



**BUSINESS SCHOOL**

## Retirement Policy and Research Centre

A commentary from the Retirement Policy and Research Centre

### The spousal deduction. How did the courts get it so wrong?

*PensionCommentary 2020-11*<sup>1</sup>

The RPRC invited Sissi Stein-Abel, long-time critic of the direct deduction policy, and administrator and editor [www.nzpensionprotest.com](http://www.nzpensionprotest.com) to document some of her observations on the Human Rights Review Tribunal hearing in March 2018 and the long journey to get the repeal of the invidious spousal deduction on the eve of its abolition on 9 November 2020. This opinion piece does not necessarily reflect the views of the RPRC.

23 November 2020

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#### **Sissi Stein-Abel writes:**

Letters or emails from the Ministry of Social Development (MSD) in October 2020 informed those affected by the Spousal Deduction that “*your partner’s overseas pension will not be deducted from your New Zealand Superannuation (NZS) any longer after 9 November*”. This is a reason to celebrate the end of the discriminatory Spousal Provision/Deduction which punished pensioners in a relationship with someone who receives an overseas pension higher than NZS.

But do we really have reason to celebrate? Sure, it is a success that this grossly unfair legislation (Sections 187-191 of the Social Security Act 2018, formerly Section 70) has been changed after all the hard work NZPensionProtest, the RPRC, the Retirement Commissioner and others have put into this fight, and 400 to 600 pensioners might benefit from it.

But what does it mean in real terms? While it might make a big difference of several hundred dollars every month for some pensioners, in other cases, for all the administration costs, the amounts involved were minimal. One superannuitant I know has now received the puny amount of NZ\$8.76 on 10 November instead of nothing and will get a bit over NZ\$40 per fortnight in the future. Or a few dollars more if the exchange rate changes to their advantage. And if the exchange rate changes to their disadvantage, they may receive next to nothing.

#### **Background to the Human Rights Review Tribunal case:**

But how lucky are we that the Government has changed the law! Perhaps you remember that there was a hearing on the Spousal Provision at the Human Rights Review Tribunal (HRRRT) in Wellington in March 2018?<sup>2</sup>

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<sup>1</sup> PensionCommentaries are opinion pieces published as contributions to public debate, and do not necessarily reflect the view of the RPRC.

<sup>2</sup> S,Stein-Abel’s full report of the hearing used for this section can be found [here](http://www.nzpensionprotest.com/Home/the-fight/hrrt-hearing-march-2018)  
<http://www.nzpensionprotest.com/Home/the-fight/hrrt-hearing-march-2018>.

The hearing on Spousal Provision, named *McKeogh & Others vs the Attorney General*, at the HRRT in Wellington took place from 5 to 14 March 2018. The defendants in the case were represented by a counsel who defended the indefensible, in my opinion, justifying discrimination and unfairness imposed on New Zealanders married to or in a loving relationship with the “wrong” partners. Most of these partners have lived in New Zealand for decades, contributed to the tax base and society in many different ways, but they are receiving an employer/employee-funded overseas pension they earned before setting foot in New Zealand.

Mr X (Crown Law) served MSD’s “alternative facts” softly speaking, with minimal gestures, like a teacher explaining the world to ignorant students, with the only difference being that he wished to persuade three highly trained lawyers (Chairman and two Members) on the bench.

After the evidence of a woman witness who received zero NZS because her non-qualified spouse’s US Social Security pension was all deducted from her NZS, the Judge told the Crown’s lawyer that he could not see that these couples were advantaged over lifelong New Zealand couples “*but significantly disadvantaged*”. He also said: “*We have heard clearly and loudly from the plaintiffs about the unfairness*”, and that they had pleaded their cases in “*a very dignified and compelling way*”.

The plaintiffs claimed that the spousal deduction was inconsistent with Section 19 of the New Zealand Bill of Rights Act 1990 because it limits their right to freedom from discrimination (by reason of their family status, the fact that they are married to a particular person) and that this discrimination was not a justified limitation of that right (Section 5 of the Bill of Rights).

The two MSD bureaucrats, so called “expert witnesses”, gave evidence for the Crown that was in my opinion an insult to the Tribunal. But their lengthy monologues about the history of everything that had remotely to do with social security since the 16th century in the United Kingdom, might have helped to fog the minds of the Tribunal, particularly on day three when the Policy Manager of the Income Support Team declared that the “*unit of assessment*” must not be the individual but the “*economic unit*” – despite NZS being universal and individually paid and not income- and asset-tested, “*unless an overseas pension is included*”.

