

# Overseas Pensions Forum: Justice Delayed?



June 2013

## Proceedings

**Retirement Policy and Research Centre**

Economics Department

Business School

The University of Auckland

Private Bag 92019

Auckland, New Zealand

[www.rprc.auckland.ac.nz](http://www.rprc.auckland.ac.nz)

## Contents

1.	INTRODUCTION. OVERSEAS PENSIONS: JUSTICE DELAYED?.....	3
2.	WELCOME. Susan St John, Co-director, Retirement Policy and Research Centre (RPRC) .....	4
3.	UNDERSTANDING THE DIRECT DEDUCTIONS POLICY. Lynne Cousins, Team Manager, Older People’s and International Policy, Ministry of Social Development.....	7
4.	ISSUES AND PRINCIPLES FOR REFORM: THE NEW ZEALAND SUPERANNUATION AND RETIREMENT INCOME AMENDMENT ACT 2009. Andrew Smith, Victoria University of Wellington.....	8
5.	HUMAN RIGHTS ACT 1993: DISCRIMINATION. Sylvia Bell, Principal Legal & Policy Analyst, Human Rights Commission .....	11
6.	INDIVIDUAL EXPERIENCES OF NEW ZEALAND’S DDP: Philip Meguire and Vivien Engler .....	12
7.	JACINDA ARDERN, Member of Parliament, Labour; Member Social Services Committee, Opposition spokesperson Social Development. ....	14
8.	OVERSEAS PENSIONS POLICY: POTENTIAL FOR A CLASS ACTION. M. Claire Dale, Research Fellow, Retirement Policy and Research Centre. ....	17
9.	REFORM OPTIONS 1, 2 AND 3 FOLLOWED BY OPEN DEBATE. Chair: M. Claire Dale, Research Fellow, RPRC .....	18
10.	REFORM OPTION 1. RAISING THE RESIDENCY TEST. Susan St John, Co-director, RPRC .....	19
11.	OPTION 2: A FAIRER POLICY. APPORTIONED BASIS. Michael Littlewood, Co-director, RPRC .....	20
12.	OPTION 3: THE NEW ZEALAND SUPERANNUATION AND RETIREMENT INCOME (PRO RATA ENTITLEMENT AMENDMENT BILL). Sponsored by Denis O’Rourke, New Zealand First Member of Parliament .....	21
13.	SURVEY: EVALUATE THE OPTIONS FOR REFORM. Completed by those attending the Forum, many of whom are directly affected by the current Direct Deductions Policy .....	23
14.	JUSTICE DELAYED? CLOSING WORD- Michael Littlewood, Co-director, Retirement Policy and Research Centre .....	23
15.	PRESENTERS (in speaking order) .....	24

## **1. INTRODUCTION. OVERSEAS PENSIONS: JUSTICE DELAYED?**

The RPRC hosted the Forum, Overseas Pensions: Justice Delayed? at the University's Business School on 6 June 2013. With the help of the Human Rights Commission and Victoria University's School of Accounting and Commercial Law, the Forum brought together academics, Ministry of Social Development (MSD) officials, politicians and affected pensioners, to debate the way forward.

### **The problems in brief:**

Normally, a person qualifies for the full state age pension, New Zealand Superannuation (NZS), after only ten years' residence and with at least five of those years being after age 50. However, if that person has what the MSD decides is an equivalent state-administered pension from another country, NZS is reduced by the amount of that pension under section 70 of the Social Security Act 1964. This is the 'Direct Deduction Policy' (DDP). Problems arise when the DDP is applied to overseas-based private retirement savings, or to a spouse's NZS.

### **The problems as stated in the Ministry of Social Development's 2008 [Review of Treatment of Overseas Pensions and Payment of New Zealand Superannuation and Veteran's Pension Overseas: Paper Two - Proposals](#):**

While the Review found that current policies on the treatment of overseas pensions and payment of NZS overseas are operating reasonably well and provide good protection for most New Zealanders, it identified a number of areas that could be improved.

The Review recommended two proposals that did not require amendment to primary legislation. These related to work which could facilitate the conclusion of a social security agreement with the US; and updating the Social Security (Overseas Pension Deduction) Regulations 1996, setting out the mechanics of the treatment of overseas pension policy.

The Review also recommended eight proposals requiring amendment to Social Security and Income Tax legislation. Most importantly, the recommendations included:

- remove the proportion of foreign state pensions built up by voluntary contributions from the scope of section 70 of the Social Security Act 1964;
- discontinue the policy of deducting a person's overseas pension from their spouse's NZS entitlement.

Although the New Zealand Superannuation and Retirement Income Amendment Act 2009 revised the general portability rules for NZS, it created new anomalies and did not address the concerns regarding deductions of private pensions or spouses' NZS.

### **RPRC contributions to the debate**

The RPRC has done a considerable amount of work over the last six years on the problems associated with the DDP, including two forums in 2010, a number of Working Papers, academic and media articles, and lobbying. This work is accessible [here](#). While there has been no change to the MSD's handling of the overseas pensions' issue, there is a growing political awareness of the issues.

### **The Forum**

The Forum heard from an MSD representative who described how the DDP is applied; and how many pensioners are affected. Associate Professor Smith from Victoria University's School of Accounting outlined the history of the DDP and possible reform principles and Labour's Jacinda Ardern confirmed that the opposition parties wanted

Parliament to look at the issue. Sylvia Bell from the Human Rights Commission explained the legal framework for complaints of discrimination while the RPRC's Dr M.Claire Dale reported on informal legal advice that class actions against the MSD are possible but would be expensive. The Forum also heard from two people who are directly affected by the policy.

The second part of the Forum analysed three options for addressing the major problems with the DDP (each of the options would require transition provisions):

- **Option 1:** Associate Professor Susan St John (RPRC) outlined *Option 1* which sees the current ten year residency requirement lifted to 25 years. That means New Zealand could essentially ignore other state pension entitlements and section 70 would no longer be needed.
- **Option 2:** Michael Littlewood (RPRC) described *Option 2* that would be triggered by the presence of an overseas pension similar to NZS. Pensioners would receive that overseas pension, NZS would switch to 1/540<sup>th</sup> of the full benefit for each month of residence in New Zealand (1/45<sup>th</sup> for each year between ages 20-65).
- **Option 3:** Denis O'Rourke (New Zealand First) explained *Option 3*. This would change qualification for NZS for all New Zealanders (not just those with overseas pensions) into 1/540<sup>th</sup> for each month of residence between ages 20-65 (100% after 45 years). Only those New Zealanders who had lived in New Zealand for the full 45 years (with, perhaps, a five year period of grace) would receive the full NZS. Any overseas pension would remain the pensioner's property.

