obtain the information required. The Privacy Commissioner considered section 11 provided wide powers for the Ministry to obtain information from any person about any person and that the Code should cover procedures applying to the obtaining of information about persons other than beneficiaries.

24. The Ministry responded and said it had concerns about amending the Code without amending the legislation. The Ministry considered such a change was a challenge to the

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<sup>60</sup> We have no evidence that a Code was passed at this time or that any of the proposed initiatives were implemented.

legislation, which is explicit that the Ministry must approach the beneficiary first but silent on other parties. The Ministry considered this would be acting ultra vires, and had difficulty agreeing to the amendment.

25. Between August and November 2001, the Ministry and OPC consulted on the drafting of the Code.
26. In June 2002 the Privacy Commissioner wrote to the Ministry and noted it had been more than 3 years since the statutory review was undertaken and the outcome is still not finalised.
27. Consultation of the Code continued. The Ministry proposed the following amendments:
  - (i) Section 11 notices would advise the existence of the Code and attach a copy;
  - (ii) A “plain English text booklet” will be prepared for distribution with the Code;
  - (iii) Preliminary requests (prior to the issue of a section 11 notice) will be made to any person who is the subject of the information rather than just to the beneficiary;
  - (iv) Review period revised from 12 months to 3 years;
  - (v) Beneficiary definition revised to include all people covered under section 11(2) of the Act. This meant the Ministry would have to apply the same process for seeking information regardless of whether the individual of interest is receiving the benefit;
  - (vi) ‘Prejudice to the maintenance of the law’ definition expanded;
  - (vii) ‘Reasonable cause’ definition simplified;
  - (viii) If an investigator wanted to make initial enquiries about a beneficiary, the information must still be sought first from the beneficiary and that third party;
  - (ix) The process of giving section 11 notices is to comply with principle 3 of the Privacy Act. The Ministry is to let the recipient know of their right to complain to OPC. Additionally, to advise of the existence of the Code and notify the person or agency how they can view a copy.
28. The Commissioner agreed with these proposed amendments.
29. Amendments (i), (iv), (v), (vi), (vii) and (ix) were implemented.
30. In 2003 the then Privacy Commissioner (Marie Shroff) was consulted on the three-yearly review of the Code. The Code had been amended to include an explanation of what ‘prejudice to the maintenance of the law’ means. The Code was also amended to include a definition of ‘reasonable cause’, this was that officers must hold a ‘reasonable cause to suspect offending’ and then apply the prejudice exception.

31. The Privacy Commissioner did not support either definition. The Commissioner's opinion was that the definitions were included for 'administrative convenience' and were subverting the original intent of section 11.
32. Despite the objection the Code passed into effect with the definitions remaining as originally drafted.

### 2004 - 2005

33. In November 2004, the Ministry wrote to the Privacy Commissioner to advise of a review of the Code, and noted it was required to do so by January 2005 and thereafter at three yearly intervals.
34. In February 2005 the Commissioner wrote to the Ministry and reiterated comments from 2003 regarding the definition of 'prejudice to the maintenance of the law' and 'reasonable cause'.
35. In April 2005 the Commissioner received a copy of the Code from the Ministry, which contained only minor amendments, and a noted that the Code was next due for review in 2008.

### 2008

36. The Code is not reviewed.

### 2012

37. In July 2012 the Privacy Commissioner received notice of the Ministry's intention to amend the Code.
38. Southland Beneficiaries and Community Rights Centre (SBCRC) wrote to the Commissioner on proposed Code changes. SBCRC noted that the Ministry have said that the requirement to seek the information from beneficiaries first is impeding their investigations. SBCRC said that the requirement to go to the beneficiary first should not change and noted that of the thousands of allegations of fraud "large numbers of these allegations are malicious, envy, jealousy based" and "we have experienced many cases of clients being accused of relationships where there is no justification for the complaint."
39. SBCRC also noted that in their experience "the beneficiary once presented with the knowledge of being investigated are quite cooperative with the investigators and know full well that the documentation can be resourced if the originals are lost or destroyed. Again, it is not the experience of the advocates that the destruction of evidence is common and widespread amount beneficiaries under investigation" and "[t]he privacy rights of these people should not be removed just because of them belonging to a lower socio-economic grouping."
40. National Beneficiary Advocates Consultancy Group (NBACG) provided a submission to the Ministry on the proposed changes and stated:
  - "The effect of the proposed change is to bypass in all cases the need to first request information from the beneficiary"