They claimed that “*married couples achieve economies of greater scale*” than two singles living together. Even if this was true, pensioners affected by the direct deductions in general and spousal deductions in particular are most often at the bottom of the wealth and income scale.

The MSD’s 2005 Review on the treatment of overseas pensions, signed by Peter Hughes (then CEO of MSD), Mark Sowden (Manager Labour Market and Income for Secretary to the Treasury), Michael Cullen (Minister of Finance) and David Benson-Pope (Minister for Social Development and Employment), had confirmed on page 2: “*The majority of these people [page 14 specifies 85%] have been in New Zealand for more than 30 years and are living on modest incomes. Seven per cent of these people were born in New Zealand.*”

On page 14 it also reads: “*Overseas pensioners typically belong to low income households. Over sixty percent of overseas pensioners have an income level below the threshold which would preclude entitlement to a Community Services Card.*”

The three plaintiffs and their partners, represented by the Office of Human Rights

Proceedings (OHRP), couldn't visit their families and friends overseas anymore. One of them, an 82-year old male, said he felt like a much-diminished man because his Norwegian wife of 33 years received all the money from overseas and he, with only a tiny fraction of NZS, could only decide on small-ticket items. Their social life was changing, friendships became more distant due to the inability of keeping up with others. *"It is psychologically devastating"*, he said, *"One country confiscates money from another country, and it is the confiscation of money accrued by another person at another place and another time. This makes me very angry."* (This couple were so desperate and depressed that they could not bear living in New Zealand any longer. A year after the hearing, without hope that the HRRT would make a speedy or fair decision, the couple, both in their eighties and he a born-and-bred New Zealander, moved to Norway!)

The plaintiffs and other pensioners affected by the spousal deduction suffered, as the OHRP Director summarised it: *"material disadvantage, significant emotional harm, loss of dignity, stress, ill-health, feelings of guilt (for marrying their partner and causing the situation) and loss of financial independence"*. But no, said the MSD expert, *"they achieve economies of greater scale"*!

The MSD expert explained every single social welfare benefit at length, going back several centuries and to the Māori hapu, and then to 1898 when social security officially started in New Zealand. He even quoted the Destitute Persons Act of 1846<sup>3</sup> to prove that working women should be treated as dependents of their husbands if those received an overseas pension.

He explained how many shillings were paid at the time for which need. He put stress on the word *"need"* – and we still wonder why New Zealand millionaires would receive NZS if it is needs-based and not an individual entitlement. Obviously there has been no shift in thinking at the MSD since the early days. Therefore just a little reminder: we were in 2018 at the time of the hearing.

Mr X the Crown's lawyer also dug out various other sections of the Social Security Act and said: *"You can't pay twice for the same need"* or *"the same contingencies"* (Section 72; now Section 187), therefore deducting an overseas pension from NZS *"was not means-testing"*. So what is means-testing?

### **Earned entitlements vs social welfare benefit**

Section 71 [now Section 189] is about the *"Deduction of weekly compensation from income-tested benefits"*, and it says that if a person *"is qualified to receive an income-tested benefit (other than New Zealand Superannuation) [...] where (b) the person's spouse or partner receives weekly compensation, 2. the rate of the benefit payable to the person must be reduced the amount of weekly compensation payable to the person"*. This is clear when someone applies for an Accommodation Supplement or Disability Allowance while also receiving NZS, but contributory overseas pensions are not social welfare benefits like Jobseeker Support or Residential Support Subsidy.

Contributory employer and employee-funded overseas pensions are earned entitlements, unlike social welfare benefits that are paid to people in need who cannot support themselves. On top of it all, overseas countries usually don't export means-tested social welfare benefits to foreign countries, including New Zealand: only earned pensions are

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<sup>3</sup> See [http://www.nzlii.org/nz/legis/hist\\_act/dpa184610v1846n9354/](http://www.nzlii.org/nz/legis/hist_act/dpa184610v1846n9354/).

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MSD's "expert witness" Mr Y confirmed under cross examination that no other income apart from overseas pensions is included in the Direct Deduction Policy: not income from well-paid employment, or from investment, or from private pension schemes, or from KiwiSaver, not contracted-out overseas pensions (like the one from the UK), or when the contributions made overseas are mandatory as in about all overseas pension savings schemes but coincidentally not administered by or on behalf of the overseas government (like in Chile, or with the employer-funded compulsory superannuation in Australia; Superannuation Guarantee/SG), or when so-called occupational pensions are paid to civil servants.