In summarising the present position, Michael Littlewood (RPRC) suggested there were some things that did not require a change to section 70 but that needed a change in MSD's policy. The 'family income test' that affects spousal pensions is probably wrong in law and could provide the basis of a class action; and occupational pensions should not be included in the DDP. There also needs to be much better information available on a country-specific basis for future immigrants.

On the three reform options, we need a public debate. However, a major impediment is the current Government's reluctance to discuss changes to age pensions' policy. Until we can get past that hurdle, current overseas pension policy looks like 'Justice delayed'.

## 2. WELCOME. Susan St John, Co-director, Retirement Policy and Research Centre (RPRC)

### Why are we bothering?

- Section 70 affects 64,622 or 11% of retirees
- Deductions total \$237 million annually

The policy has a fiscal saving, so that dropping it would have a fiscal cost. This does *not* mean there are no cost-effective policy reforms. Some obvious anomalies would cost very little to remove.

### RPRC activity

- 2 forums 2010
- Working papers
- Lobbying
- Academic articles

None of this has borne fruit to date. Now we also have the recent rejection of request for review of section 70 from the House of Representatives (2013) Report of the Social Services Committee: Briefing into pension eligibility and entitlements, including portability. The chair, Peseta Sam Lotu-liga, [stated](#):



**Briefing into pension eligibility and entitlements, including portability**

Report of the Social Services Committee

*The New Zealand Labour Party, the Green Party, and New Zealand First are of the view that the information received confirmed that an inquiry was warranted. The majority of the committee, while sympathetic to the anomalies in the system, decided not to initiate an inquiry. Prevailing fiscal constraints were also a consideration in this decision.*

**Some consequences of the Direct Deduction Policy (DDP)**

- Financial hardship: expecting to supplement New Zealand Superannuation
- Physical health is compromised
- Ability to work is impaired
- Resentment at the injustice
- Money and time lost
- New Zealand’s international reputation is compromised

**People receiving overseas pensions & subject to DDP by country (MSD 2012):**

	2004	2012	% change
UK	37,754	48,367	28%
Australia	914	9,110	896%
Netherlands	2,400	3590	50%
Canada	306	1451	374%
China	166	-	....%
USA	98	468	378%
Germany	87	282	224%
Ireland	91	206	126%
Switzerland	82	217	164%
Fiji	45	64	42%

The Table does not tell us how many immigrants do not have an overseas pension and still get NZS by meeting the low residency requirements. The Chinese with Chinese pensions are no longer recorded in this table. While they were in the past, the MSD website now states “Chinese pensions are not deductible under Section 70”.

**New Zealand Superannuation (NZS):**

- Individual basis
- Not tied to contributions
- Flat rate, taxable
- Not welfare
- Low residency requirements: 10 years (5 after age 50)

**Spectrum of issues and complaints:**

We might all agree about the extreme ends of the spectrum.

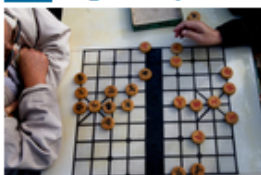
It is the large variety of different anomalies in the middle that provides controversy



- What if the overseas pension is more like KiwiSaver?
- What if immigrants get too easy access?

**Media are full of stories**

**NEWS Migrants' parents left alone in NZ**



5:30AM Friday May 31, 2013 By Lincoln Tan  
 Thousands of elderly migrant parents, sponsored by their children under a family reunification scheme, are being left to fend for themselves in New ... [More](#)  
 Immigration - National

**NEWS Ageing China migrants a 'major concern'**



8:18AM Tuesday Apr 23, 2013 By Lincoln Tan  
 Nearly 40 per cent of immigrants from China gaining New Zealand permanent residence last year were aged 50 or over. ... [More](#)  
 Population - Immigration - National

## Overseas Kiwis pocket \$230m in pensions

**ROB STOCK**

FIGURES submitted to Parliament reveal the far-flung climes where Kiwis choose to retire and the \$230 million of New Zealand Superannuation sent to them.

New Zealand rules allow people to receive superannuation over-

Of those people, 31,069 were in Australia.

The rules allow pensioners to travel abroad for up to 26 weeks and not have their payments cut, with some flexibility for unforeseen circumstances preventing their timely return.

Those who choose to live over-

Country	No of people	NZ Super exported
Australia	31,069	\$96,276m
Holland	152	\$8,345m
Costa Rica	295	\$5,036m
Canada	259	\$3,656m
Spain	78	\$2,572m

overseas means they are better off thanks to uneven – some claim unjust – deductions New Zealand makes from the overseas state pensions paid to recipients here.

Bob Stevens, a Canadian, has long campaigned against what he sees as the injustice of having his two Canadian and one Irish pen-

tions policy, which has caused much anguish.

The committee said in its report: "The New Zealand Labour Party, the Green Party and NZ First are of the view that the information received confirmed that an inquiry was warranted."

**The issues will not go away**

- *Ageing population*
  - Babyboomers are retiring
  - People are increasingly mobile, so the numbers affected by DDP will increase
  - More immigration post age 50
- *Cost of New Zealand Superannuation*
  - Fiscal problems
  - Fairness issues
  - Transparency issues
- *Issues for a stable democracy*
  - Good policy and adequate process for review and adaptation to new circumstances. We cannot continue with unfair policies if we want to uphold respect for our democracy.

**Outcomes of this forum**

- Not all expectations will met

- No speaker is personally responsible

Questions to answer

- Are there legal remedies?
- If not, what does a policy approach offer?
- What are the options?
- Can we agree on the way forward?