- “NBACG are greatly concerned that this approach will foster an attitude that the beneficiary is a third-class citizen with no right to privacy and no right to natural justice”
  - “the intention to bypass section 11 requests to the client seems to be based on the wish for expediency rather than any risk that the client in fact poses [...] implying that every person investigated by the Ministry is ‘likely’ to prejudice the maintenance of the law”
  - “this proposed change also takes no account of the vast number of situations when early contact with the beneficiary results in an early resolution of the investigation”
41. NBACG also noted that the change could be seen as discriminatory for the purposes of the Human Rights Act as it creates a class of persons no longer able to exercise their right to privacy.
42. The Privacy Commissioner provided feedback on the proposed internal Frequently Asked Questions information sheet to be provided to Ministry staff regarding the changes and commented:
- “the proposed change to the definition in the Code does not change what the Ministry can legally do, it merely simplifies the wording of the provision. It is misleading and inaccurate to imply a change in the Code would impact investigation effectiveness”
  - “The Ministry still needs to demonstrate that application of the provision would be likely to prejudice the prevention, detection, investigation, prosecution or punishment of an offence. It is not sufficient to argue that the prevention, detection etc is taking place”
  - “the amendment simplifies the definition but doesn’t change the legal scope”
  - In regard to the Ministry’s comment that there is a delay in investigation in 95% of cases, OPC commented: “this explanation misrepresents the legal effect of changing the Code. Our understanding is that the rationale for the change is to remove confusion arising from the current non-exhaustive list of applications, rather than to change any legal obligation the Ministry may be under”
  - “please remove the sentence that reads ‘the Office of the Privacy Commissioner has agreed that any change to the Code attached to section 11 is an operational decision’ as it does not accurately reflect our position. This is also not appropriate context to quote this Office”
  - In regard to the Ministry noting information can be requested from third parties without notifying clients the Commissioner commented: “this does not apply to all clients and the explanation therefore needs to be limited explicitly to investigations etc where action otherwise would be prejudicial”.
43. In August 2012 the Ministry emailed the Commissioner and stated that they would not be making any amendments as a result of beneficiary advocacy groups submissions.

44. The Privacy Commissioner provided final comments to the Ministry which included:
  - “the proposed simplification of the ‘maintenance of the law’ definition in the Code does not affect the legal rights of individuals”
  - “The Ministry will still need to demonstrate that application of the provision would be likely to prejudice the prevention, detection [etc]. It is not sufficient to argue that the investigation prosecution etc is taking place”
  - “we have significant concerns about the FAQ as currently drafted. Communication document as relating to the change must not represent the change in definition as a change to the Ministry’s legal obligations or as legally enabling changes to the Ministry’s practice. Doing so raises significant reputational risks for OPC”
45. In October 2012 the Privacy Commissioner sought an update on the Code from the Ministry.
46. The Ministry never provided an update, we can however infer that no changes were made as result of the Privacy Commissioner’s comments and that the proposed change in Ministry policy and practice was instituted in 2012 without further reconsideration.
47. The Code was due for review in 2015 – no such review was undertaken at this time or any time since.

## Appendix C: Summary of historic complaints

### 1. Human Rights Review Tribunal

#### ***Heta v Ministry of Social Development [2013] NZHRRT 8***

- 1.1 Ms Heta received a Domestic Purposes Benefit for various periods from 1985. Relevantly, she received such a benefit from 1 June 2001 to 1 March 2010. In November 2009, the Ministry started an investigation into an allegation that Ms Heta was living with her partner of many years, with whom she had four children. Ms Heta argued that MSD interfered with her privacy during the course of her investigation by failing to comply with clause 3 of the Code of Conduct, which requires the Ministry to first seek information from the beneficiary before going to third parties.
- 1.2 In this case, the Ministry had gone to Ms Heta to request information in accordance with the Code. However, the investigator failed to ask Ms Heta for information that was subsequently sought from Sky and Immigration New Zealand. The Ministry admitted that it did not follow the Code and its own internal guidance by failing to request this information from Ms Heta in the first instance. Despite this, the Tribunal did not find an interference with Ms Heta's privacy as she had not established significant humiliation, loss of dignity or injury to her feelings owing to the Code breach. Her distress, the Tribunal found, was not caused by the Code breach, but from the fact that she was investigated and prosecuted for benefit fraud.