Curiously, the government-administered Chinese pensions that are not deducted from NZS were not even mentioned! And still the "expert witness" insisted NZS was universal and not means-tested.

The real reason for fighting so hard to keep the Spousal Provision in place was the fear that after removing it, all other pensioners would question the deduction of their overseas pensions and jeopardise the Government's income stream from overseas that contributes significantly to cost savings on NZS (just under NZ\$340 million in 2017; NZ\$430 million in March 2020).

*"The removal of the spousal deduction would undermine the principle of the Direct Deduction Policy"*, said Mr Y, and: *"If the spousal deduction was removed, there would be pressure from pensioners affected by the Direct Deduction Policy."* The same argument was repeated in lawyer Mr X's reply to the OHRC's closing statement: *"Every other person who suffers the direct deduction will ask: 'What's the difference to my deduction?'"* This means the injustices and discrimination inflicted on a small number of pensioners were justified in order to avoid pressure regarding the controversial Direct Deduction Policy in its entirety.

The Retirement Commissioner's recommendation to abolish Spousal Provision was dismissed because *"it requires legislative change"*. Which brings us back to the Government that is elected by the people of New Zealand, but the policies are enforced by always the same bureaucrats who insist on keeping the discriminatory treatment of this group of pensioners in place.

Interestingly, in February 2007 MSD themselves recommended the Minister amend the legislation and stop the Spousal Deduction. MSD said this would benefit 150 couples (increased to 588 by October 2017) and have minimal fiscal impact, then costing about NZ\$1.5 million a year. While the minimal cost – currently about NZ\$2.7 million – was mentioned several times, OHRP lawyer Mr Z once and for all listed the ridiculous administration costs of the Spousal Deduction and the subsequent complaints process, and he didn't even include people involving the Ombudsman and the permanent need to answer the daily complaints and letters of pensioners. Administration costs include the costs of:

- "Encouraging" pensioners to apply for their overseas pensions
- Establishing if someone has entered a relationship with a person who might receive an overseas pension
- Establishing if an overseas pension is deductible
- The Review of the decision
- Appeals to the Benefits Review Committee (BRC)
- Appeals to the Social Security Appeal Authority (SSAA)

- Appeals to higher courts such as the Human Rights Review Tribunal or the High Court
- Monitoring and adjusting for changes of the exchange rate
- Writing and sending regular statements to affected pensioners.

Mr Y's lengthy tales were outperformed by his MSD colleague Mr B who had been working for MSD since 2003 and as an advisor in the CEO's office for 14 months. He spoke for hours on end about the "*unit of assessment*" used to transform two individuals into an "*economic unit*" – which then allows MSD to deduct the "excess" of one partner's overseas pension from the New Zealand partner's NZS. "*It is a long-standing and well-established approach*", he said.

Mr B listed every single available benefit in New Zealand since 1898 and, just as Mr Y and Mr X, repeated that "*NZS falls within the major benefits but is not income- and asset-tested – unless an overseas pension is included*". So what is it? Income- and asset-tested or not? A social welfare benefit or an entitlement? "*Providing a basic standard*" and "*giving financial assistance*", he said. So why is it paid to millionaires?

It was Mr B who went back to the Māori hapu. We watched and listened in disbelief, as he talked about disability support, education and Accommodation Supplement, and how many shillings were paid for which need in the early 1900s, that "*married couples achieve economies of greater scale*", that "*Maori and Pacific Islanders are disadvantaged because they live in larger family units*".

Mr B said that it was all about the "*core family*" and that this family approach should "*remain until women have the same income as men*" - the wife as the eternal dependant. He had forgotten that in the elderly couple's case it is the woman who brings in most of the money in the form of her overseas pension.

What a transparent attempt to fool the members of the Tribunal, mixing up all these benefits that are rightly means-tested because they are social welfare benefits, unlike NZS which is an individual entitlement to every person in New Zealand who has lived here for ten years between age 20 and 65, five of which after age 50. If this is too generous didn't, that is a totally different story.

But the Tribunal interrupt Mr B and tell him that he was trying to fool them. While we and other observers thought his ramblings were an insult to the court, the Bench listened intently. I was not sure if they were impressed, mesmerised or confused.

The "*core family*" and "*economic unit*" themes carried on throughout the following days, and the Chairman, who had been extremely polite, friendly and patient for a long time, seemed to lose his patience with the OHRP Director who at some point added "*marital status*" to "*family status*" to the grounds of discrimination, only to announce he might exclude it again and then perhaps re-include it. This was quite unfortunate.