### 3. UNDERSTANDING THE DIRECT DEDUCTIONS POLICY. Lynne Cousins, Team Manager, Older People's and International Policy, Ministry of Social Development

Existing policy settings for direct deduction of overseas pensions:

#### New Zealand Superannuation



- Payable to people
  - aged 65 or over
  - ordinarily resident in New Zealand
  - who have been resident and present in New Zealand for ten years since the age of 20, five years must be since the age of 50
- Paid from general taxation
- Indexed to wages

#### Direct Deduction Policy (DDP)

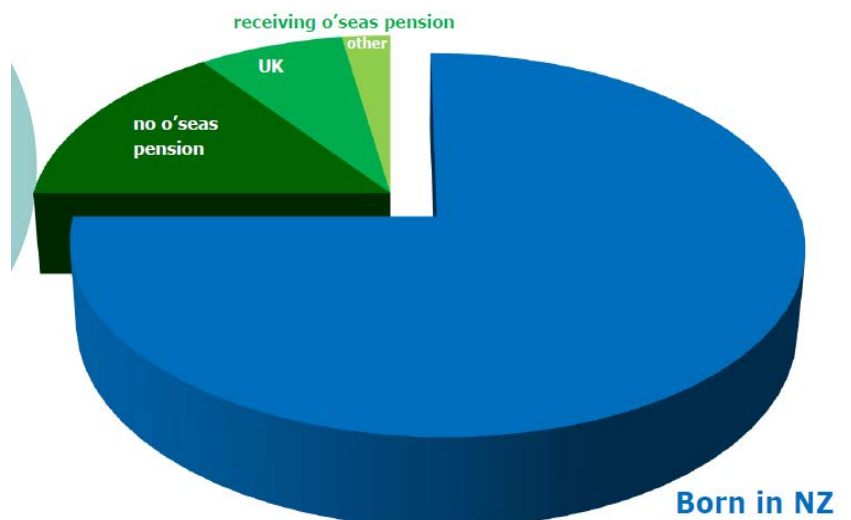
- New Zealand benefits and pensions are reduced by the value of an overseas state pension
- The policy has been in place since 1938
- People getting NZ Super are the largest group affected by this policy

#### Section 70 of New Zealand Social Security Act 1964

S 70 generally requires the dollar-for-dollar deduction of the amount of any overseas pension if the overseas pension meets *both* the following criteria:

- forms part of a programme providing benefits and pensions for any of the circumstances for which New Zealand benefits may be paid; and
- is administered by or on behalf of the government of the country paying the overseas benefit or pension

#### Born Overseas



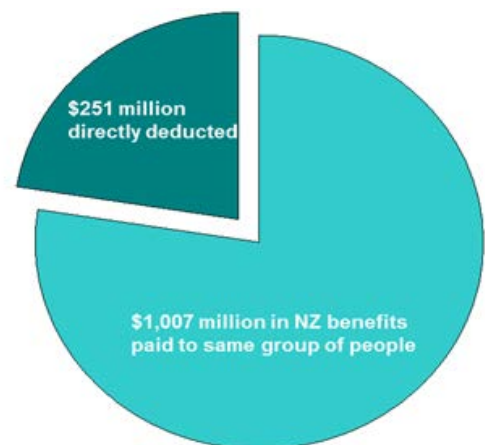
## One pension principle

- A person generally only receives the equivalent of one state pension
- New Zealand uses direct deduction for NZS
- Other countries use proportional payments to achieve the equivalent of one state pension

## Examples for Two Other Countries:



**For people living in New Zealand who receive an overseas pension,** New Zealand is paying approximately four times more than is deducted.



## 4. ISSUES AND PRINCIPLES FOR REFORM: THE NEW ZEALAND SUPERANNUATION AND RETIREMENT INCOME AMENDMENT ACT 2009. Andrew Smith, Victoria University of Wellington

### Cross-Border Problems with Pensions

- Individuals may be liable to contribute to a pension scheme in more than one country;
- Their eligibility or entitlement to receive pensions in one (or both) countries may be reduced or terminated;
- They may have problems receiving a full pension in the country they retire in.
- Cross-border pension issues and solutions are made more complex by wide variations in the retirement income policies of different countries, eg. emphasis may differ on Tier I and Tier II pensions and the way they are funded and administered.
- Because of these issues, many countries have entered into bilateral “social security agreements” (SSAs to help resolve cross-border pension issues for their citizens.



## Basic Eligibility for NZS

- To qualify for NZS, applicants must have 10 years of New Zealand residency after the age of 20, 5 years of which must be after the age of 50. (Note: under Totalisation provisions in New Zealand's 8 SSAs, residency overseas can count as NZ residency.)
- In addition, applicants must be "ordinarily resident" in New Zealand at the time of their application.
- There are no issues about individual contributions to a social security fund in New Zealand since NZS is funded from general taxation. (Some issues concerning the funding of cross-border pensions are dealt with at the Governmental level under some SSAs.)

## How are migrants accommodated with NZS?

**Outwards:** For many years New Zealand social security law had no provisions to assist NZers retiring overseas. There was a blanket prohibition upon paying New Zealand benefits outside New Zealand which only changed in 1990. (There were only two SSAs up to 1990).

**Inwards:** migrants to New Zealand are accommodated by:

- Liberal residency tests for NZS entitlement; but
- Tempered with a deduction policy for any public pension received from offshore.
- These provisions appear largely designed to accommodate UK migrants.
- They may also assume that New Zealand pensions would be more generous than any pension a migrant would bring them- which may have been the case in the 1950s.
- Only 2 social security agreements were negotiated prior to 1990- one with the UK and another Australia which were regularly revised and updated.
- Neither agreement required New Zealand pensions to be paid offshore- instead the UK and Australian governments assumed responsibility for payment.
- In 1990 a major shift occurred when it was decided to permit payment of NZS outside New Zealand to any country but with a significant discount (75%). (This change did not affect New Zealand retirees in Australia and the UK.)
- Policy was also amended to negotiate social security agreements with other countries beyond Australia and the UK. This was made possible by the decision to allow NZS to be paid offshore.
- These provisions were later liberalised:
  - The discount was reduced to 50% in 1999;
  - Special portability rules were introduced for Pacific Island countries (Cook Islands, Niue and Tokelau) which were more generous;
  - Subsequently the list of eligible Pacific Island countries was extended to encompass all Pacific Island states and some territories

## Current Rules for NZS Portability:

- In November 2009 the Government passed the *New Zealand Superannuation and Retirement Income Amendment Act* which revised again the **general portability rules** for NZS.
- Politicians from all parties supported the changes, all of them emphasising the desirability of allowing NZers the freedom to retire where they want to.