### 2. Complaints to the Office of the Privacy Commissioner

- 2.1 The Office of the Privacy Commissioner (OPC) has received seven complaints about the use of the Ministry's section 11 powers since 2012. Three of the complaints have included requests to the Ministry for access to personal information (Information Privacy Principle (IPP) 6) about investigations of allegations of fraud by the Ministry. One complaint was to a third-party agency who had been issued a section 11 notice by the Ministry. In one of the IPP 6 complaints, the beneficiary was provided with her file and OPC closed the complaint as no further action was necessary. In the other cases OPC found that no further action could be taken in the circumstances.
- 2.2 Five of the seven complaints were also investigated under the collection principles 1- 4 of the Act. In two of the cases, it was found that there had been no breach of the collection principles as the Ministry had requested the information from the individual first and provided a reasonable amount of time to respond. Both of the individuals in these complaints were partners of a beneficiary and not the beneficiary themselves. One of the complaints is in the process of being heard in the Human Rights Review Tribunal.
- 2.3 In another case, the Ministry accepted the investigator had breached the Code. The investigator had provided the individual 10 days to respond to the request for information, however the investigator issued section 11 notices only 5 days after it had requested the information from the individual.

- 2.4 In another, OPC found a breach of the Code as well as principles 2, 8 and 11. This complaint was investigated under collection, accuracy and disclosure. The investigator found that there had been an interference with the complainant's privacy. The Ministry accepted the breaches and interference for principles 8 and 11 but not for principle 2. The Ministry also did not accept they had breached the Code.
- 2.5 OPC has two investigations which are still ongoing.
- 2.6 We note that the number of complaints received by our Office since 2012 appears low. This could be because the individuals being investigated are more focused on the investigation at hand, rather than considering a complaint to our Office. Alternatively, it could be that they were not aware of their rights to complain. It is the Ministry's responsibility to implement the recommendations made in this report, and in doing so, ensure all beneficiaries under investigation are made aware of their right to complain if they consider that there has been a breach of their privacy or the Code.

### 3. Complaint - Ms A

#### Background

- 3.1 Following a data match with the Inland Revenue Department the Ministry established a debt against Ms A for an overpayment. Ms A disputed the Ministry's calculations and asked for a review of the overpayment established. The Ministry found there were inconsistencies in its assessment. On three different occasions the debt figure established against Ms A changed. Each time it was re-assessed, the debt amount said to be owed decreased. The Ministry's final debt was revised and calculated at around half the initial amount established against Ms A. As part of the review the Ministry issued section 11 notices to several third parties without first seeking the information from Ms A.

#### How the investigation began

- 3.2 Ms A was investigated as she had been identified as having received undeclared taxable income whilst in receipt of the benefit through an Inland Revenue data match.

#### Failure to seek information from individual

- 3.3 When the Ministry investigated Ms A it issued section 11 notices to 12 different agencies. The Ministry did not request the information from Ms A first. One of the section 11 notices ("the notice") was sent to an incorrect agency. This was because the Ministry had inaccurate notes in its system and thought Ms A had previously been employed at this agency. The notice had Ms A's name, IRD number and date of birth. Additionally, the notice was signed off by an investigator in the Fraud Intervention Services. Had the Ministry requested the information from Ms A first, she could have informed the Ministry of its mistake.

### **Breach of the Code of Conduct**

- 3.4 My Office investigated this case under principle 2/section 3 of the Code and found the Ministry had breached its Code. My Office found that the Ministry did not have reasonable grounds to believe that asking Ms A directly for the information it required first, would have prejudiced the maintenance of the law. My Office considered that the Ministry should not take a blanket approach to applying an exception. The Ministry had not provided evidence to suggest that collection from a source other than Ms A was necessary. Ms A had no previous allegations of benefit fraud or investigations, or previous data match cases.

### **Failure to take reasonable steps to check accuracy of information before use**

- 3.5 Additionally, the case raised issues under principles 8 and 11. Principle 8 says before it uses or discloses personal information, an agency is to take reasonable steps to check that information is accurate, complete, relevant, up to date and not misleading. By not checking with Ms A about the agencies it intended to send notices to, it used incorrect information found on its system. We found a breach of principle 8, as a reasonable step would be to check with Ms A first before issuing the notice.
- 3.6 My Office also found a breach of principle 11 as the Ministry did not have good reason to disclose Ms A's personal information, including the fact she was being investigated for fraud, to an agency that she had never worked for.