The whole fiasco became particularly cringeworthy when Mr X – instead of admitting that the policy is well and truly outdated - justified the deductions with the fact that the policy "*goes back to 1938 and earlier*" and: "*It is a long-standing parliamentary matter, confirmed over and over again by Parliament, woven into the social security system.*"

## **Decision time**

After more than two and half years the HRRT published its decision a few weeks ago, and unbelievably: the Chairman, a QC, and the two HRRT members have ruled that there was nothing wrong with the policy. They find that it is okay that couples with an

earned overseas pension income are cut down to size, so they do not receive more pension money than a couple where no-one has ever contributed to a pension scheme. They didn't consider the legislation a breach of Human Rights on the grounds of family status.

If you read my report on the hearing, you'll see that I was sceptical towards the outcome, that I had hope but didn't expect miracles – and it would have been a miracle if a New Zealand court had decided in favour of anything involving migrants. Here is [the decision from 15 October 2020](#).

As the HRRT is obviously not aware of changes to legislation in New Zealand, they had to release [a supplementary decision](#) a few days later! In this document from 19 October 2020 they wrote that *"the Tribunal received advice from counsel that legislation currently awaiting the Royal assent will amend the Social Security Act 2018, s 189(2) by removing the spousal deduction"*. At the time, of course, this Royal Assent had been given already. Now this *"upcoming legislative development [...] may require the decision to be recalled and reissued, should the Tribunal see fit."* Finally they noted: *"It is a matter of regret this information was not provided to the Tribunal at an earlier date."* Then they absolved themselves: *"Be that as it may, as counsel correctly note the amendment will not affect the Tribunal's decision given on 15 October 2020."*

The Tribunal's unfathomable decision, lucky everyone, is only academic.

Had the Government had any hope that the HRRT would not see any discrimination in the treatment of such couples, they may not have changed the law that came into effect on 9 November. The Government changed the law because it expected the opposite outcome, with Prime Minister Jacinda Ardern and others admitting in the past that the Spousal Provision was in breach of Human Rights.

It is ironic that, due to under-resourcing by the same Government, it took the Tribunal more than two and half years to publish a decision that is now redundant – as unbelievable as that is. Had there not been this enormous delay, nothing might have changed and we would still need to fight for justice for these couples.

The Tribunal has fallen for the spin of the two MSD bureaucrats and the Crown Lawyer who enveloped the Tribunal into a fog of misrepresentations and distortions, despite the Chairman telling them that he could not see that the three plaintiff couples were advantaged over lifelong New Zealand couples *"but significantly disadvantaged"*.

This makes you really wonder how the Tribunal could come to the conclusion that the *"unit of assessment"* must not be the individual – despite NZS being universal, individually paid and not income- and asset-tested *"unless an overseas pension is included"* – but must be the *"economic unit"*. And how could the Tribunal decide that the unjustifiable treatment of the *"significantly disadvantaged"* couples wasn't discriminatory? The MSD witnesses argued: *"Both couples have the same amount. The same amount flows into each of the households, just from different sources."*

With their decision, the HRRT clearly accepted the justification, dished up by Crown Law and the two MSD bureaucrats, who maintained that wives should remain dependants in the 21<sup>st</sup> century.

Due to the chaotic representation of the plaintiffs by the then-Director of the OHRP, who couldn't even explain properly how the Direct Deduction Policy works, the Tribunal members might not have correctly understood the issues. During the hearing I was never sure if they were mesmerised or confused by what was presented to them by the

MSD officials and the Crown lawyer. They were surely not impressed with the OHRP Director who seemed to have problems understanding what he was talking about, perhaps as a result of another lawyer preparing all the paperwork.

You wonder why the Tribunal has – again – bowed to the Crown, why they have not seen through the transparent attempt by Crown Law and MSD to fool them, and how it can be acceptable in 2020 to defend a pension law from 1955 which treats partners, particularly women, as dependants. (And remember, the Direct Deduction Policy actually dates back to 1938!)

However, we have to follow one piece of advice the Chairman gave early into the hearing. He said that *“the question was if the Spousal Provision was unfair or unlawful”*. And: *“If the law is clear, it just has to be tolerated and should be passed back to Parliament.”* This has now happened with the formal abolition of the Spousal Provision policy.

The Direct Deduction Policy remains the even bigger fight that adversely affects more than 100,000 pensioners in New Zealand.

For comments on this PensionCommentary and for further information please contact:

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