- Under the earlier general portability rules, NZS could be paid outside of New Zealand after 10 years' residency but only at one rate (50%).
- The 2009 amendments changes these rules so that the amount paid outside New Zealand is determined by the number of years the superannuitant has lived in New Zealand between the ages of 20 and 65. Possible now to get 100% paid offshore & free of New Zealand tax too!
- Full payment of NZS outside of New Zealand is not possible unless the superannuitant spends 45 years of their working life in New Zealand.
- Residency after 64 years is no longer taken into account for general portability but is still done so for Pacific Islands portability.
- But applicants must be ordinarily resident in New Zealand at the time they apply for NZS. (Unless an SSA applies).
- The existing Pacific Island portability rules were not changed in 2009 and retirees can still receive NZS at full rates after 20 years' residency.

### Who Is Getting NZS Paid Overseas?

	Number	Average \$
Australia*	31,069**	\$6,317
Netherlands*	1,252	\$6,681
Cook Islands	295	\$17,071
Canada*	659	\$5,548
Samoa	178	\$16,360
22 other countries	1,330	\$10,598

\*SSA Countries. \*\*Excludes those who have lost their NZS by moving to Australia. Note UK omitted as \$0 paid to the UK due to UK SSA.

### Are the 2009 Changes an Improvement?

#### YES:

- The new formula for general portability is a much fairer outcome for those who have worked all their lives in New Zealand between 20-65 years.
- Reduces the amount payable to elderly migrants retiring outside of NZ when they have contributed little (if anything) during their working lives.

#### NO:

- Does not address the issue that NZS is paid overseas exempt from NZ tax which may result in a larger net pension.
- If does not change the privileged status for Pacific Island retirees.
- Does nothing for retirees suffering a disadvantage under the Australian SSA.
- No change for local retirees with foreign pensions.
- The 2009 changes address only one of many international problems with NZS despite acknowledgment by the Select Committee in 2013 that there are others.
- Very few people will benefit from the 2009 changes- it is puzzling why improving general portability was given such priority by Parliament while deliberately avoiding any consideration of much greater problems with NZS.

## The Remaining Problems

- Nothing has changed for retirees who bought overseas public pensions to New Zealand that are deducted from NZS;
- Trans-Tasman pension anomalies and fiscal risks to New Zealand from the Australian SSA;
- Issues with migrant parents becoming eligible for NZS after short period of residency.

## My Conclusions

- The current NZS rules produce windfall gains for some lucky people while they discriminate against others when there are **no sound policy reasons** for doing so.
- Current rules reflect poor policy design, historical anomalies, short-term fiscal considerations, SSA grandfathering issues and political reluctance to revisit NZS issues.
- **Time for a comprehensive review!**

## 5. HUMAN RIGHTS ACT 1993: DISCRIMINATION. Sylvia Bell, Principal Legal & Policy Analyst, Human Rights Commission

### Structure of Human Rights Act (HRA)

- Part 1 lists functions and powers of the Human Rights Commission;
- Part 1A applies to discrimination by the public sector including legislation & policy;
- Part 2 applies to services offered to the public by the private sector;
- Part 3 deals with resolution of disputes about compliance with Parts 1A & 2;
- Part 4 deals with the Human Rights Review Tribunal.

### Discrimination

- Discrimination is not defined in either the HRA or the Bill of Rights
- Not all discrimination is illegal
- There must be different treatment
- Involving one of the prohibited grounds
- That results in material disadvantage.

### Prohibited Grounds of Discrimination: s.21 HRA

- **Sex** which includes pregnancy & childbirth
- **Martial status** which means being single; married or in a civil union or defacto relationship; the survivor of such a relationship; separated from a spouse or civil union partner or party to a relationship that is now dissolved;
- **Religious or ethical belief**
- **Colour**
- **Race**
- **Ethnic or national origin** including nationality or citizenship
- **Disability**
- **Age**
- **Political opinion**
- **Employment status**
- **Family Status** which means having responsibility for care of dependants; or not having responsibility; being married to, or being in a civil union or defacto relationship with a particular person; or being a relative of a particular person
- **Sexual Orientation**

### Different standards apply to Part 1A & Part 2

- Under Part 1A an action will be discriminatory if it cannot be justified under s.5 of the Bill of Rights, i.e. the restriction cannot be justified as a reasonable limitation.
- Under Part 2 an action will be discriminatory if a specific exception does not apply.
- Because the issue of pensions relates to the application of the law the relevant provision of the HRA is Part 1A.

### Approach to identifying an appropriate comparator

- To establish discrimination, the treatment complained of needs to be compared with the treatment of a group in similar circumstances.
- Establishing this has proved problematic- for example, who should a pregnant woman be compared with, given that men cannot become pregnant?
- In *McAlister* in Supreme Court, Tipping J noted that a comparator is not appropriate if it "rules out discrimination at an early stage in the inquiry".
- The comparator needs to fit the statutory scheme.
- Needs to allow prima facie discrimination to be identified but giving the person or agency alleged to be discriminating the opportunity to justify it.

### Disadvantage

- It is necessary to establish different treatment;
- That is, whether a prohibited ground is a factor.
- Ground only needs to be a material ingredient.
- Does the treatment result in disadvantage, If so, can the treatment be justified?

### Justification

Test in *R v Hansen*

- a) Does the limitation serve a purpose sufficiently important to justify curtailing the right?
- b) (i) is the measure **rationally connected** to the purpose?  
(ii) does it impair the right or freedom **no more than is reasonably necessary** to achieve the purpose?  
(iii) is the restriction **proportionate** to the importance of the objective?

If all these criteria are satisfied then the measure is justified and will not be considered discriminatory.

## 6. INDIVIDUAL EXPERIENCES OF NEW ZEALAND'S DDP: Philip Meguire and Vivien Engler

### i) **Access to my USA age pension. Philip Meguire, University of Canterbury.**

Mrs Meguire and I emigrated to NZ in 1995 from the USA, when we were both in our early 40s.

SS= Social Security, the USA public old age pension. Unlike the case with NZS, SS amount is based on one's work history, and increases with starting age.

Under USA-NZ tax treaty, USA does not tax NZS & New Zealand does not tax SS.

The following calculations pertain to 2026 and later, when Mrs Meguire's claim on SS attains a maximum.

0.80=Assumed representative current US\$ exchange rate.