### **Harm**

- 3.7 Ms A lives in a small community and works in a specialised industry. It caused Ms A significant humiliation that an agency in her community knew she was being investigated for beneficiary fraud. This discouraged Ms A from applying for employment there in future. The Ministry agreed with my investigator's final view that it had breached principles 8 and 11 and had interfered with Ms A's privacy. However, the Ministry disputed that it had breached principle 2/section 3 of the Code. Ms A was provided with compensation for the harm caused by the interference of her privacy.

## Appendix D: The Privacy Act

There are twelve privacy principles at the heart of the Privacy Act. They govern the collection, use, storage and disclosure of personal information. Below I describe the principles most relevant to this Inquiry as well as how ‘harm’ is established under the Privacy Act.

### Principle 1 – Purpose for collection

1. Principle 1 says agencies should only collect personal information when it is necessary for a lawful purpose that is related to their work and it is necessary to collect the information for that purpose.
2. In the case where the Ministry is investigating benefit fraud it must only collect information that would assist it in investigating those allegations, any information collected must be necessary for this purpose.
3. Purpose is a central consideration when collecting personal information. The operation of many of the other principles flows from this starting point. For example, when collecting information agencies must tell people what purpose they are collecting it for (principle 3), and information can then only be used (principle 10) in line with this original purpose unless an exception applies.
4. My Inquiry has established that the Ministry’s requests are overly broad resulting in the collection of information unnecessary to the Ministry’s purpose of ensuring the correct entitlements are paid to individuals. There will be times when extraneous information is collected incidentally to legitimate information, however there have been a number of instances of excessive collection of, for example, text messages, which suggest a breach of this principle.

### Principle 2 – Source of the information

5. Under principle 2 an agency must collect personal information directly from the individual concerned unless an exception to principle 2 applies. Section 3 of the Code of Conduct mirrors aspects of principle 2 by requiring that beneficiaries are first asked for information before it is sought from third parties. This ensures the person concerned is aware of what is going on and has some control over their information. It is only appropriate for the Ministry to collect information from third parties when the ‘prejudice to the maintenance of the law’ exception applies.
6. Additionally, the Ministry must give the beneficiary reasonable time to provide the information or documents and advise the beneficiary of that period. This is unless the Ministry has reasonable grounds to believe that doing so would prejudice the maintenance of the law.<sup>61</sup> This could be, for example, where this is a real risk to evidence being destroyed that would otherwise have assisted the Ministry to investigate allegations of fraud.

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<sup>61</sup> <https://privacy.org.nz/further-resources/knowledge-base/view/247>

### Principle 4 – Collection must not be unreasonably intrusive

7. Principle 4 says personal information must not be collected by unlawful means or by means that in the circumstances are unfair or intrude to an unreasonable extent upon the personal affairs of the individual concerned.
8. Principle 4 governs how personal information is collected, distinct from what information is collected. When an agency collects information about a person, it has to do it in a way that is fair and legal. The Supreme Court has found that the collection of personal information can amount to a search when the individual concerned has a reasonable expectation of privacy. That will be particularly true when the information goes to the “biographical core” of the individual.<sup>62</sup> This means that an overly broad demand can be an unreasonable search under the Bill of Rights Act. That would make it unlawful, which would clearly make its collection a breach of principle 4.

### Principle 6 – Access

9. Under principle 6 people have the right to ask for access to the personal information an agency holds about them, unless one of the withholding grounds applies. This principle is a strong right and is an important one for natural justice. The withholding grounds are set out in sections 27-29 of the Privacy Act. Our Office would be able to review information withheld under one of these sections.

### Principle 8 – Accuracy

10. Under principle 8 an agency is required, before it uses or discloses personal information, to take reasonable steps to check that information is accurate, complete, relevant, up to date and not misleading.
11. What is required in terms of checking will vary depending on matters like the proposed use; the age of the information and the reliability of its source; the practicalities of verifying accuracy or currency; and the probability, severity and extent of potential harm to the individual should the information be inaccurate.