I saw the light only in 2013, after reading about the case of Bob Stevens and conversing with him via Email.<sup>1</sup>

**Retire in New Zealand** (weekly, in NZ\$)

1. SS in NZ\$	576	US\$461/0.80
2. Amount of (1) offset by Super	22	min(30% of 1, 50% of 4)
3. Super before offset	621	<i>given</i>
4. Super after offset	45	3 – 1
5. NZ income tax on (4)	9	21% of 4
6. USA income tax on (1) – (2)	66	12.75% of 1 – 2
7. Total public pensions net of taxes & offsets	523	1 – 2 + 4 – 5 – 6
8. SS after USA income tax, forget Super	527	<i>complicated</i>
9. Effective "tax" rate on SS + Super	56.3%	one – 7/(1+3)

**Retire in USA** (all amounts weekly).

1. Exchange rate	<b>0.80</b>	<b>0.743</b>	US\$/NZ\$
Super: NZ\$318 = 621 × ((21.41 + 24.66)/(2 × 45))			
2. Preceding in US\$	254	236	US\$
3. SS	461	461	US\$
4. Super offsets SS: min(30% of 3, 50% of 2)	127	118	US\$
5. USA income tax ≈ 12.75% of 3 – 4	40	39	US\$
6. Total public pensions net of taxes & offsets = 2 + 3 – 4 – 5	548	540	US\$
7. Effective "tax" rate on SS + Super = (4 + 5)/(2 + 3)	23.3%	22.5%	

**If we retire in New Zealand:**

- We will get some Super only when the US\$ exchange rate is greater than 0.743;
- At current exchange rates, we are worse off by NZ\$200/year if we apply for Super, once taxes and offsets are netted out;
- Taxes and offsets eat up about 56% of raw SS + Super;
- Our retirement benefit is access to Christchurch General Hospital.

**If we retire in the USA:**

- At current exchange rates, we will get NZ\$283/week (= 318 – 45) more than if we retired in New Zealand. This amount is free of income tax in both NZ and the USA & is not offset by SS;
- Every US\$ of Super reduces SS by US\$0.50;
- We are better off by about US\$6100/year, after taxes and offsets, than if we retire in NZ;
- Taxes and offsets eat up only 23% of raw SS + Super.

∴ *The Iron Law of Unintended Consequences holds.*

<sup>1</sup> The related calculations I presented in Wellington, 2010, were an error, I did not appreciate the importance of the November 2009 Act.

**ii) Treatment of spouses under the DDP. Vivien Engler, Auckland**

My name is Vivien Engler and I am a New Zealand citizen. I have lived in New Zealand most of my life apart from several short periods in which I lived in the United States of America.

On a visit to the USA I met my second husband, Richard, who is an American citizen. We were married in New Zealand in 1984 and he became a New Zealand citizen in 1986. Over the next few years we spent time in both countries and I became a US citizen in November 1992. The longest consecutive period that we lived in the USA was 5 years.

In 1993 I suggested that we make our home in New Zealand as my daughter was about to start a family and I did not want to be a long distance grandmother. At the time Richard took some convincing as his family were all living in the USA. One of the arguments I used to sway him was that when he reached retirement age he would still receive his US Social Security which would be converted to NZ dollars. The exchange rate at the time was pretty favourable and we presumed it would stay that way for longer than it actually has. Richard has been retired for 5 years since he reached the age of 67 and is now receiving his US Social Security.

As you may or may not be aware, US Social Security is based on the number of years you have worked and the amount that you have contributed over your working life unlike the NZS which is a fixed amount given to all those who qualify. I am not entitled to receive US Social Security in my own name as I only worked for 37 quarters and I need 40 quarters to be eligible.

When I turned 65 in September 2011, I applied for my NZ Superannuation. Having been through a messy divorce from my first husband, Richard and I keep separate finances as we both have our own children. I was looking forward to receiving my NZS. I was shocked to be told that as my husband's US Social Security was more than NZS my payment would be reduced. This made me really angry and I wrote to the Ministry of Social Development to ask for a review of my case. The outcome of the review was that the original decision that they made was correct. Over the next few months I wrote letters to the Retirement Commissioner, Paula Bennett and my local MP but to no avail. It appeared that the only way I could receive the full amount was if I were to divorce my husband and live in separate houses!

It is my view that the New Zealand government is in effect relying on the United States government to fund my superannuation and I do not think this is right. It is irrelevant what my husband is receiving. I have worked most of my adult life in New Zealand and am still working 32 hours a week. I understood that the New Zealand Government has made a promise that all New Zealand citizens are entitled to receive NZS yet I am being penalised purely because I married an American citizen.

Over the next few years as the baby boomers reach retirement age there are going to be more cases like mine and this unjust situation simply must be rectified.

**7. JACINDA ARDERN, Member of Parliament, Labour; Member Social Services Committee, Opposition spokesperson Social Development.**

While there are layers of complexity to some of the issues that have been discussed here today, my purpose for having entered into this fray is relatively simple, and so my message will be brief.

Some time ago now, when I first had the privilege of becoming the Spokesperson for Social Development, a steady stream of letters started falling into my inbox. Each was different in some way – a retiree from Canada, another from Ireland, one from both. Someone from the States, Switzerland, the UK. Stories dotted around the world but all with the same theme. Each had contributed personally to a pension scheme while working abroad, each was now having that deducted by the New Zealand Government to “off-set” the cost of them being paid a pension. I was intrigued. I looked into the Direct Deduction Policy. On paper, it sounds reasonable

*“Overseas benefits and pensions\* (including periodical allowances) are deductible from New Zealand entitlements if they are paid under a programme that: pays benefits and pensions for similar purposes as those paid in New Zealand, eg old age/retirement, survivor's and disability pensions; and is administered by, or on behalf of, an overseas government.*

*The direct deduction of an overseas state-administered benefit or pension reduces New Zealand Superannuation, Veteran's Pensions and other New Zealand social security benefits on a dollar for dollar basis (section 70 of the Social Security Act 1964). This means that people receive an amount that is equivalent to the amount of one state benefit or pension.*

*Overseas benefits or pensions funded by voluntary contributions may be deductible under section 70 of the Social Security Act 1964. We assess deductions of overseas pensions on a case by case basis.”*

It may sound like a simple enough concept, but is it?

As Susan St John has said “Complexity and inequality arise with interpretation and application of Section 70 and with the definition of ‘state pension’....these difficulties and apparent injustices resulting in the many complaints brought to the Social Security Appeal Authority...and the Human Rights Commission in recent years have produced little resolutions for complainants.”

And so, naturally these issues have landed at the feet of MPs. It cannot be said these complaints haven't caused reflection and analysis on both sides of the House – they have. But they haven't caused the change sought by those affected.

Multiple reviews have occurred and recommendations made, but there has still been little movement. People will certainly have their views on why this is. Mine is rather simple. This is a complex corner of an otherwise extraordinarily simple entitlement.

At the time, it may have seemed like the direct deduction policy allowed us to retain our simple universal scheme while the world became more mobile around us. But I no longer believe it is fit for purpose, and I believe many politicians share that view. It was something Labour put to the test recently, when I took terms of reference to the Social Services Select Committee, seeking an inquiry into the Direct Deduction Policy.

Sadly, after considering the issue, the Committee voted the inquiry down. I should note that Labour, Greens and NZ First voted in favour, and Government members voted against.

The report they gave was as follows:

*On 22 August 2012 we initiated a briefing into pension eligibility and entitlements, including portability, to gather information because we were considering whether to initiate an inquiry into overseas pension policy under the New Zealand Superannuation Scheme, and other pension portability issues related to section 70 of the Social Security Act 1964.*

*Some of us were concerned that the direct deduction policy might have been applied inconsistently. This policy can reduce entitlement for New Zealand superannuitants if they are also entitled to an overseas public or private pension, or if their partner receives an overseas pension.*

*We considered reviewing the application of the direct deduction policy, the entitlement of superannuitants to receive gross New Zealand Superannuation overseas regardless of whether another country deducts tax from their entitlement, and the deduction from the entitlement of people whose partners receive overseas pensions.*

*We wrote to the Minister for Social Development asking for a summary of any changes to pensions, particularly regarding eligibility and entitlement, the direct deduction policy, international portability, active and pending treaties and reciprocal agreements, public access to information about pensions, and any changes to the scheme since 2007. This information was received as evidence.*

*The New Zealand Labour Party, the Green Party, and New Zealand First are of the view that the information received confirmed that an inquiry was warranted. The majority of the committee, while sympathetic to the anomalies in the system, decided not to initiate an inquiry. Prevailing fiscal constraints were also a consideration in this decision.*

So, after testing the view of politicians on this issue, I still maintain that we agree there is an issue. The blockage in my view is the domino effect. Pluck out the Direct Deduction Policy and we suddenly have an entire debate to be had over fairness and equity in our pension policy and the issue of portability. But if you don't pull this domino out – examine it, and ensure it is fit for purpose, we're left with inequity too.

That's why Labour believes we should commit to bringing together experts in the field of pension policy, and develop a path forward that maintains the right of kiwis to a universal scheme, but takes into account the mobility of both New Zealand citizens, but also those who choose through the course of their working life to settle in New Zealand, and contribute to it.

We have not predetermined what the outcome of such a piece of work will be, just that it needs to happen. We would hope that to ensure the sustainability of any policy in this area, and the need for security for the future retirees, that other parties will support such an investigation, and we would welcome their contribution to it. Ultimately this complex issue remains in some respects very simple.

It's about fairness.



## 8. OVERSEAS PENSIONS POLICY: POTENTIAL FOR A CLASS ACTION. M. Claire Dale, Research Fellow, Retirement Policy and Research Centre.<sup>2</sup>

**Note:** the following is based on discussions with a number of senior lawyers. It is a relatively brief review of the issues involved, and does not provide any member of the public with legal advice on the issue.

The relevant law is section 70 of the Social Security Act 1964, which generally provides that where a person is entitled to an overseas age pension, their entitlement to New Zealand Superannuation is reduced by the amount of the overseas pension.

As a preliminary point, there is no way to overturn legislation through the courts in New Zealand. Accordingly, the only way to mount a challenge through the courts is by means of challenging decisions under the legislation.

An initial complicating factor is that the "pension", "superannuation" and "social security" schemes in different countries differ from one another. There are many variables. For example, in some countries what you are paid out depends on how much you contribute through your working life, as opposed to having a right to a fixed amount regardless of contribution, as in New Zealand.

These factors may make some schemes less closely comparable to that of New Zealand than others, so the arguments may differ depending on the specifics of a pertinent country's scheme. This would make it hard to challenge the treatment of all schemes in a single class action.

More importantly, the process of challenging the treatment of overseas pensions is not readily amenable to a class action. The Chief Executive of the Ministry of Social Development decides how an overseas pension might or might not qualify. Each case is decided individually and is challenged in the following way:

- Work and Income New Zealand; to
- Benefits Review Committee; to
- Social Security Appeal Authority ("Tribunal"); to
- High Court (by way of case stated, meaning that all of the formalities are dealt with by the Tribunal that then transfers the case to the High Court for adjudication); to
- Court of Appeal; and finally to
- Supreme Court.

In this chain of review, a class or group of pensioners aiming to challenge each of their respective decisions do not have *locus standi* to bring one action together.

A Tribunal representative has informally advised that if a number of challenges concerning the same principles were brought at the same time, then the Tribunal might consider them together for practical reasons, but each review of a Chief Executive's decision is ruled on separately.

---

<sup>2</sup> A number of senior lawyers very kindly provided the RPRC with their opinions on the possibility of using a class action to challenge the injustices in current overseas pensions policy.

If a group of pensioners wanted to challenge how the current legislation is interpreted by the Chief Executive, there would only be *locus standi*<sup>3</sup> for one pensioner, perhaps funded by a class of interested people, to challenge the Chief Executive's decision in their own case. Ideally, a number of such representatives concerned with different jurisdictions could seek review of their respective Chief Executive decisions. While these would not strictly speaking be class actions, the actions could create precedents concerning each jurisdiction to be applied to all future Chief Executive decisions.

A brief review of recent case law suggests that the Courts heavily favour the Chief Executive's decision over the interpretations pleaded by the pensioner, no matter which jurisdiction is concerned. So the likelihood of success in bringing future challenges would seem low. This is not to say that a well-funded challenge or series of challenges, using the services of experienced and senior counsel, might not have some chance of success.

*If a number of challenges concerning the same principles were brought at the same time, the Tribunal might consider them together for practical reasons. However, each review of each of the Chief Executive's decisions would still be ruled on separately.*

**BUT:** Case law shows the courts heavily favour the Chief Executive's decision over the interpretations pleaded by the pensioner:

***Of 25 challenges to the direct deduction policy in the Courts, none has succeeded.***

**So, to move forward:** Continued lobbying and raising publicity with the aim of getting the legislation changed is more likely to be an effective (and less expensive) approach.