### Principle 11 – Disclosure

12. Under principle 11 an agency must not disclose personal information unless it believes on reasonable grounds that one of the exceptions to that principle applies. One of the exceptions to principle 11 is that non-compliance is necessary to avoid prejudice to the maintenance of the law by any public-sector agency, including the prevention, detection, investigation, prosecution, and punishment of offences.
13. In this case, when the Ministry issues section 11 notices requiring information, it discloses personal information about the individual concerned to the agency it is requesting information from. We have looked at section 11 notices issued by the Ministry and the variety of information they disclose about the beneficiary. The amount of personal information contained in the notice will depend on the agency the Ministry is notifying. The notices our Office has viewed included the individual’s full name, date of

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<sup>62</sup> See *R v Alsford* [2017] NZSC 42 at [63] per William Young, Glazebrook, Arnold and O’Regan JJ

birth and in some cases IRD numbers, phone numbers and addresses. The notices are also always signed off by an investigator identifying themselves as working in the Fraud Intervention Services Unit, thereby disclosing the fact that the individual is under investigation for fraud.

## Harm

14. The purpose of an Inquiry under section 13(1)(m) of the Privacy Act is to look into issues that could infringe upon the privacy of the individual. A section 13(1)(m) inquiry differs from the investigation of a complaint from an individual under Part 8 of the Privacy Act. In the case of an individual we are investigating to assess whether there has been an interference with privacy. An interference is made up of a breach of a privacy principle plus harm.
15. While it is not the purpose of this Inquiry to establish whether there has been harm caused to any particular individual it is relevant to note the extent of potential harm resulting from the Ministry's practices to gauge the extent of any infringement on the privacy of the individual.
16. The Privacy Act states that an individual has experienced harm if, in the opinion of the Privacy Commissioner, the action of the agency:
  - (i) has caused, or may cause, loss, detriment, damage, or injury to [the] individual;  
or
  - (ii) has adversely affected, or may adversely affect, the rights, benefits, privileges, obligations, or interests of [the] individual; or
  - (iii) has resulted in, or may result in, significant humiliation, significant loss of dignity, or significant injury to the feelings of [the] individual.

## Appendix E: Public reports

Whakamana Tāngata – Restoring Dignity to Social Security in New Zealand – Welfare Expert Advisory Group

<http://www.weag.govt.nz/weag-report/>

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 – Frances Joychild QC

<https://www.msd.govt.nz/documents/about-msd-and-our-work/publications-resources/archive/2002-rukareport.pdf>

When is MSD going to give up its damaging and arcane views towards sole mothers who repartner? – Jeni Cartwright, Child Poverty Action Group

<https://www.cpag.org.nz/when-is-msd-going-to-give-up-its-damaging/>

The complexities of ‘relationship’ in the welfare system and the consequences for children – Child Poverty Action Group

<https://www.cpag.org.nz/assets/141204CPAG%20Welfare%20System%20final.pdf>

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

<https://library.nzfvc.org.nz/cgi-bin/koha/opac-detail.pl?biblionumber=5102>

Welfare for Wellbeing – Child Poverty Action Group and Action Station

<https://www.cpag.org.nz/assets/Welfare%20for%20Wellbeing%20PDF.pdf>

Access to Justice for Beneficiaries: A Community Law Response – Community Law Canterbury

<http://www.communityresearch.org.nz/research/access-to-justice-for-beneficiaries-a-community-law-response/>

Seeking the Common Good or just making us be good? Recent amendment to New Zealand’s Social Security law – Māmari Stephens

<https://www.victoria.ac.nz/law/research/publications/vuwlr/prev-issues/volume-44,-issue-2/Stephens.pdf>

Right to Social Security – Human Rights Commission

[https://www.hrc.co.nz/files/5414/2388/0511/HRNZ\\_10\\_right\\_to\\_social\\_security.pdf](https://www.hrc.co.nz/files/5414/2388/0511/HRNZ_10_right_to_social_security.pdf)

Why is tax evasion treated more gently than benefit fraud? – Lisa Marriott

<https://www.victoria.ac.nz/news/2017/08/why-is-tax-evasion-treated-more-gently-than-benefit-fraud2>

20% of benefit fraud tip-offs have some legitimacy – Checkpoint

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Official Information Act response 2018 June – Benefit fraud allegations

<https://www.msd.govt.nz/documents/about-msd-and-our-work/publications-resources/official-information-responses/2018/june/r-20180612-details-regarding-reports-of-benefit-fraud-msd-received-in-2017.pdf>

Aggressive prosecution focus at MSD preceded woman's death, inquest told – Stuff.co.nz

<https://www.stuff.co.nz/national/87347930/aggressive-prosecution-focus-at-msd-preceded-womans-death-inquest-told>

Benefit fraud procedure changed following suicide – Radio New Zealand

<https://www.radionz.co.nz/news/national/340729/benefit-fraud-procedure-changed-following-suicide>

A chance to reverse our humiliating welfare system – Newsroom

<https://www.newsroom.co.nz/2018/04/29/106495/a-chance-to-reverse-nzs-humiliating-welfare-system>

## Appendix F: Case studies

### CASE STUDY - MS C

#### Background

Ms C and Mr D were accused of being in a relationship in the nature of marriage. The Ministry investigated Ms C's relationship with Mr D after receiving a tip off from the allegation line. Ms C was interviewed six months after the investigation was initiated.