Even if legislation is not changed, publicity will help create public awareness and an environment friendlier to court challenges to individual decisions

## **9. REFORM OPTIONS 1, 2 AND 3 FOLLOWED BY OPEN DEBATE.** **Chair: M. Claire Dale, Research Fellow, RPRC**

**Main types of pension issues: misinterpretation, misinformation, lack of transparency, and unfair deductions**

- Marital discrimination / spousal deduction
- Australian anomalies
- *Unfair* allocation and distribution of pension benefits e.g. 100% of gross NZS taken overseas.

**Policy reform aim: provide treatment in the calculation of NZS that is:**

- Simple
- Fair for immigrants, in relation to other superannuitants;
- Fair for emigrants; and
- Fair to the working age population,
- Fiscally sustainable, and

---

<sup>3</sup> In law, *locus standi* means the right to bring an action or to be heard in court. Locus standi is the ability of a party to demonstrate to the court sufficient connection to and harm from the law or action challenged to support that party's participation in the case.

- Transparent and politically feasible.

**Proposals for reform of the current system (additional to spousal treatment):**

*Option 1:* Susan St John

*Option 2:* Michael Littlewood

*Option 3:* NZ First MP, Denis O'Rourke

**10. REFORM OPTION 1. RAISING THE RESIDENCY TEST.  
Susan St John, Co-director, RPRC**

**Option 1**

- requires lateral thinking.
- is based on a view that much of the need for Section 70 arises because of **low residency requirements**.

When the first old age pension was introduced in 1898, it required 25 years' residency, and 'good moral character and sober habits'. In 1940, Universal Super required 20 years (this eventually became the National Super). Currently **only 10 years' residency** is required to qualify for NZS, with 5 after age 50.

**Option 1:**

- Raises residency requirements for all to 25 years, achieved between ages 20 and 65 (under current rules people can arrive in New Zealand at age 55 and collect NZS at age 65)
- Abolishes section 70
- Where 25 years' residence in New Zealand is satisfied (**without totalisation**),<sup>4</sup> any other 'basic' state pension entitlements are ignored, other than for tax purposes<sup>5</sup>
- 85% of those caught by the DDP have lived in New Zealand more than 30 years (MSD)<sup>6</sup>.

**Under social security agreements (SSAs)**

- Totalisation may be allowed
- New Zealand has only 8 SSAs
- **If and only if** totalisation is used, the aim is to secure one basic pension only e.g. Australia (OAP), UK (Basic State Pension), Canada (OAP).

**Option 1:**

- Simplification and fairness improves. There doesn't need to be complex formulae which give everyone a different amount.

**But** transitional issues:

---

<sup>4</sup> Totalisation: time spent in a country where New Zealand has a Social Security Agreement (SSA) is counted as time spent in New Zealand.

<sup>5</sup> This would get over the unfairness that some overseas incomes are deducted and not others.

<sup>6</sup> So Option 1 would wipe out the problem for 85% of those currently affected

- Social security agreements may have to be redrawn
- Establishing 25 year residency record not much more complex than the present requirement for ordinary New Zealanders applying for NZS (most will have no problem with establishing residency)
- People in special circumstances may need special provisions.

## 11. OPTION 2: A FAIRER POLICY. APPORTIONED BASIS. Michael Littlewood, Co-director, RPRC

### Option 2: apportioned basis:

- Each country bears its own costs
- *Emigrants* now have a 1/540<sup>th</sup> entitlement to NZS payments overseas
  - ...why not *immigrants*?
- Recognise a 45 year accrual (45 years from age 20 to age 65 x 12= 540 months).

### Option 2: the suggested rule

- At State Pension Age, does the applicant have a Basic Pension entitlement from another country?
  - **Yes:** NZS reduced by 1/540<sup>th</sup> for each month of residence outside New Zealand between ages 20-65
  - **No:** NZS payable in full.
- No NZS if outside New Zealand between ages 20-65 (540 months).

### Option 2- issues

- Definition of 'Basic Pension' central:
  - Must be analogous to NZS
  - Generally Tier 1 but could extend into Tier 2 where Tier 2 takes the place of a Tier 1 scheme (e.g. in the US)
  - Some discretion needed but principles must be stated and adhered to.
- Offset proportion calculated at age 65 stays fixed
- Separate offset for each of a couple
- If overseas State Pension Age is later, offset is calculated at later age
- Current 10(5) residence rule could go.

### Option 2 advantages

- Simple and transparent
- Reflects 'contribution' by immigrants to NZ
- Retirees keep each country's entitlements:
  - Assures other countries of 'fairness'
- Sidesteps complexities of overseas schemes
  - ...and their changing conditions after state pension age
- Consistent with treatment of emigrants after age 65
- Limits 'gaming' against NZ taxpayers
- If SSA, could unify payment - but that would have no impact on total entitlement.

### Option 2 disadvantages

- Presence of any 'Basic Pension is an 'all-or-nothing' test

- 'Months of non-residence' may not relate to Basic Pension accrual
- 'Months of non-residence' is a more exacting test (evidential requirements)
- Each immigrant will have a different NZS, as happens now with section 70/DPP.

## **12. OPTION 3: THE NEW ZEALAND SUPERANNUATION AND RETIREMENT INCOME (PRO RATA ENTITLEMENT AMENDMENT BILL). Sponsored by Denis O'Rourke, New Zealand First Member of Parliament**

### **NZ First Superannuation (NZS) policy:**

- Retain the NZS age at 65 years
- Non-contributory entitlement
- No means testing
- NZS is based on residence
- Recipients will have made a contribution to New Zealand over their full work life
- It is therefore an entitlement, not a social welfare benefit
- Any fiddling with the current terms of entitlement (raising the age of eligibility, means-testing) would be a fundamental breach of the social contract.
- The pro rata proposal is consistent with the original basis of NZS because it is based on actual residence between 20 and 65 years.

### **The New Zealand Superannuation and Retirement Income (Pro Rata Entitlement) Amendment Bill**

Proposes a fair system of proportional entitlement based on years of residence in New Zealand between 20 and 65 years.

- New Zealand Superannuitants currently affected by section 70 will retain their overseas pensions.
- The proposed legislation will apply to all New Zealanders.
- There will be no need for reciprocal agreements pertaining to pensions.

### **Pro rata entitlement to NZS is New Zealand First's response to these problems:**

- The inequities and anomalies of the reciprocal agreements regarding overseas pensions under Section 70 of the Social Security Act 1964
- The unfairness to current and future taxpayers of supporting retirees (without overseas pensions) who may only have been resident in New Zealand for as short as 10 years and yet are entitled to full NZS
- The future return flow of expatriate Kiwi retirees as other countries raise their pension age and reduce healthcare and welfare entitlements.

### **Argument for Option 3:**

For section 70, the Option 3's outcome is similar to the outcome offered in Option 2. Pensioners get pro rata entitlement to NZS and retain their overseas pensions from one or more other countries.

### **Why Option 3, not Option 2?**

*Fairness is comparative*

- Why would Section 70s accept pro rata NZS when migrants from non-pension countries can get full NZS after 10 years' residency?
- Note especially the parent category migrants have no requirement to work
- One Law For All.

#### *Option 3 closes another loophole*

- Option 3 also covers the problem of migrants and expat Kiwis evading Section 70 by 'cashing up pensions for a lump sum' before returning to New Zealand to retire.

#### *Option 3 links to New Zealand First's Immigration policy*

- In addition to pro rata entitlement, there should be a quota on parent reunion migrants- and this quota should be the same for all nationalities.
- There should be a cap on older migrants. (Prof Paul Spoonley 23 April 2013 NZ Herald)
- 'Superannuation Funding' that is, the total cost of NZS, must be curbed.

#### *We believe Option 3 is the fairest option, but it is the hardest option to sell*

- Option 3 requires the biggest mind shift
- It addresses all principal issues
- Aligns NZS closer to other countries' pension residency requirements
- *Option 3 clearly distinguishes between 'entitlement' and 'benefit'.*

#### **Option 3:**

- Also encourages Kiwis who choose to work overseas for extended periods to consider their pension entitlements
- Pro Rata will reflect their working lives in New Zealand and they will retain the pensions they earn while overseas.

#### **Beyond the scope of the Bill**

- NZ First supports a Welfare Backstop: If a pro rata pension is inadequate, then it is appropriate for a social welfare benefit top-up.
- Such a benefit would be means tested.

#### **Conclusion**

- The time is ripe for certainty.
- Sustainability issues must not compromise the social contract upon which NZS is based.
- The real issue is fairness: to those who have contributed to the New Zealand economy and society, to those with overseas pensions and to future New Zealand taxpayers.

**13. SURVEY: EVALUATE THE OPTIONS FOR REFORM.**  
 Completed by those attending the Forum, many of whom are directly affected by the current Direct Deductions Policy

	Option 1	Option 2	Option 3
<b>Please Rank Each option A B C</b>	Raise residency of NZS to 25yr	Apportion NZS if <b>there is</b> an overseas basic pension	<b>All</b> entitlement to NZS on a proportional basis
Simplicity			
Fairness			
Feasibility			
My overall ranking			
Comments			

**Note:** The results of the Survey will be reported in the June 2013 edition of the RPRC Update, and available online.

**14. JUSTICE DELAYED? CLOSING WORD- Michael Littlewood, Co-director, Retirement Policy and Research Centre**

**What we have has to change:**

- Section 70's current application is wrong in principle, inequitable, opaque and complex
- One aspect (the impact of spousal pensions) is probably wrong in law
- A class action may be possible
- With increased mobility at all ages, the problems will increase in number and complexity.

**Three options** (none of these require a change to section 70)

- Fix what's obviously wrong:
  - Deductions of occupational pensions
  - Spousal deductions / marital discrimination
  - The lack of accurate, country-specific explanations
- Draw a line under the past- at least fix it for future pensioners
- Fix it for everyone- probably unrealistic
- A major impediment: the Government's refusal to discuss pensions

## 15. PRESENTERS (in speaking order)

Susan St John	PhD, Co-director Retirement Policy and Research Centre, Associate Professor, Economics, University of Auckland	Susan's projects include overseas pensions policy, analysis of suitable decumulation products, tax reforms and the family tax credit system, child poverty and family income assistance, long-term care policy, the role of home equity release, and the economic implications of Accident Compensation.
Lynne Cousins	Team Manager, Older People's and International Policy, Ministry of Social Development	Since 2004, the Policy team has contributed to 'whole-of-government' policy development in retirement income, housing, transport, ageing in place, disability support, employment, community and voluntary sector involvement, protection of older peoples' rights and interests, and developing 'future-oriented' policies to respond to New Zealand's ageing population.
Andrew Smith	Associate Professor, School of Accounting and Commercial Law, Victoria University, Wellington	Andrew's research is mainly conducted into aspects of international taxation, specifically double tax agreements and also international social security harmonisation.
Sylvia Bell	Principal Legal and Policy Analyst	Sylvia is Principal Legal and Policy Analyst with the Human Rights Commission, based in Auckland.
Jacinda Ardern	MP, Labour	After a degree in communications and before entering Parliament, Jacinda was an advisor in the Office of Prime Minister Helen Clark. She then worked as an Associate Director for the Better Regulation Executive in UK Cabinet Office. Election as president of IUSY (the largest international political youth organisation) took her to Jordan, Israel, Algeria and China. Current roles include: Member, Social Services Committee; Spokesperson: Social Development, Children; Associate Spokesperson, Arts, Culture and Heritage.
M Claire Dale	PhD, Research Fellow, Retirement Policy and Research Centre, The University of Auckland	Claire's research interests include economic policy development: tax and welfare, decumulation, longevity risk and long-term care provision. She is outraged that recommendations for overseas pensions policy reform from MSD, Retirement Commission, Human Rights Commission, and RPRC, have been ignored.
Michael Littlewood	BA, LLB, Co-director Retirement Policy and Research Centre, University of Auckland	Michael is involved in the debate on public policy for both public and private retirement incomes, and has written extensively on aspects of public and private provision for retirement.
Denis O'Rourke	MP, NZ First	Denis has a LLB from Canterbury University. From 1989 to 2004, he was a Christchurch City Councillor. His special expertise is in legal drafting, commercial law and statutory interpretation. He has served on the boards of a number of companies and government agencies: Christchurch Transport, Transwaste Canterbury, Recovered Materials Foundation, Meta NZ, Christchurch International Airport, Postbank, the Disputes Tribunal and the Legal Aid Review Panel.

### Acknowledgements:

Thanks to the contributors (and their employers); The Business School of The University of Auckland; the Human Rights Commission; The Economics Department of The University of Auckland; and Victoria University of Wellington.