The Ministry concluded that due to the relationship the couple had received benefits they were not entitled to for around seven years and established an overpayment debt of \$99,000. The Ministry issued a number of section 11 notices prior to informing Ms C and Mr D of the investigation.

#### Overcollection of sensitive information

The Ministry issued section 11 notices to 27 agencies including the Accident Compensation Authority, District Health Board and Police. The Ministry also collected the couples' Facebook information. The Ministry also collected a summary of Ms C's birthing record, which noted attendees as including a "partner", and required the DHB to provide all admission and booking forms since 2016. The Ministry also obtained Police domestic violence reports from Ms C's previous relationships.

Much of this information appears to fall outside what the Ministry can reasonably collect, particularly Police domestic violence reports for previous relationships.

#### Avoidance of prohibitions on collecting certain information in the Code

Compliance with the Code is also potentially at issue in this case as the Ministry obtained medical information that may be confidential and so not required to be provided under the Code. The fact that birthing records included information about attendees including a "partner" also seems to circumvent the prohibition on asking those in the health and disability sectors for their opinion about whether a beneficiary is married or in a relationship in the nature of marriage. This restriction was put in place in order to protect people's privacy, particularly in relationships of trust and confidence, such as between patients and medical professionals. Accordingly, it is concerning that this may be avoided through a sidewind.

## CASE STUDY – MS D

### Background

Ms D was accused of being in a relationship in the nature of marriage as a result of an anonymous tip off.

Ms D was not notified of the investigation before section 11 notices were issued to 21 agencies and individuals approached (sometimes more than once), including utilities companies, telecommunications companies, schools, and employers.

### Failure to seek information from individual and provide information when requested

Ms D was not provided an opportunity to provide the information herself as contemplated by the Code. Additionally, Ms D, through an advocate, requested her file in preparation for an upcoming interview between Ms D and the Ministry. This request was declined in full on the basis that access would prejudice the maintenance of the law. The Ministry further stated that the information was not required as Ms D already knew the allegation against her and this was sufficient.

Access to one's own information is an important right and is a key aspect of natural justice. As Ms D was not provided with her information, or at least some of it as requested prior to the interview, she was likely at an immediate disadvantage.

### Overly broad requests for information

At least six of the section 11 notices were not issued for specific time periods but were "ongoing" leading agencies to have ongoing correspondence with the fraud investigator.

An ongoing requirement to provide information could lead to overcollection of information unnecessary to the investigation of fraud. In this case, some of the information collected from schools incidentally included medical information.

## CASE STUDY – MS E AND MR F

### Background

Mr F and Ms E were accused of living in a relationship in the nature of marriage and receiving benefits they were not entitled to. Mr F and Ms E are both on a benefit. A Work and Income Case Worker referred Ms E and Mr F to the Ministry's fraud team for investigation, having received information from the Police that they were in a relationship as well as collecting benefits they were not entitled to. The Ministry issued a number of notices under section 11 to a range of parties prior to informing Mr F and Ms E that they were under investigation.

The Ministry concluded that Mr F and Ms E had received benefits they were not entitled to and were in a relationship and established a total shared debt of over \$15,000. Ms E has lodged a review of decision against the debt, Mr F has not.

### Failure to seek information from the individual directly

Neither Mr F nor Ms E were provided an opportunity to provide the information requested from third parties as contemplated by the Code.

Ms E notes in her interview with the Ministry that she wishes that she had been asked first about the relationship as she is concerned that the Case Worker has a dislike for her.

### Collection of sensitive information

The Ministry made requests of Mr F's and Ms E's telecommunication providers for all text messages sent and received for a five-month period. This information is highly personal and would be unable to be obtained by Police without a warrant. It therefore appears highly intrusive in the circumstances.

## CASE STUDY - MS G

### Background

Ms G was investigated by the Ministry over an allegation she was in a relationship in the nature of marriage with the father of her children. The Ministry issued over 30 notices under section 11 to a range of parties prior to informing Ms G that she was under investigation and requiring her to attend an interview.

### Collection of sensitive information

Six months' worth of all Ms G's incoming and outgoing text messages along with several years worth of bank statements, hospital admission forms, Police records, her children's school enrolment forms and car registration details were among the information collected by the Ministry.

The collection of all incoming and outgoing text messages of a beneficiary under investigation was not an uncommon occurrence in the files reviewed. In Ms G's case text message content collected included information about health appointments, her dating life and messages of a sexual nature.

Police information collected by the Ministry indicates that there was violence present in the relationship under investigation. The Ministry assessed that the violence was not at a level sufficient to negate the relationship was one in the 'nature of marriage'. Information held by the Ministry indicated that Ms G's mental health made her a potentially vulnerable client and that the investigation would need to be managed with due consideration to these factors.

At interview Ms G admitted she was in a relationship in the nature of marriage and an overpayment debt of around \$100,000 was established.

Ms G's case underlines the complexity of the cases investigated by the Ministry and the need for clear training and guidance to investigative staff on issues such as domestic violence. The case also highlights the importance of case by case assessments of the most suitable evidence to seek and information gathering methods for investigations.

## Appendix G: Inquiry Terms of Reference

### Terms of Reference: Inquiry into MSD's use of collection powers under section 11, Social Security Act 1964

#### Background

In July 2018 a community organisation approached the Office of the Privacy Commissioner with concerns about the Ministry of Social Development's (MSD) collection of information about beneficiary clients from third parties under section 11 of the Social Security Act 1964, in particular where fraud allegations are being investigated.

MSD's powers to obtain personal information under section 11 are governed by a Code of Conduct (the Code), as provided for in sections 11(1), 11B and 11C. The Code requires MSD to approach clients for information prior to exercising its section 11 powers, unless an exception applies. The community organisation's concerns raise a question for inquiry about whether MSD's exercise of these powers is consistent with the Code.

The Privacy Commissioner is consulted on the Code and any review of the Code. Individuals may complain to the Privacy Commissioner about breaches of the Code as if it were a code of practice issued under the Privacy Act.

#### Authority

The Inquiry is a Privacy Commissioner initiated inquiry under section 13(1)(m) of the Privacy Act 1993. The Privacy Commissioner has inquiry functions under that provision to inquire generally into any matter including any governmental law, practice or procedure if it appears that the privacy of the individual is being or may be infringed thereby.

As part of any inquiry the Privacy Commissioner may use his powers to summon witnesses and obtain relevant documentation under section 91 of the Privacy Act.

#### Matters for Inquiry

The purpose of the Inquiry is to inquire into whether MSD's exercise of its section 11 powers to investigate allegations of client fraud, is compliant with the Code and the privacy principles, and whether it infringes or may infringe individual privacy.

The Inquiry will consider the processes and procedures that govern MSD's exercise of its section 11 powers, the type and amount of information obtained, the frequency of use of section 11 powers and the purpose for which information is obtained. This will include considering when MSD is voluntarily obtaining information from clients as the Code requires before a section 11 notice is given, and when MSD is relying on the exception to that requirement, where it is considered that compliance would prejudice the maintenance of the law.

The Inquiry will be informed by input from the MSD, as well as any departmental reviews, non-governmental reports, Court/Tribunal decisions, public submissions and individual accounts that are available. The Inquiry intends to collect its evidence in private and does not intend to hold public hearings.

The Inquiry will use this information to inform recommendations to improve compliance with the Code that are necessary and desirable on the basis of the Inquiry's findings.

### **Exclusions**

The Inquiry will not directly investigate any individual's complaint or concern relating to the use of section 11. However, this does not limit the Privacy Commissioner's investigation powers under Part 8 of the Privacy Act.

Individuals who believe their privacy may have been infringed and wishing to consider a complaint to the Office of the Privacy Commissioner can find more information on this process at [www.privacy.org.nz](http://www.privacy.org.nz)

### **Commencement of Work and Reporting Requirements**

The Inquiry will commence on and may begin considering evidence on 9 October 2018.

A draft report will be provided to MSD prior to being finalised. The report will be publicly released once it has been considered by MSD.

Where appropriate, the Privacy Commissioner may make recommendations prior to issuing a final Inquiry report.